Clemons v. Norton Healthcare, Inc.

United States District Court for the Western District of Kentucky, Louisville Division

September 24, 2013, Decided; September 25, 2013, Filed

CIVIL ACTION NO. 3:08-CV-00069-TBR

Reporter
2013 U.S. Dist. LEXIS 137106 *; 2013 WL 5407184

ELIZABETH A. CLEMONS, DAVID R. KHALIEL, and LARRY W. TAYLOR, on behalf of themselves and all other similarly situated individuals., Plaintiffs v. NORTON HEALTHCARE, INC. RETIREMENT PLAN., Defendant

Prior History: *Clemons v. Norton Health Care, Inc., 2009 U.S. Dist. LEXIS 9591 (W.D. Ky., Feb. 9, 2009)*

Core Terms

communicated, defense counsel, Sanctions, motion to quash, deposition

Counsel: **[*1]** For Elizabeth A. Clemons, On behalf of himself and all other similarly situated individuals, David R. Khaliel, on behalf of himself and all other similarly situated individuals, Larry W. Taylor, on behalf of himself and all other similarly situated individuals, Plaintiffs: Joel R. Hurt, LEAD ATTORNEY, Ellen M. Doyle, Pamina G. Ewing, William T. Payne, Feinstein Doyle & Kravec, LLC, Pittsburg, PA; Michael D. Grabhorn, LEAD ATTORNEY, Grabhorn Law Office, PLLC, Louisville, KY.

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Judges: Thomas B. Russell, Senior United States District Judge.

Opinion by: Thomas B. Russell

Opinion

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon Plaintiffs' Motion to Strike the Affidavit of Laura Mooser **[*2]** and for Sanctions. [1] (Docket No.149.) Defendant has responded. (Docket No. 152.) Plaintiffs have replied. (Docket No. 169.) This matter is now fully briefed and ripe for adjudication. For the following reasons, the Court will **GRANT** Plaintiffs' Motion to Strike the Affidavit and **DENY** Plaintiffs' Motion for Sanctions. (Docket No. 149.)

[1] Defendant submitted the Affidavit of Laura Mooser in in support of its Motion for Summary Judgment at Docket No. 145. (Docket No. 145-5.)

Ms. Mooser is a retired participant in the Defendant Plan and a non-named class member. On July 26th, 2012, Defendant subpoenaed Ms. Mooser for a deposition. (Docket No. 120-3.) This deposition was to occur on August 22nd, 2012. *Id.* On August 18, 2012, Plaintiffs moved to quash the subpoena and requested a protective order. (Docket No. 120.) Defendants responded to the motion to quash on August 31, 2012. (Docket No. 126.) On November, 19, 2012, before the Court ruled on Plaintiffs' pending motion to quash, Defendant filed its Motion for Summary Judgment. (Docket No. 145.) In support of its motion, Defendant submitted a number of exhibits, including an affidavit from Ms. Mooser. (Docket No. 145-5.) This affidavit was executed **[*3]** on November 2, 2012. *Id.* There was no notice to or consent from Plaintiffs' Counsel as to contact by Defendant's counsel with Ms. Mooser. (Docket No. 149, Page 6.) The Court granted the Plaintiffs' motion to quash and barred Defendant from taking Ms. Mooser's deposition on November 20, 2012, holding that the Defendant had not satisfied the "particularized need" for taking Ms. Mooser's deposition. (Docket No. 146.)

Plaintiffs argues that Defendant's contact with Ms. Mooser violated Kentucky Supreme Court Rule ("SCR") 3.130(4.2), which prohibits communication with a client represented by a lawyer about the subject of the representation. [2] In effect, Plaintiff argues that Defendant circumvented process by directly soliciting Ms. Mooser's testimony by way of affidavit while the Plaintiffs' motion to quash was pending (which was later granted).

On the **[*4]** other hand, Defendant argues: (1) Ms. Mooser was represented by independent legal counsel; (2) Ms. Mooser's independent legal counsel was contacted by Defendant's counsel with respect to the affidavit under attack through Plaintiffs' motion; (3) not once did counsel for Defendant speak to Ms. Mooser, and all communication were through her identified legal counsel; and (4) Ms. Mooser's affidavit was presented and signed prior to the Court's ruling that Ms. Mooser could not be compelled to participate in the action given her status as a non-named class member.

Specifically, Defendant alleges that it received a telephone call from Mr. Matthew Gay, who stated he was legal counsel retained by Ms. Mooser. (Docket No. 152, Page 3-4.) Upon being informed of the Plaintiffs' motion to quash, Defendant informed Mr. Gay that the deposition could not move forward. (Docket 152, Page 4.) In early October, with this Court not having ruled in on the motion to quash, Defendant inquired of Mr. Gay whether Ms. Mooser would be willing to supply an affidavit instead. *Id.* Mr. Gay stated she would, and Mr. Gay and Defendant exchanged draft affidavits. At no time, and under no circumstances did Defendant directly **[*5]** contact, speak to, or otherwise communication with Ms. Mooser other than through Mr. Gay. (Docket No. 152, Page 5.)

In its reply brief, Plaintiffs state that Mr. Gay never contacted them and Defendant never indicated it had been contacted by Mr. Gay. (Docket No. 169, Page 2.) Plaintiffs reiterate that Defendant's actions were a violation of Kentucky SCR 3.130(4.2)'s plain language and a circumvention of Plaintiffs' motion to quash.

I. Motion To Strike

The crux of the disagreement between the parties goes

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[2] SCR 3.130(4.2) Communication with person represented by counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

to whether or not Defendant was prohibited by Kentucky SCR 3.130(4.2) from conversing with Ms. Mooser indirectly through Mr. Gay (the attorney Ms. Mooser retained) with respect to the subject of Plaintiffs counsel's representation: the Class lawsuit. The Court finds that this was prohibited by Kentucky SCR 3.130(4.2). It is significant that Ms. Mooser had not opted out of the Class and Mr. Gay did not represent the Class when the communication occurred.

While not controlling on the Court because it is a Northern District of Illinois case, the Court adopts much of the reasoning in *Blanchard v. Edgemark Fin'l Corp., 175 F.R.D. 293 (N.D. Ill. 1997)*. *Blanchard* involved a situation very similar **[*6]** to the present case. [3] There, after the court certified a class and appointed class counsel, defense counsel communicated with the named plaintiff, Beale, through separate counsel (Attorney Carroll) that Beale had retained to represent him in a related state court action. *Id. at 301*. This ultimately resulted in a settlement of all claims (including the other related matter in federal court). The communication prompted plaintiffs to assert a Rule 4.2 violation. [4] *Id. at 303*. The *Blanchard* defendant argued that Rule 4.2 was not violated because "defense counsel never communicated *directly* with Beale and thus, never communicated with a party, as proscribed by the 'anti-contact' rule." *175 F.R.D. at 301*. Rejecting this argument, the court held:

> While [defense counsel] did not communicate directly with Beale, [defense counsel's] communications were no doubt reconveyed to Beale through Attorney Carroll. Put another way, Attorney Carroll was the means of communicating to Beale. The Court finds that [defense counsel's] indirect communication with Beale through Attorney Carroll implicated many of the same concerns and posed many of the same risks that would have been present if [defense counsel] **[*7]** had communicated with Beale directly. Thus, the Court concludes that the distinction between the two methods of communication is insignificant and does not remove the contact from the ambit of Rule 4.2.

Id.

Similar to the Defendant here, who argues that Mr. Gay was Ms. Mooser's chosen counsel and Kentucky SCR 3.130(4.2) is not implicated, the *Blanchard* defendant argued that because Attorney Carroll (who was not class counsel) was Beale's chosen counsel and would protect Beale's interests, Rule 4.2 concerns were not implicated. The *Blanchard* court rejected the notion that Beale (who was represented by class counsel) could consent to or waive a Rule 4.2 type violation. *175 F.R.D. at 302*. [5]

In this case, Mr. Gay did not and could not represent Ms. Mooser in this matter, as she was part of the Class and was already represented by Class Counsel. Defendant was well aware of this fact, but proceeded to contact Ms. Mooser (through Mr. Gay) without notice or approval from Class Counsel. The Defendant was required to obtain the consent of Class Counsel before

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[3] *Blanchard* does have some minor differences from the present case: a named plaintiff was involved and that plaintiff actually settled all claims (a more substantial "communication" than is involved here). However, the Court finds these differences are not controlling and, in any case, Kentucky SCR 3.130(4.2) prohibits this communication.

[4] The plaintiffs asserted a Rule 4.2 violation under Illinois law, which is very similar to Kentucky SCR Rule 3.130(4.2).

[5] The *Blanchard* court further observed that Attorney **[*8]** Carroll likely lacked sufficient knowledge about the class litigation to protect either Beale's interests or that of the class. *175 F.R.D. at 302*.

communicating with Ms. Mooser and did not do so.

This decision is not at odds with the plain language or purpose of Kentucky SCR 3.130(4.2). In fact, it is consistent with it. That Rule states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by *another lawyer in the matter*, unless the lawyer has the *consent of the other lawyer* or is authorized to do so by law or court order.

Kentucky SCR 3.130(4.2) (emphasis added). Plaintiffs' counsel was Ms. Mooser's lawyer "in the matter" because she was part of the Class and had not opted out. Therefore, Defendant could not communicate about the **[*9]** subject of the representation (the Plaintiffs' suit) without the consent of Plaintiffs' counsel. As Comment 4 points out: "A lawyer may not make a communication prohibited by this Rule through the acts of another." This encompasses a communication through a person's chosen attorney, Mr. Gay in this case, if that chosen attorney was not the actual lawyer "in the matter." [6] As a result, the communication with Ms. Mooser through Mr. Gay, who was not representing Ms. Mooser for the purpose of the Class lawsuit which was the subject of communication, was a violation of Kentucky SCR 3.130(4.2). Therefore, the Court will **GRANT** Plaintiffs' Motion to Strike Ms. Mooser's affidavit (Docket No. 149.). *See* *Shoney's v. Lewis, 875 S.W.2d 514 (Ky. 1994)* (granting motion to strike where plaintiff's counsel communicated with agents of one of the defendants without consent from defendant's counsel). [7]

II. Motion for Sanctions

The Court will **DENY** Plaintiffs' Motion for Sanctions at this time. (Docket No. 149.) While Defendant's communication with Ms. Mooser was a technical violation of Kentucky SCR 3.130(4.2), the Court feels a grant of the Motion to Strike is a sufficient remedy and sanctions are not warranted. The Court notes that the outcome on this issue was a close call and there is not any applicable Sixth Circuit precedent that would give the parties guidance as to how a Court would view this type of communication. Therefore, the Court will **DENY** Plaintiffs' Motion for Sanctions. (Docket No. 149.)

CONCLUSION

For **[*11]** the foregoing reasons, IT IS HEREBY ORDERED as follows:

> (1) Plaintiffs' Motion to Strike Ms. Mooser's affidavit that Defendant submitted in support of its Motion for Summary Judgment (Docket No. 145-5), is **GRANTED**. (Docket No. 149.) Defendant may not refer to Ms. Mooser's affidavit and its content in any further filings in this matter. If such references are contained in the briefing, the Court will not consider it in making its ruling.

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[6] Defendant argues that Comment 7 to Kentucky SCR 3.130(4.2) made this communication permissible. (Docket No. 152, Page 5.) Comment 7 states: "If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for **[*10]** the purpose of this Rule." The Court disagrees. A Class lawsuit where a class member has the option to opt out of the class and hires an independent counsel is a distinctly different situation than where a constituent of an organization hires their own counsel. Therefore, Comment 7 is not applicable to this situation.

[7] The Court notes that Defendant had the option under Kentucky SCR 3.130(4.2) Comment 6, to seek a court order to determine whether this communication would have been permissible. Defendant failed to do just that, instead going ahead with the communication.

(2) Plaintiffs' request to the Court to order Defendant not to contact Ms. Mooser, or any other Class member (directly or indirectly), without Class Counsel's or this Court's permission is **GRANTED**. (Docket No. 149.)

(3) Plaintiffs' Motion for attorneys' fees and costs and for sanctions is **DENIED**. (Docket No. 149.)

IT IS SO ORDERED.

Date: September 24, 2013

/s/ Thomas B. Russell

Thomas B. Russell, Senior Judge

United States District Court

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Ex Parte Contact with Current and Former Employees of Defendant Employer: Ethical Considerations

A Lexis Practice Advisor® Practice Note by

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This practice note provides guidance on ethical considerations and best practices for attorneys representing an individual employee when contacting current and former employees of a defendant employer. It covers topics including the reasons and best practices for an employee's attorney to contact current and former employees, the reasons and best practices for the employer's attorney to object to that contact, and federal and state ethics rules and constraints.

The practice note focuses mainly on the ABA Model Rules of Professional Conduct, since they serve as the model for many jurisdictions and federal courts often apply them when making disciplinary rulings. State ethics rules are also critical, however, since attorneys are subject to the rules in the jurisdictions they practice in, and state and federal courts can apply them when making disciplinary rulings. For those reasons, this practice note also includes a survey of the no-contact rule in various states.

Specifically, this practice note addresses the following topics:

- Ethical Rules and Ex Parte Contact
- Why Contact Current and Former Employees of a Defendant Employer?
- ABA Model Rule 4.2: Application and Exceptions
- Additional Ethical Constraints on Communications with Current or Former Employees
- Key State Ethics Rule Distinctions
- Best Practices for Attorneys Representing Employees
- Best Practices for Defendant-Employer's Attorneys

For more information on discovery for employee-side attorneys, see Discovery in Employment Discrimination Litigation: What Plaintiffs Can Request and Obtain from Defendants. For a related annotated form, see Discovery Plan (Title VII Discrimination Cases) (Pro-Employee).

Ethical Rules and Ex Parte Contact

Ethics rules generally prohibit ex parte contact with current employees of a represented organization who either:

- Are high-ranking –or–
- Were directly involved in taking actions against your client

While jurisdictions vary, you are generally permitted to contact former employees or current low-ranking employees without first getting the consent of the organization's attorney. Even where ethics rules permit ex parte contact with an organization's current or former employees, however, there are other ethical considerations that may restrict that contact. These include ethics rules regarding contact with unrepresented persons and not violating the rights of third parties.

Why Contact Current and Former Employees of a Defendant Employer?

For an individual employee's attorney, current and former employees can be critical sources of factual information in employment disputes, particularly discrimination and retaliation cases.

For example, a current or former employee could be:

- A participant in the adverse action taken against your client (e.g., termination, demotion, decrease in pay, or hostile work environment)
- A witness to the adverse action or the emotional distress caused by the adverse action –or–
- A comparator to help prove pretext, causation, or damages

Current and Former Employees as Participants

In discrimination and retaliation cases, plaintiff employees need to prove that a defendant employer took an adverse action against them because of an unlawful reason. Speaking with a current or former employee who participated in the adverse action (i.e., participants) is often the most direct source of information about the causation element.

For instance, if your client's supervisor decided to terminate her, a frank conversation with the supervisor about why she made that decision would help you understand whether the termination was discriminatory. At the least, it would help you learn about how the defendant employer may defend against claims of discrimination.

Participants also have information about your client's work performance, the work performance of comparator employees, the identity and role of other participants, and the defendant-employer's policies and practices.

Current and Former Employees as Witnesses

Current and former employees who were not participants can still have information that is relevant and material to proving your client's claims.

Adverse Action

Although a current or former employee was not a participant in the adverse action against the plaintiff employee, he or she may have information about the decision maker's motive, such as statements the decision maker made about the adverse action. Witness testimony can also provide context for and explain documentary evidence related to the adverse action, which you may be able to use to counter or undermine the defendant employer's explanation.

Emotional Distress

Such witness testimony can also be helpful for establishing the emotional distress caused by the unlawful conduct. Current and former employees who worked with your client and observed the defendant-employer's adverse treatment of your client and the effects it had on her are often critical sources of such witness testimony.

Defense Rebuttal

Once you can prove that a defendant employer took an adverse action against your client, the defendant employer will inevitably claim that it took the adverse action for a nondiscriminatory, legitimate business reason, often by claiming that your client was a poor performer or violated some company policy. In addition to documentary evidence of your client's positive performance (e.g., written performance reviews, merit-based awards and bonuses, etc.), current and former employees who can attest to your client's work performance and conduct at work can help rebut the defendant-employer's defense.

Current and Former Employees as Comparators

As mentioned above, defendant employers routinely defend against claims of discrimination or retaliation by claiming that there was a legitimate business reason for the adverse action against your client. For instance, in a sex discrimination case involving a termination, the defendant employer may claim that your client arrived late to work and thus deserved termination for violating a time and attendance policy. If the case involves a failure to promote, the defendant employer may claim that your client did not have the requisite qualifications or experience for the higher-paying position.

One of the strongest ways to rebut this kind of defense is to find current or former employees who were similarly situated to your client but were treated differently. If you can find employees of the opposite sex who similarly arrived late to work but were not terminated or who had similar qualifications and experience but were promoted, this will help show that the defendant-employer's asserted reason for its adverse action against your client is pretextual and a potential cover for sex discrimination.

Comparator employees are also important for establishing the economic damages your client has suffered. Taking the example of the sex discrimination case above, in addition to establishing liability, you will need to prove the economic losses that your client has suffered. If you can show that the defendant employer provided raises or enhanced benefits to similarly situated employees subsequent to your client's termination, you can use that information to increase the economic damages available to your client.

Reasons Defendant Employers Seek to Prevent Ex Parte Contact with Current and Former Employees

Defendant employers are most eager to prevent ex parte contact with current and former employees who participated in the adverse action (i.e., participants). This is primarily because the acts or omissions of those employees may impute liability to the defendant employer.

At the least, the information that participants have can be highly probative evidence in employment disputes. Given the potentially damaging nature of this type of information, defendant employers do not want you to have access to it outside the protective environment of discovery.

Defendant employers also are eager to prevent you from speaking ex parte with potential witnesses or comparators in order to restrict the flow of information that is damaging to the defendant-employer's interest.

For an annotated form for acquiring such information in discovery, see Document Requests (Plaintiff to Defendant) (Single-Plaintiff Discrimination Action).

ABA Model Rule 4.2: Application and Exceptions

ABA Model Rule 4.2 prohibits you from communicating with a person you know to be represented by another attorney about the subject matter of a representation, unless the opposing attorney has given consent or you are authorized by law or court order to speak with the person. This is often called the "no contact rule."

Comment 7 to ABA Model Rule 4.2 states that, where the represented person is an organization, the no contact rule extends to any constituent of the organization who:

- "[S]upervises, directs or regularly consults with the organization's lawyer concerning the matter"
- "[H]as authority to obligate the organization with respect to the matter" –or–
- "[W]hose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability"

Comment 7 specifically permits you to speak with former constituents of the organization. In addition, if a current constituent of the organization has personal counsel in the matter, you can speak with that person so long as you get the personal counsel's consent.

Contacting Current Employees under ABA Model Rule 4.2

ABA Model Rule 4.2 and Comment 7 prohibit "ex parte communications" (i.e., communications between you and an employee without getting consent from the defendant-employer's attorney) with current high-ranking employees of the defendant-employer's organization. These include executive-level employees who can make binding decisions on behalf of the organization.

Comment 7 also extends the no contact rule to current employees who were participants in the adverse action against your client. For instance, suppose a mid-level manager terminated your client's employment. That mid-level manager would likely not be high-ranking enough to regularly interact with the company's attorneys or to make decisions on behalf of the organization. However, an admission from that mid-level manager that he or she fired your client because your client complained about sexual harassment would be imputable to the defendant employer for purposes of civil liability.

If a current employee does not fall within the above categories, then ABA Model Rule 4.2 permits ex parte communications. In addition, if current employees fall within one of the above categories but have retained their own counsel, you can communicate with those current employees so long as their personal counsel consents. If their personal counsel consents, you do not need to get consent of the defendant-employer's counsel.

Furthermore, the no contact rule applies only when you know the defendant employer is represented in the matter at hand. If the defendant employer has not yet retained counsel to handle any legal matters related to your client's employment, then the no contact rule does not yet apply.

However, any ex parte communications with current employees permissible under ABA Model Rule 4.2 still must comply with the other related ethical obligations, which are discussed below. They also must comply with any applicable state rules, some of which are more restrictive than Model Rule 4.2.

If you were to violate the no contact rule, the defendant employer could seek injunctive relief from a court to prevent any future impermissible ex parte contact. If impermissible ex parte contacts have already produced information related to the matter, the defendant employer may ask a court to prohibit the use of that information during litigation.

The defendant employer may even ask a court to disqualify you as counsel in the matter. Defendant employers might also request the court to award sanctions against you. Courts generally have broad discretion in fashioning sanctions and injunctive relief to match the severity and impact of your unethical conduct. You could also face disciplinary action from the bars in which you are licensed, ranging anywhere from censure to license suspension.

Contacting Former Employees under ABA Model Rule 4.2

ABA Model Rule 4.2 does not prohibit any ex parte communications with former employees. For instance, although you cannot have an ex parte communication with the defendant-employer's current high-level executives, you can contact them as soon as they resign. Such communications, however, must comply with other related ethical obligations, which are discussed below.

Additional Ethical Constraints on Communications with Current or Former Employees

If you have determined that a current or former employee is not covered by an applicable no contact rule, there are still other ethical rules that might affect your ability to interview the desired witness.

Communications with Unrepresented Persons

ABA Model Rule 4.3 creates guidelines for communication with an unrepresented current or former employee. Rule 4.3 prohibits an attorney from stating or implying that he or she is disinterested and requires the attorney to make reasonable efforts to correct any misunderstanding regarding her disinterest. The rule also prohibits the attorney from giving legal advice to the unrepresented person, other than the advice to secure counsel, if the attorney knows or reasonably should know that there is a possible conflict of interest between the unrepresented person's interests and the attorney's client.

To comply with this rule, when first speaking with a current or former employee, you should identify who your client is. You should also explain whether your client has interests opposed to those of the unrepresented person.

To illustrate, in a sexual harassment case, you reach out to a former coworker of your client who still works for the defendant employer. Under Rule 4.2, you are permitted to speak ex parte with this person because he is not high-ranking enough to be covered by the Rule and he was not a participant in the harassment. At the beginning of the call, you identify yourself as representing your client in her sexual harassment claim against the defendant employer.

In response, the current employee discloses that he is eager to speak with you, but that the defendant employer has directed all employees not to speak with your client or her attorney without first contacting in-house counsel. He then asks if it is legal for his employer to stop him from speaking to you or your client. Under Rule 4.3, you must advise the employee that you cannot provide him with legal counsel, since there is a potential difference between your client's interests and his. You can, however, recommend that he seek the guidance of another attorney as to whether he can speak with you despite the defendant-employer's instructions.

Individual Employee Representation

ABA Model Rule 4.2 Comment 7 specifically states that you can have communications with any current employee who has personal counsel in the matter without getting consent of the defendant-employer's counsel. If the current employee has personal counsel, however, ABA Model Rule 4.2 requires you to get the personal counsel's consent before communicating with that current or former employee about the subject matter of the representation.

It is beneficial to confirm with the defendant-employer's counsel that none of the relevant high-ranking or participant employees are represented by personal counsel. It is possible that you may have more success in securing the cooperation of a witness if they are represented by personal counsel instead of the defendant-employer's counsel.

ABA Model Rule 4.2 also imposes an ethical obligation to get the consent of counsel for former employees or lower-level current employees if they have personal representation, even though they might be exempt from the no contact rule as applied to the defendant employer.

Before interviewing any current or former employee, it is a good practice to ask if they have an attorney. If they respond yes, immediately ask them for the attorney's information and direct all further communication to the attorney.

Using Agents to Communicate with a Represented Party

Not only does ABA Model Rule 4.2 prohibit you from speaking ex parte with a represented party, it also prohibits you from using "the acts of another" to have such communication. See Comment 4 to ABA Model Rule 4.2. This means that you cannot hire an investigator as an agent to talk to employees covered by the no contact rule.

Comment 4 to Rule 4.2, however, states that "[p]arties to a matter may communicate directly with each other, and an attorney is not prohibited from advising a client concerning a communication that the client is legally entitled to make." This means that your client may speak to an employee covered by the no contact rule, and you can advise the client on the information gained through that communication provided you did not use your client to circumvent the no contact rule.

To avoid violating Rule 4.2's prohibition on using "the acts of another" to circumvent the no contact rule, you must never direct your client to communicate with represented individuals. It is also a best practice to explain that you are ethically prohibited from communicating directly with represented individuals and that you cannot encourage or direct your client to have communications that are prohibited for you. You can, however, let the client know that the client is not prohibited from communicating directly with represented individuals.

When doing this, be very careful. According to the ABA, "[p]rime examples of overreaching include assisting the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against

interest without the opportunity to seek the advice of counsel." ABA Formal Opinion 11-461. Any indication that you overreached could result in sanctions such as:

- Default
- Disqualification as counsel
- Exclusion of evidence unethically obtained –and–
- Payment of an opposing party's costs

The risk to your client's case and your professional reputation is real.

Non-disclosure Agreements and Purloined Documents

ABA Model Rule 4.4(a) prohibits you from obtaining evidence in a way that violates the rights of a third person.

Many employers require some or all of their employees to sign non-disclosure agreements (NDAs), preventing the employees from disclosing certain kinds of confidential information. NDAs often remain in effect even after the individuals terminate their employment with the employer. Inducing a current or former employee to breach an active NDA may violate the defendant-employer's legal rights to confidentiality.

When speaking with a current or former employee, you should avoid asking about confidential information that is likely to be covered by an NDA, such as trade secrets and proprietary business information. Not only may such actions violate your ethical duties, but it may subject you to liability for interference with the defendant-employer's contractual rights.

You should also avoid requesting or inducing a current employee to purloin company documents, since that would violate the rights of the defendant employer.

Additionally, if you receive a document or electronically stored information that you know or reasonably should know was inadvertently sent, ABA Model Rule 4.4(b) requires you to promptly notify the sender. If a current employee mistakenly sends you a confidential company document, you must let the employee know as soon as you can, although you are not obligated to return the document.

Attorney-Client Privilege

Although the no contact rule generally does not prohibit ex parte communications with former employees, there are many former employees who you know or should reasonably suspect participated in privileged communications with the defendant-employer's attorneys. Defendant-employers have the legal right to maintain the confidentiality of attorney-client privileged communications, and former employees, no matter how high-ranking, do not have the ability to waive the defendant-employer's privilege.

Depending on your jurisdiction's rules on corporate attorney-client privilege, lower-level employees can engage in privileged attorney-client communications when they interact with corporate counsel on certain matters. Thus, current employees who might not be covered by the no contact rule might be aware of privileged information that the defendant employer has a right to keep confidential.

Since you have an ethical obligation not to use methods of obtaining evidence that violate the legal rights of any person, see ABA Model Rule 4.4(a), you should not induce any current or former employees to divulge any confidential information covered by attorney-client privilege.

When interviewing any current or former employee, it is a good practice to advise them not to talk about any communications they had with the defendant-employer's attorneys or any other information that might be privileged.

Key State Ethics Rule Distinctions

Almost every jurisdiction has a rule that either is a version of ABA Model Rule 4.2 or contains a similar no contact rule. Some jurisdictions have minor variations in how they describe the class of current employees with whom you cannot have ex parte communications. Other jurisdictions include idiosyncratic requirements or exceptions. Before deciding to engage in ex parte communications, you should check the rules of professional conduct for each state in which you are licensed or practicing.

Below is a survey of jurisdictions that have adopted ABA Model Rule 4.2 verbatim, as well as several jurisdictions that have variations of the rule.

Jurisdictions That Have Adopted ABA Model Rule 4.2 Verbatim

Many jurisdictions in the United States have adopted Rule 4.2 and Comment 7 verbatim. These include:

- Colorado
- Delaware
- Idaho
- Illinois
- Indiana
- Kansas

- Kentucky
- Missouri
- Nebraska
- Ohio
- Oklahoma
- Pennsylvania
- South Carolina
- Vermont
- West Virginia
- Wisconsin
- Wyoming

California Rule of Professional Conduct 4.2

California Rule of Professional Conduct (CRPC) 4.2 is written differently from ABA Model Rule 4.2 and Comment 7, although its substantive restrictions on ex parte communications are very similar.

Similar to ABA Model Rule 4.2, CRPC 4.2(a) says a member of the California bar "shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer."

CRPC 4.2(b) defines the scope of the no contact rule as applied to represented corporations, partnerships, associations, and other private or governmental organizations. The rule prohibits communications with:

1. "A current officer, director, partner, or managing agent of the organization" –and–

2. Any "current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability"

CRPC 4.2(b) significantly overlaps with the categories of current employees listed in ABA Model Rule 4.2 Comment 7, as officers, directors, and managing agents of a corporation are those employees who typically interact with a corporation's attorneys and can make binding decisions on behalf of a corporation.

CRPC 4.2 and its Comments do not mention the application of the no contact rule to former employees. However, both subsections to CRPC 4.2(b) specify that the prohibition extends only to current employees. Thus, like ABA Model Rule 4.2, CRPC 4.2 permits ex parte communications with former employees.

Florida Rule of Professional Conduct 4-4.2

Florida Rule of Professional Conduct (FRPC) 4-4.2(a) and the Comment to FRPC 4-4.2 contain language identical to ABA Model Rule 4.2 and Comment 7. Florida, however, has added further details to its Rule 4-4.2 that allow certain limited ex parte contact.

The first sentence of FRCP 4-4.2(a) is identical to ABA Model Rule 4.2: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

FRCP 4-4.2(a) then goes on to state that an attorney may "communicate with another's client to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on a person." Any such ex parte communication must be "strictly restricted to that required by the court rule, statute or contract," and you must provide a copy of the communication to the person's attorney.

If, for instance, a contract requires your client to provide a written notice of breach to a specific employee of your client's employer, then you are allowed to provide written notice to that employee without regard to the no contact rule, so long as you also give a copy of the written notice to the employer's attorney.

FRCP 4-4.2(b) regulates communications with a person who has limited representation. In this circumstance, you can communicate with the person as if the person was unrepresented, unless you receive a written notice that the attorney's limited representation covers the subject matter of your communication. If you receive written notice, then you may not engage in ex parte communications on any subject matter within the limited scope of the representation.

Maryland Attorneys' Rule of Professional Conduct 19-304.2

Maryland Attorneys' Rule of Professional Conduct (MARPC) 19-304.2 contains restrictions very similar to those found in ABA Model Rule 4.2 and Comment 7, although it has a unique addition that provides a good practice to avoid engaging in unethical ex parte communication.

MARPC 19-304.2(b) prohibits ex parte communications with:

- "[C]urrent officers, directors, and managing agents" –and–

- "[C]urrent agents or employees who:
    - "[S]upervise, direct, or regularly communicate with the organization's attorneys concerning the matter" –or–
    - "[W]hose acts or omissions in the matter may bind the organization for civil or criminal liability"

These categories significantly overlap with the categories of current employees listed in ABA Model Rule 4.2 Comment 7, as officers, directors, and managing agents of a corporation are those employees who typically interact with a corporation's attorneys and can make binding decisions on behalf of a corporation.

Unlike ABA Model Rule 4.2 and the rules in other jurisdictions, MARPC 19-304.2(b) specifically requires you to make an inquiry of any current employee "to ensure that the agent or employee is not an individual with whom communication is prohibited by this section." You also have to disclose your identity to the current employee and say that your client has an interest adverse to the defendant employer.

Although most jurisdictions do not specifically require you to ask current employees whether they are high-ranking enough to prohibit ex parte communications, following MARPC 19-304.2(b) as a model is a good practice. Asking first will help you avoid any prohibited ex parte communications.

Like ABA Model Rule 4.2 Comment 7, MARPC 19-304.2 does not prohibit ex parte communications with former employees, but notes that other ethical restrictions apply. Specifically, MARPC 19-304.2 Comment 6 points to MARPC 19-304.4(b), which is substantively identical to ABA Model Rule 4.4(b) ("A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.").

New York Rule of Professional Conduct 4.2

New York Rule of Professional Conduct (NYRPC) 4.2(a) and its Comment 7 are, with minor linguistic variation, identical to ABA Model Rule 4.2 and Comment 7. See 22 NYCRR § 1200.0, Rule 4.2(a).

New York, however, has added further details in additional subsections to its Rule 4.2 that detail when an attorney can ethically direct another person to speak with a represented person. See 22 NYCRR § 1200.0, Rule 4.2. NYRPC 4.2(b) specifies that you are allowed to direct your client to have ex parte communications with a represented person, provided that the represented person is legally competent and you give "reasonable advance notice" to the represented person's attorney that the communication will be taking place. See 22 NYCRR § 1200.0, Rule 4.2(b). Under this rule, you could direct your client to communicate with executives currently employed by the defendant employer, so long as you gave opposing counsel reasonable advance notice, even if opposing counsel never consents to the communication.

NYRPC 4.2(c) addresses the situation of a client who is an attorney (which includes if you are acting pro se). In such a circumstance, the attorney-client may have ex parte communications with a represented person, provided that the represented person is legally competent and you as his or her attorney give "reasonable advance notice" to the represented person's attorney that the communication will be taking place. See 22 NYCRR § 1200.0, Rule 4.2(c).

Texas Disciplinary Rule of Professional Conduct 4.2

Texas Disciplinary Rule of Professional Conduct (TDRPC) 4.02 is not patterned on ABA Model Rule 4.2, although its no contact rule is similar.

TDRPC 4.02(a) states that "a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." This rule is very similar to ABA Model Rule 4.2, although it also specifies that you may not "cause or encourage" someone else to engage in ex parte communications covered by the no contact rule. Comment 1 to the state rule specifically prohibits you from causing or encouraging your client to engage in communications with a represented person.

TDRPC 4.02(b) extends the no contact rule to any "person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation." Thus, you cannot have ex parte communications with expert witnesses, investigators, or other agents of opposing counsel.

TDRPC 4.02(c) defines the term "organization or entity of government" used in TDRPC 4.02(a). This term includes:

- Those employees or agents of an organization that "presently" have a "managerial responsibility" relating to the subject matter of representation –and–
- Those "presently employed . . . whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission"

The "managerial responsibility" category would largely overlap with two categories of employees covered by ABA Model Rule 4.2:

- Those who regularly consult with a company's attorneys –and–
- Those who have authority to make binding decisions on behalf of the company

Comment 4 to the state rule specifically provides that you may have ex parte communications with former employees, as well as with "a person presently employed . . . whose conduct is not a matter at issue but who might have knowledge concerning the matter at issue." It also states that, if current employees covered by the no contact rule have their own counsel on that matter, consent of personal counsel is all that is required to comply with your obligations under TDRPC 4.02.

Virginia Rule of Professional Conduct 4.2

Virginia Rule of Professional Conduct (VRPC) 4.2 is verbatim identical to ABA Model Rule 4.2. However, VRPC 4.2 Comment 7 is written very differently from ABA Model Rule 4.2 Comment 7, and thus includes far fewer current employees within its version of the no contact rule.

VRPC 4.2 Comment 7 extends the no contact rule to employees who come within the organization's "control group" as defined by the Supreme Court case, Upjohn v. United States, 449 U.S. 383 (1981), or "who may be regarded as the 'alter ego' of the organization."

As VRPC 4.2 Comment 7 describes, the "control group" or "alter ego" test captures only those employees "who, because of their status or position, have the authority to bind the corporation." Comment 7 further states that "[a]n officer or director of an organization is likely a member of that organization's 'control group.'" The "control group" test covers only high-ranking employees who can make decisions on behalf of the corporation. Thus, in Virginia, you can have ex parte communications with lower-level employees like mid-level managers who may have played a decisive role in discriminating against your client, as they are not high-ranking enough to fall within the no contact rule.

VRPC 4.2 Comment 7 specifically exempts former employees from the no contact rule, even where the former employee was formerly a member of the company's "control group." Although you cannot speak to the defendant-employer's current executives without the consent of opposing counsel, you are free to interview them once they resign.

Best Practices for Attorneys Representing Employees

Attorneys representing employees should follow these guidelines for contacting current and former employees of the defendant employer.

Contacting Current Employees

The no contact rule does not apply unless you know that the defendant employer is represented in the matter. Therefore, it is ethical to send an initial communication such as a document preservation letter or a demand letter directly to a current high-ranking employee of the defendant employer. Once a defendant employer's attorney surfaces, however, the no contact rule is triggered.

Once the defendant employer has legal representation, you should be careful not to contact any current employee that might be covered by the no contact rule. This includes executives, in-house counsel, high-ranking managers, and any lower-level employees who participated in the adverse actions against your client. You should also avoid contacting current employees who you know have broad NDAs with the defendant employer.

If you are going to contact current employees not covered by the no contact rule, it is a good practice to have your client first make contact with the current employees and ask if they would be willing to speak with you. While you are not ethically required to take this step, this practice can avoid witnesses feeling anxious or intimidated by having an attorney reach out to them without any forewarning. If the current employees tell your client they are willing, you should contact them promptly.

It is a good practice to identify yourself, your role as your client's attorney, and the nature of your client's dispute with the defendant employer. You should then ask the current employees about their role in the company to ensure they are not covered by the no contact rule. Before asking any questions related to your client's case, be sure to ask whether the current employees have personal representation and to advise them that they should not share any of the defendant-employer's privileged information.

If the current employees confirm they do not have personal representation, you can then interview them about facts relevant to your client's case. Be sure not to ask any questions that might prompt the current employees to divulge privileged information or otherwise violate the legal rights of the defendant employer.

If you would like to contact current employees covered by the no contact rule, you will likely have to wait until you are in litigation and can subpoena them for depositions. While you can always ask the defendant-employer's attorney for permission to contact the current employees covered by the no contact rule, the defendant-employer's attorney will almost certainly not consent to any such contact. For more information about taking such depositions, see Deposing Employer Witnesses: How to Prepare in Employment Discrimination Cases (Pro-Employee) and Rule 30(b)(6) Deposition Strategies for Employee-Plaintiffs in Employment Cases. For annotated forms, see Notice of Deposition (FRCP Rule 30(b)(6)) (Plaintiff to Defendant). For a related checklist, see Deposing Employer Witnesses Preparation Checklist.

Contacting Former Employees

Since the no contact rule does not apply to former employees of the defendant employer, you do not need to seek permission from the defendant-employer's attorney before contacting them.

You should still work with your client, however, to identify former employees who are sympathetic to your client's case. Sympathetic former employees are more likely to be honest and give you useful information. Moreover, former employees who may be antagonistic to your client might decline to speak with you and inform the defendant employer about your contacts. Such an outcome is undesirable because the defendant employer may take action to discourage other more sympathetic current and former employees from speaking with you. It also prematurely alerts the defendant employer to the fact that your client may be bringing claims against it.

You should avoid contacting former employees who you know have broad NDAs with the defendant employer that restrict such communications.

If you are going to contact former employees, it is often beneficial to have your client first make contact with the former employees and ask if they would be willing to speak with you. As explained above, some witnesses can feel anxious or intimidated when an attorney reaches out to them without any forewarning. If the former employees tell your client they are willing to speak, you should contact them promptly.

When you first make contact with a former employee, it is a good practice to identify yourself and your role as an attorney representing your client who has an employment dispute with the defendant employer. You should then confirm that the former employee no longer works for the defendant employer.

Before asking any questions related to your client's case, be sure to ask whether the former employees have personal representation. You should also advise them that they should not share any of the defendant-employer's privileged information. This is especially important for former high-ranking employees who may have regularly been in contact with the defendant-employer's attorneys.

If the former employees confirm they do not have personal representation, you can then interview them about facts relevant to your client's case. Be sure not to ask any questions that might prompt the former employees to divulge privileged information or otherwise violate the legal rights of the defendant employer.

Best Practices for Defendant-Employer's Attorneys

Attorneys representing the defendant employer should follow these guidelines when an employee's attorney contacts your client's current and former employees.

Preventing Contact with Current Employees

If you are a defendant-employer's attorney, it is not unethical for you to instruct your client's current employees not to speak with the plaintiff's attorneys, unless you reasonably believe that such an instruction might be adverse to a current employee's interest. See ABA Model Rule 3.4(f).

While this may seem attractive because it can help limit damaging information from leaking out, think carefully before making such a blanket instruction. It may run afoul of some federal employment statutes, such as the National Labor Relations Act, 29 U.S.C. §§ 151–169. It can also degrade the workplace culture by indicating to employees that the company seeks to bury misconduct instead of address it. This can lead to employees being unwilling to report compliance and legal violations internally, which can increase the company's potential legal exposure in the future.

If a plaintiff's attorney makes an ex parte communication with one of your client's current employees covered by the no contact rule, you should immediately contact the plaintiff's attorney and tell him or her that you represent the defendant employer in the matter. You should then notify the attorney that you do not consent to any contact with your client's employees who are covered by the no contact rule.

If the plaintiff's attorney continues to make unethical ex parte communications with your client's current employees, you can consider seeking injunctive relief from a court to prevent any further impermissible contacts. If the matter is in litigation, you can also seek sanctions from a court, if appropriate.

Preventing Contact with Former Employees

The no contact rule generally does not give you any right to object to a plaintiff's attorney's contact with your client's former employees. You are, however, able to protect your client's

rights to attorney-client privilege and to confidentiality under any NDAs.

If a plaintiff's attorney induces one of your client's former employees to violate your client's legal rights, you should immediately contact the offending attorney. Tell the attorney that you represent the defendant employer in the matter, that the former employee is subject to an NDA, and that you will take all action necessary to protect your client's rights. You can also consider seeking injunctive relief or sanctions from a court, if necessary and appropriate.

Alexis Ronickher, Katz, Marshall & Banks, LLP

Alexis Ronickher is a partner with the whistleblower and employment law firm of Katz, Marshall & Banks, LLP, in Washington, D.C. She specializes in representing clients in sexual harassment and whistleblower cases, as well as other employment matters, including civil rights discrimination and retaliation and Title IX violations. As part of her whistleblower practice, she represents clients pursuing *qui tam* claims under the False Claims Act and who have submitted whistleblower tips to the S.E.C. under the Dodd-Frank S.E.C. whistleblower program. In 2018, Law360 recognized Ms. Ronickher as a "Rising Star," just one of five employment lawyers nationally to earn this designation, and in 2017 and 2018 Super Lawyers recognized her as a "Rising Star" for Washington, D.C.

Ms. Ronickher has litigated cases nationwide in federal and state courts, as well as in administrative hearings. She represented a hair stylist in a sexual harassment and retaliation trial that resulted in a jury verdict of $2.3 million in favor of her client. In 2018, she represented whistleblowers in a successful *qui tam* lawsuit against a naval husbandry company for fraudulently billing the government that resulted in a $20 million settlement, and in 2014 she represented a whistleblower in a *qui tam* and retaliation lawsuit that resulted in a $10 million settlement. Ms. Ronickher has also represented numerous other employees and whistleblowers in cases that have successfully resolved confidentially prior to or during litigation.

Ms. Ronickher speaks frequently about whistleblower protections, sexual harassment, and employment law, has written extensively on employment law matters, and has appeared in numerous national and local media. In 2016, she was elected to serve on the steering committee for the D.C. Bar Association's Labor and Employment Community, and has served as Co-Chair since 2017.

Ms. Ronickher received her law degree from Stanford Law School and her undergraduate degree from the University of California, Santa Barbara.

I.L., a minor, by Ashley Lau and Justin Keating, Guardians, and Ashley Lau and Justin Keating, Individually v. Allegheny Health Network; West Penn Allegheny Health System, Inc., d/b/a the Western Pennsylvania Hospital; Allegheny Specialty Practice Network; Allegheny Clinic; Century Medical Associates; Allegheny Perinatal Associates; James Rowland, M.D.; Christann Jackson, M.D.; Ronald Thomas, M.D.; Maria N. Udrea, M.D.; John Luiza, M.D.; Faith Ighoyivwi, M.D.; Paul Weinbaum, M.D.; and, Aurora Marcelo Miranda, M.D.

Medical Negligence—Discovery—Stipulation Rule—Opinion Testimony—Retrospective Assessments—"Happy Hour"—Duty to Meet and Confer—Manner of Conducting Depositions in Allegheny County

A defendant-physician can be asked opinion questions, including standard of care questions and properly grounded hypothetical questions, in deposition. A stipulation by counsel limiting the scope of defendant's expert opinion at trial in order to preclude inquiry at deposition is unworkable as it improperly precludes appropriate inquiry into relevant and material information. Defendant expert parties may provide retrospective assessments in discovery.

Designated times to present discovery motions are euphemistically known among local counsel as "Happy Hour." The continuing acceptance of informal "Happy Hour" norms undermines judicial economy. The Court has proposed an amendment to Local Rule 208.3(a)(4)(b) to promote that counsel confer and consult before presenting a motion and is adopting the duty of counsel to confer and consult in good faith. Counsel will be accountable for reporting to the Court the specifics of their meaningful meet and confer efforts.

No. GD 18 - 011924. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Ignelzi, J.—March 30, 2021.

OPINION and ORDER of COURT

This Pretrial Discovery Opinion and Order of Court involves the discovery deposition of a defendant physician in a medical negligence action and various objections raised, including but not limited to, the scope and breadth of opinion testimony at deposition. Before this Court are Plaintiffs' Motion to Overrule Objection and Reconvene Deposition (ECF 53)[1] and Defendants' Response in Opposition to Plaintiffs' Motion (ECF 52). Plaintiffs seek to reconvene the deposition to compel the physician to answer questions regarding the timing of the delivery and any follow-up questions that reasonably flow from his responses. (ECF 53, Proposed Order at ¶¶2-3). This Court is the assigned Special Motions Judge pursuant to Allegheny County Local Rule 208.3(a)(5).[2] The Special Motions Judge handles the bulk of all pretrial discovery motions. The motions assignment has a long and storied history.[3] As with any storied history, there are certain portions which need to be amended and changed.[4]

Procedural Summary

This action was initiated on September 17, 2018, by Praecipe for Writ of Summons (ECF 1). Thereafter, on November 7, 2018, Plaintiffs filed their initial Complaint (ECF 19)[5] in medical negligence related to the birth of I.L., a minor. Plaintiffs aver as a result of an emergent cesarean section on September 24, 2016, the baby suffered hypoxic ischemic encephalopathy (HIE) causing severe injury to the brain due to deprivation of oxygen. (ECF 53 at ¶5).

Plaintiffs' Third Amended Complaint (ECF 38), alleges, inter alia, that deponent Defendant, Ronald Thomas, M.D.: acted in his own right as a medical practitioner and as agent of specific corporate Defendants (ECF 38 at ¶12); signed a prenatal ultrasound report that was conducted on or about August 25, 2016 (ECF 38 at ¶38); was consulted by co-Defendant physician Christann Jackson, M.D. related to a September 23, 2016 sonogram; and "recommended that an induction should be scheduled within the next day or so given the bowel appearance and doppler results[.]" (ECF 38 at ¶¶45, 46).

Count IV of Plaintiffs' Third Amended Complaint against Dr. Thomas alleges negligence, and avers that Defendant Deponent Thomas failed to exercise reasonable treatment and care, in any or all of the following respects:

(a) In failing to make a plan for delivery by 38 weeks;

(b) In failing to arrange for Ashley's admission to the hospital and delivery of I.L. at 38 weeks 1 day on September 23, 2016, given elevated umbilical artery value in combination with fetal growth restriction and gastroschisis with evidence of increasing bowel dilation;

(c) In failing to arrange for delivery of I.L. before the presentation of Ashley Lau on September 24, 2016 at West Penn Hospital in active labor; and

(d) In failing to review and/or correctly interpret the electronic fetal monitor tracing recorded on September 22, 2016 which clearly reflected contractions mandating admission and delivery of I.L on September 23, 2016 at the latest.

(ECF 38 at ¶77).

Dr. Thomas' video deposition was conducted on August 5, 2020 from 10:09 a.m. until 2:05 p.m. The Plaintiffs' Motion (ECF 53) and Defendants' Response (ECF 52) relate to the scope and breadth of the deposition, objections raised, and the conduct of counsel. Plaintiffs aver Defense Counsel's objections and interruptions frustrated the essential purpose of discovery by raising speaking objections and directing the Defendant deponent to not answer certain questions related to medical opinion testimony. (ECF 53 at ¶8). Defendants aver that due to Plaintiffs' Counsel's repetitive questioning, unnecessarily prolonged deposition, and personal attacks on counsel; that Defense Counsel had properly placed valid objections and ended the deposition after four hours. (ECF 52 at ¶1). The repetitive areas are detailed in Defendant's Response at Exhibit B consisting of four (4) pages containing sixty-one (61) bullet points. (ECF 52, Exhibit B).

Each party incorporated excerpts of the deposition in support of their contentions. Dr. Thomas' complete deposition transcript was attached as Exhibit A to Defendants' Response. (Deposition of Ronald Thomas, M.D., August 5, 2020, ECF 52 at Exh. A).

Defense Counsel raised objections at deposition pages 21, 24, 28, 29, 48, 50, 62, 66, 67, 97, 105, 108, 118, 145, 146, and 148. This Court has reviewed the pertinent pleadings and every page and line of the one hundred forty-nine (149) page deposition transcript including objections and the interaction of counsel.[6]

Factual Summary

Upon review of the record before this Court, the nature of Dr. Thomas' medical training and specialty is high-risk obstetrics. (Dr. Thomas dep. at p. 31). The Complaint, deposition transcript, and related pleadings provide limited information, but it may be inferred that Dr. Thomas is an expert in maternal fetal medicine.[7] In this instance, Dr. Thomas was involved in two ultrasound examinations of the mother Ms. Lau, dated September 1 and 23, 2016. (Id. at p. 6). On September 23, Dr. Thomas was consulted and recommended that an induction should be scheduled within the next day or so given the bowel appearance and the doppler results. (ECF 38 at ¶¶45-47).

Dr. Thomas did not see Ms. Lau on either September 1 or 23. (Dr. Thomas dep. at p. 7). On September 24, 2016 at 5:17 p.m., the child was delivered via emergency C-section at West Penn Hospital. (ECF 38 at ¶¶47-52). Dr. Thomas did not speak to Ms. Lau or her family after the events of labor and delivery and had no direct involvement whatsoever. (Dr. Thomas dep. at pp. 60-61).

It is clear from review of the Third Amended Complaint and Dr. Thomas' Deposition Transcript, that one of the Plaintiffs' theories against Dr. Thomas involves his participation on September 23, 2016, the day before delivery. It is alleged that on that date, Dr. Jackson read the ultrasound / sonogram and did a remote evaluation with Dr. Thomas. Based upon this remote evaluation, it is alleged Dr. Thomas suggested delivery within the next day or two. Plaintiffs contend delivery should have occurred on September 23, 2016 at the latest.

The deposition questions and objections are related to factual testimony, standard of care, timing and management of delivery, opinion testimony, and repetitive questioning.

Scope and Standard of Review

In preparing this Opinion, this Court has reviewed substantial appellate law as well as opinions from Pennsylvania Courts of Common Pleas including District and County reports. This review includes Allegheny County Court of Common Pleas discovery opinions by the well-recognized jurist, the Honorable R. Stanton Wettick and the recent and well-reasoned opinions of the Honorable Terrence R. Nealon of the Court of Common Pleas of Lackawanna County. This Court adopts the standard of review for discovery disputes as thoroughly articulated in Howarth-Gadomski v. Henzes, M.D., 2019 WL 6354235 (Lacka. Co. 2019) and Karim v. Reedy, M.D., 2016 WL 111324 (Lack. Co. 2016).[8]

> "The trial court is responsible for overseeing discovery between the parties and, therefore, it is within that court's discretion to determine the appropriate measures to insure adequate and prompt discovery of matters allowed by the Rules of Civil Procedure." Rohm and Haas Co. v. Lin, 992 A.2d 132, 143 (Pa. Super. 2010), cert. denied, 565 U.S. 1093 (2011). Under Pa.R.C.P. 4003.1, "discovery is liberally allowed with respect to any matter, not privileged, which is relevant to the cause being tried." Berg v. Nationwide Mutual Insurance Company, Inc., 44 A.3d 1164, 1178 n. 8 (Pa. Super. 2012), app. denied, 619 Pa. 719, 65 A.3d 412 (2013). Information is relevant "if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding a material fact." Klein v. Aronchick, 85 A.3d 487, 498 (Pa. Super. 2014), app. denied, 628 Pa. 632, 104 A.3d 5 (2014). The relevancy standard applicable to discovery is necessarily broader than the relevancy test used at trial for the admission of evidence. Com. v. TAP Pharmaceutical Products, Inc., 904 A.2d 986, 994 (Pa. Cmwlth. 2006); George v. Schirra, 814 A.2d 202, 205 (Pa. Super. 2002). Moreover, any doubts regarding relevancy are to be resolved in favor of discovery. Ario v. Deloitte & Touche, LLP, 934 A.2d 1290, 1293 (Pa. Cmwlth. 2007).
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> "Pennsylvania has a long history of liberal discovery in order to further the truth-determining process essential to our judicial system, prevent unfair surprises should the matter proceed to trial, enhance an attorney's ability to strongly and effectively advocate for a client, and enable the efficient operation of our judicial system." Office of the District Attorney of Philadelphia v. Bagwell, 155 A.3d 1119, 1138 (Pa. Cmwlth. 2017), app. denied, 643 Pa. 669, 174 A.3d 560 (2017). "Of the various discovery procedures available to litigants, depositions provide the most effective means of investigating a claim or defense via spontaneous responses to commonly unscripted questions." Ezrin v. Hospice Preferred Choice, Inc., 2018 WL 4778396, at *5 (Lacka. Co. 2018). In a deposition setting, "as the inquiry proceeds, the framing of each question is dependent upon the answers to preceding questions." Arvonio v. PNC Wealth Management, 35 Pa. D. & C. 5th 213, 220-223 (Lacka. Co. 2013) (quoting Nardell v. Scranton-Springbrook Water Service Co., 24 Pa. D. & C. 2d 663, 667 (Luz. Co. 1961)). As a result, depositions provide litigants and their counsel the opportunity to discover the details of their adversary's claims or defenses while simultaneously locking witnesses into their anticipated trial testimony. See Brown v. Trinidad, 111 A.3d 765, 774 (Pa. Super. 2015) ("Although taking the deposition of a witness on the day of trial is unusual, we agree with the trial court that it nonetheless had the effect of making Trinidad aware of what [the witness's] trial testimony would be."). To that end, "[l]itigants and their counsel have an obligation to act reasonably in scheduling and conducting discovery depositions." Euceda v. Green, 40 Pa. D. & C. 5th 317, 331 (Lacka. Co. 2014).
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> Our discovery rules are designed "to allow a fair trial on the merits" and to enable the party seeking to prove a claim or defense to secure discovery pertinent to the matters which [s]he will be required to prove at trial. Keystone Dedicated Logistics. LLC v. JGB Enterprises, Inc., 77 A.3d 1, 12 (Pa. Super. 2013). For that reason, the party objecting to discovery generally bears the burden of establishing that the requested information is not discoverable. Koken v. One Beacon Ins. Co., 911 A.2d 1021, 1025 (Pa. Cmwlth. 2006); Brogan v. Rosenn, Jenkins & Greenwald, LLP, 27 Pa. D. & C. 5th 553, 562 (Lacka. Co. 2013). Furthermore, any limitations on discovery sought by the civil litigants should be construed narrowly. Venosh v. Henzes, 31 Pa. D. & C. 5th 411, 420 (Lacka. Co. 2013), aff'd, 105 A.3d 788 (Pa. Super. 2014).

Howarth-Gadomski v. Henzes, M.D., 2019 WL 6354235 at *3-4 (Lacka. Co. 2019). See also Karim v. Reedy, M.D., 2016 WL 111324 (Lacka. Co. 2016)(Judge Nealon articulated the scope and standard of review almost identically as in Howarth-Gadomski with additional citations to several Lackawanna County cases: Scranton Laminated Label. Inc. v. Florimonte, 27 Pa. D. & C. 5th 502, 521 (Lacka. Co. 2013), aff'd, 100 A.3d 314 (Pa. Super. 2014), app. denied, 105 A.3d 313 (Pa. 2014), cert. denied, 135 S.Ct. 1505 (U.S. 2015) and McAndrew v. Donegal Mut. Ins. Co., 56 Pa. D. & C. 4th 1, 7 (Lacka. Co. 2002)).

Discovery Deposition Objections

The first objection Defense Counsel raised is that Dr. Thomas is only a fact witness and therefore Plaintiffs are not permitted to seek opinion testimony. Plaintiffs' Counsel questioned Dr. Thomas about Hypoxic Ischemic Encephalopathy ("HIE"). (Dr. Thomas dep. at page 21, line 1 to page 23, line 1). Defense Counsel continued throughout the deposition to object to Plaintiffs' Counsel seeking expert opinion testimony. (Id. at 145:13-147:12).

> Q. And I know the American College of Obstetrics has a definition that they have used in the past. They define HIE as an etiology considered to be a limitation of oxygen and blood flow near the time of birth. Is that a fair definition of HIE?
>
> A. That is fair.
>
> DEFENSE COUNSEL: Counselor, objection. You are going far afield here. My client was not involved in delivery. I have given you some latitude here, but please get to the facts of this case. He is not here to talk about HIE. He is not here to talk about his criteria or ACOG. So, he is a fact witness, please focus on his facts. He is not here to talk about HIE, so get a new question, please.

(Id. at 21:1-16).

The second objection Defense Counsel raised precluded any questioning that did not involve Dr. Thomas' participation. Defense Counsel justified this objection by stating: "[b]ut what happens after his involvement, that is a retrospective review." (Id. at 22:25-23:1).

Defense Counsel continued to object that Dr. Thomas is not giving opinions unless it relates to his specific involvement in Plaintiff's care:

> A. So, the antenatal testing again has to be emphasized as being a view of a chronic nature, not to address an acute episode or an acute insult.
>
> Q. Do you think that this was an acute insult?
>
> DEFENSE COUNSEL: He is not going to answer that. He is not here to comment on what happened to your client after his care ended, so he is not answering that.

(Id. at 28:1-3).

The next objection Defense Counsel raised was Dr. Thomas did not deliver the baby, Plaintiffs' Counsel could not ask anything about the delivery:

> DEFENSE COUNSEL: He is not talking about delivery. Unless you know a fact that I don't, he wasn't involved in delivery.
>
> PLAINTIFFS' COUNSEL: I am not talking about this delivery. I am talking about the management of patients like this. We are talking about –
>
> DEFENSE COUNSEL: He's not answering. Counselor, I'm going to spare you. You are trying to get standard of care opinions out of a fact witness on a topic he had no involvement with, so he is not answering that.

(Id. at 50:24-51:9).

Defense Counsel concluded that any questions about delivery were not permitted and maintained his objections because Dr. Thomas' last involvement with the patient was on September 23, 2016 (the day before delivery on September 24). However, Dr. Thomas had participated in a remote evaluation with Dr. Jackson on September 23, 2016, wherein Dr. Thomas suggested delivery within the next day or two. (Id. at 8:16-22). Later in the deposition, Plaintiffs' Counsel pursued questioning Dr. Thomas about the events of September 24, 2016.

Defense Counsel objected to Plaintiffs' Counsel asking whether Dr. Thomas' September 23, 2016 recommendation was to have the patient admitted and delivered within 24 to 48 hours. (Id. at 62:14-72:18).

> DEFENSE COUNSEL: No, counselor. You are trying to be cute here and get an opinion that I have told you he won't give. So, he has answered your question generically. We are not talking about this patient after the 23rd.

(Id. at 62:21-25).

Defense Counsel objected that this question had been asked and answered at least five (5) times. (Id. at 66:3-5). However, notwithstanding Defense Counsel's objections, this was the first time Dr. Thomas testified about a 24 to 48 hour recommendation. (Id. at pp. 62:14-72:18). At this point, Doctor Thomas indicated that delivery would be acceptable within that week and further testified that he thought there was a three to four-day window to work with in terms of moving toward delivery. (Id. at 72:14-18).

Defense Counsel next objected that Dr. Thomas is not a records custodian and asserted that Plaintiffs' questions are not reasonably calculated to lead to the discovery of admissible evidence. (Id. at 96:1-97:6).

Again, Defense Counsel asserts Dr. Thomas is not an expert. (Id. at 108:22-23). When questioned by Plaintiffs' Counsel as to whether Dr. Thomas will be supplying expert testimony at trial, Defense Counsel would not make such a representation. (Id. at 108:24-109:4). In fact, Defense Counsel stated Dr. Thomas will defend himself at trial as the law allows within the confines of his treatment. (Id.). Despite almost three pages of argument between counsel, Dr. Thomas does eventually answer the question. (Id. at 110:1-22).

Finally, Defense Counsel suspended the deposition after alleging he was personally attacked when Plaintiffs' Counsel stated that Defense Counsel was coaching the witness. (Id. at 148:2-149:23). As a result, Defense Counsel unilaterally terminated the deposition. (Id. at 149:1-2).

Application of Law to Defendants' Objections

I. Discovery of Defendant Expert Opinions

Defense Counsel's first objection is that Plaintiffs may not seek the opinion of a defendant physician. This Court notes that prior

to 1978, former Pennsylvania Rule of Civil Procedure 4011(f) had extended testimonial proscription to parties, and stated that "[n]o discovery....shall be permitted which....would require a deponent, whether or not a party, to give an opinion as an expert witness, over his objection." Smith v. SEPTA, 3 Pa. D. & C. 476, 477 n.2 (Phila. Co. 1977). However, on November 20, 1978, the Supreme Court rescinded Pa.R.C.P. 4011(f). See Neal by Neal v. Lu, 530 A.2d 103 (Pa. Super. 1987). In its stead, the Supreme Court adopted Pa.R.C.P. 4003.1.

This Court addresses each section of Pa.R.C.P. 4003.1 as applied to Dr. Thomas' deposition. The privilege exception of Pa.R.C.P 4003.1(a) was not raised nor is at issue.[10] Plaintiffs' Counsel's questioning, particularly regarding the timing of delivery and standards of care were relevant to the subject matter and any claims or defense of the plaintiff or any of the other party defendants of this medical malpractice lawsuit. While said discovery responses may not be admissible at trial for evidentiary reasons, there is no preclusion at this juncture for a party to seek responses that may lead to the discovery of admissible evidence pursuant to Rule 4003.1(b).[11]

Pursuant to Pa.R.C.P. 4003.1(c), defense counsel do not have grounds for an objection asserting that because the information sought from a defendant expert involves an opinion or contention that it should therefore be precluded in discovery. To the contrary, Rule 4003.1(c), specifically states: "Except as otherwise provided by these rules, it is not ground for objection that the information sought involves an opinion or contention that relates to a fact or the application of law to fact. (emphasis added). See also Howarth-Gadomski, infra, at *4-5 (1989 Explanatory Comment to Rule 4003.1(c) confirms that opinions are discoverable in Pennsylvania).

While the 1978 amendment and Pa.R.C.P 4003.1 are clear, the application of the amendment and Rule throughout the trial courts of Pennsylvania has not been clear nor consistent.[12] As a result of the inconsistency of application, it is understandable that Defense Counsel herein made objections relying on the nuanced case law previously developed in Allegheny County.[13] Cf. Lattaker v. Magee Women's Hospital of UPMC, 2016 WL 3678620 (Alleg. Co. 2016); McLane v. Valley Medical Facilities, Inc., 2009 WL 6471086 (Alleg. Co. 2009); and Belan v. Ward, 67 Pa. D. & C. 4th 529 (Alleg. Co. 2004).[14] As discussed herein, those nuances are now obsolete as applied to expert opinion in discovery – an objection related to an expert providing an opinion in discovery is no longer viable.

Discovery responses related to the timing of delivery or standards of care may lead to the discovery of admissible evidence related to the plaintiffs' or any other party's conduct as pertaining to a claim or defense. In medicine, as in other professional disciplines, standards of care evolve. At the discovery phase, this Special Motions Court will not parse the nuances of standards of care, the innumerable facts specific to a case, determine whether a physician (or other person within a specialized discipline) can refuse to answer an inquiry within their general knowledge or within the realm of their qualifications, knowledge, skill, experience, training, or education and then determine whether the response would be admissible at trial. Persons within specialized disciplines, including physicians, are inherently adept at answering questions within those realms for purposes of discovery, irrespective as to whether the answers are admissible at trial.[15]

Further, this Court does not find any of the limits of the scope of discovery as set forth in Pa.R.C.P 4011 applicable here.[16] To the contrary, this Court finds that conduct of counsel raising spurious or speaking objections, instructing a deponent not to answer, or ending a deposition in contradiction to the reasoning set forth herein to thereby compel opposing counsel to expend unnecessary legal effort and Court intervention may – in itself – be a violation of Pa.R.C.P. 4011(b). As such, future deposition conduct that would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party, particularly to reschedule a deposition because of said conduct; shall be met with the imposition of sanction(s) in this matter or any similar matters brought before this Court presiding as Special Motions Judge.

As this Court is the assigned Special Motions Judge pursuant to Allegh. L. R. 208.3(a)(5), it concludes that in the Courts of Common Pleas of Allegheny County, a defendant-physician can be asked opinion questions, including standards of care, and properly grounded hypothetical questions in deposition.

During the deposition, Defense Counsel asserted Dr. Thomas is not an expert. (Dr. Thomas dep. at 108:22-23). When questioned by Plaintiffs' Counsel as to whether Dr. Thomas will be supplying expert testimony at trial, Defense Counsel would not make such a representation but stated Dr. Thomas will defend himself at trial as the law allows within the confines of his treatment. (Id. at 108:24-109:4). This deposition interaction requires this Court to examine whether a stipulation by Defense Counsel limiting the scope of the defendant expert's opinion at trial precludes inquiry at deposition. Upon review, this Court finds that such stipulations are not workable.

As a starting point, this Court finds Judge Nealon's opinions in Howarth-Gadomski v. Henzes, M.D., 2019 WL 6354235 (Lacka. Co. 2019) and Karim v. Reedy, M.D., 2016 WL 111324 (Lacka. Co. 2016) instructive and persuasive, including Judge Nealon's analysis of Judge Wettick's Trilogy of Lattaker-McLane-Belan.

The Wettick Trilogy, Lattaker-McLane-Belan, (which first established and then expanded the "stipulation rule") addresses nuances related to the scope of defendant expert opinions dependent upon the nature of whether the deponent would be offering expert testimony at trial and/or would stipulate to limiting their testimony.

> The proffered opportunity for a defendant-physician to avoid answering standard of care questions, based upon a stipulation not to offer any expert testimony on the standard of care at the time of trial, was first mentioned in Belan v. Ward, 67 Pa. D. & C. 4th 529 (Alleg. Co. 2004). In summarizing the plaintiff's discovery argument, now-retired Judge R. Stanton Wettick stated:
>
> > According to plaintiff, the defendant should have a choice: the defendant shall fully respond to deposition inquiries relevant to the standard of care, including information that may enhance counsel's ability to crossexamine the witness, or the defendant shall place on the record that he or she will not be offering any expert testimony as to the standard of care.

Howarth-Gadomski v. Henzes, M.D., 2019 WL 6354235 at *6 (Lacka. Co. 2019) citing to Belan, at 531. (Defendant-physician must answer questions relating to standard of care unless physician states on record they will not be offering any expert testimony on the issue at trial).

After Belan (2004), Judge Wettick refined the stipulation standard in McLane (2009):

> In my discovery rulings, where a professional states prior to or at his deposition that he or she will not be offering any expert testimony, I have drawn the following line: The witness may be questioned about all decisions that he or she made

> at the time he or she was furnishing services. The witness can be asked about what this witness did and did not do and why this witness did not take other actions. However, the witness who will not be offering expert testimony cannot be asked to make an after the fact evaluation of his or her work.

Id. at *2. (Cytotechnologists cannot be compelled to answer deposition opinion questions if not offering expert testimony at trial).

Finally, in Lattaker (2016), Judge Wettick sought to further nuance the stipulation standard when defense counsel declined to allow the defendant-obstetrician to offer opinions about fetal monitoring strips:

> Under both the rulings in McLane and Karim, the treating physician may be asked to look at strips, PAP smear slides, x-rays, and the like if this will assist in remembering what occurred. The only difference is that under McLane, the defendants cannot be asked what they see today, and why the medical treatment they provided did not fall below the standard of care.

Lattaker v. Magee Women's Hospital of UPMC, 2016 WL 3678620 at *5.

This Court finds the Lattaker-McLane-Belan line of cases an untenable standard applicable to deposition opinion testimony in Allegheny County. This Court cannot disregard the practical distinctions in every case, especially in medical negligence lawsuits whereby facts and opinions are invariably intertwined and amorphic during the discovery phase of litigation. "When dealing with medical evidence, the line of demarcation between fact and opinion is often amorphous." Karim, at *13. Special Motions Court in Allegheny County is not the proper venue for the parties to parse the nuances and distinctions of facts from opinions based upon stipulations relating to the discovery of defendant expert opinions. This Court finds no compelling authority to limit discovery in this regard.

Furthermore, the rule creates more problems than it allegedly solves. By example, consideration must be given its applicability and/or enforcement at trial related to adverse inference jury instructions. The standard jury charge instruction regarding adverse inference is found at Pa.S.S.J.I. (Civ) §5.50 (2020) with subcommittee notes.[17]

The general rule in Pennsylvania is that "[i]f a party fails to call a witness or other evidence within his or her control, the fact finder may be permitted to draw an adverse inference." Leonard Packel and Anne Poulin, Pennsylvania Evidence § 427 at 348, note 1 (West's Pennsylvania Practice 2013, 4th Edition, 2019-2020 Supplement, December 2019). This rule applies in civil cases and when applied to witnesses it is known as the "missing witness rule." Id.

A review of the standard jury instruction and supporting authority referenced by Packel and Poulin in Pennsylvania Evidence leads to the conclusion that the area of the law related to the adverse inference/missing witness rule is as clear as mud. In Allegheny County it is time to clear the discovery waters with less pretrial agitation and fewer unnecessary esoteric discovery disputes.

As Judge Nealon opined in Howarth-Gadowksi citing his analysis in Karim, the stipulation alternative articulated by Judge Wettick in McLane would "create disputes regarding any negative or adverse inferences to be drawn from the defendant-physician's failure to offer medical opinion testimony or to discuss the standard of care," which testimony would be "within that party's exclusive control, and would presumably be favorable to or support the cause of that party." Howarth-Gadowski at *7.

A pretrial discovery stipulation precluding a defendant expert litigant from testifying at trial related to opinions or standards of care improperly and prematurely handcuffs defendant expert litigants from exercising their right to testify at trial. The attempt to enforce such stipulations only creates additional disputes. Simply stated, throughout discovery and even during trial, facts and opinions are uncovered that may alter legal strategy or assessment. A defendant expert litigant must retain the option to testify at trial related to opinions and standards of care.

For example, a defendant may change their mind and determine they must testify at trial. This Court finds that any stipulation does not bar such a determination by a party. Discovery and trial are fluid by their nature -- information obtained in discovery or during trial may alter legal strategy or the previous stipulation to not testify. It is also respectfully submitted, that if a defendant was precluded from testifying at trial by any discovery stipulation this would create presumptive grounds for appeal. From the defendant party's perspective, the stipulation is not workable.

The "stipulation rule" also fails to address the plaintiff's independent right to call the defendant healthcare provider / physician in their case-in-chief or read their deposition in their case-in-chief. See Pa.R.C.P. 4020(a)(1), Use of Depositions at Trial. In this instance, the plaintiff has the right to know answers in discovery in advance of trial.

Restricting defendant expert testimony in discovery based upon a stipulation unintentionally welcomes a myriad of discovery-based nuances that will require the Court to address unnecessary minutia whereby the former "stipulation rule" will be swallowed by a plethora of discovery-litigated exceptions. Further, it creates additional problems at trial.

Plainly stated, the "stipulation" objection is an unworkable mechanism. It improperly precludes appropriate inquiry in discovery of relevant and material information, or information that may lead to the discovery of other admissible evidence.

Finally, as addressed by Judge Nealon in Howarth-Gadomski (2019) and Karim (2016) and referenced above:

> No Pennsylvania statute, rule, or appellate authority entitles a malpractice defendant-deponent to refuse to answer questions soliciting medical opinions, including those regarding the standard of care. Rule 4003.1(c), the Explanatory Comments to Rules 4003.1 and 4003.5, and our decisional precedent firmly state that such a party-deponent may not object to deposition inquiries on the basis that they seek opinion testimony, and that a defendant-physician need not author a pre-trial expert report since any plaintiff may discover that party's opinions via an oral deposition.

Howarth-Gadomski at *1.

"The governing law simply does not provide a defendant-healthcare professional with the ability to prevent the discovery of his or her opinions based upon that defendant's agreement not to disclose them at trial." Karim at *13.

Further review of the Wettick Trilogy with the beacon of hindsight has now exposed its foundational flaw. There is no Pennsylvania statute, rule, or appellate authority for the creation of the stipulation rule. In this Court's humble opinion grounded in litigation practicum, the stipulation rule has caused confusion among discovery counsel when applied to varying fact patterns. In practice, despite its noble intellectual intent, the stipulation rule has inadvertently welcomed more problems than it has solved. Simply put, the clinical cure had become worse than the disease. As such, this opinion offers a new remedy in Allegheny County related to discovery depositions of defendant expert litigants.

The Court would be remiss in its duty to provide guidance to practitioners in failing to address the consequences of rejecting the Wettick Trilogy Lattaker-McLane-Belan. For example, the implementation of the Stipulation Rule precluded plaintiffs from asking defendant treating physicians questions relating to whether the treatment provided to the plaintiff met the accepted standard of professional care. This line of discovery questioning is appropriate and permissible now and in the future.

Henceforth, applying this Court's standard to the facts of McLane, it would be appropriate for plaintiff's counsel to have the witness cytotechonologist review slides with a microscope at the deposition and question the deponent on their present review of the slides. Similarly, applying the standard to the facts of Lattaker, it is appropriate and permissible for the defendant treating physician to be required to review fetal monitoring strips and likewise be questioned by plaintiff's counsel about the review.

II. Retrospective Review

Defense Counsel objected on the basis that Dr. Thomas did not participate in the delivery of the baby and therefore the physician's opinion or insights are a retrospective review and not discoverable. This Court disagrees. By their very nature, opinions sought in medical negligence lawsuits are retrospective reviews of facts which, by necessity, include expert analysis of those facts in conjunction with standards of care and other factors related to the care of the patient. In this matter, the retrospective review involves an obstetrics delivery in 2016 and the facts and medical opinions related to legal claims and defenses surrounding that delivery. Specifically, an issue within this case relates to allegations about Dr. Thomas' recommendations for the timing of delivery.

This Court finds no prohibition to preclude deposition questioning because the defendant expert did not actually participate in every element of the patient's care.[18] Broader questioning is permitted as the scope of discovery is broad and expressly includes the discovery of expert opinions. See discussion of Pa.R.C.P. 4003.1 and 4011, Discovery of Defendant Expert Opinions, infra.

> The ability to discover the potential expert testimony of a party witness, either by propounding written interrogatories or by taking oral or written depositions, is fettered only by the general limitations that apply to all discovery. Since the rescission of Rule 4011(f) in 1978, the party witness against whom discovery is sought can no longer object on the ground that the requested disclosure would require him or her "to give an opinion as an expert witness."

Neal v. Lu, M.D., 530 A.2d 103 at 107 (Pa. Super. 1987).

Judge Nealon's analysis in Karim v. Reedy, M.D., 2016 WL 111324 at *11 (Lacka. Co. 2016) thoroughly addresses the nature of retrospective reviews in medical negligence cases, confirming "[i]t is quite common for defendant-physicians in malpractice trials to offer retrospective assessments of the propriety of their care. (Karim citing, e.g., Hyrcza v. West Penn Allegheny Health System, Inc., 978 A.2d 961, 978 (Pa. Super. 2009). In effect, every evaluation of care in a medical negligence case is a retrospective review:

> Indeed, expert witnesses who review medical records, deposition transcripts and other pertinent information in order to address the standard of care and causation issues in medical professional liability actions always conduct after-the-fact evaluations and provide retrospective assessments of the quality of the care and the impact, if any, that it had upon the patient's outcome.

Karim at *11.

This Court adopts the rationale of Karim, and similarly applies the same reasoning to defendant medical care personnel. Defendant expert parties may similarly be questioned at deposition like any other expert witness and may also provide retrospective assessments in discovery.[19] In accord with Judge Nealon, this Court finds that current expert opinions may be discoverable regardless of admissibility at trial. This standard is soundly supported by Petrancosta v. Malik, 2014 WL 4100723 (M.D. Pa. 2014) and Cravath v. Mercy Hospital, 2013 WL 6991989 (Lacka. Co. 2013) cited in Karim.

In Pentrancosta, the Federal District Court evaluated a dispute concerning the permissible scope of discovery and expert testimony pursuant to Fed.R.Civ.P. 26 in a medical negligence action. At deposition, defense counsel objected to a treating physician answering questions about X-rays and CAT scans related to plaintiff's condition. Defense counsel asserted that the physician's current opinion, retrospective interpretation, or present day review was not reasonably calculated to lead to the discovery of admissible evidence because the physician would not be offered as an expert at trial. Petrancosta, at *5. In reaching its conclusion, the court distinguished Jistarri v. Nappi, 549 A.2d 210 (Pa. Super. 1998)(defendant may not be required to give expert testimony on the negligence of other defendants at trial) from the issue of whether the defendant doctor may provide his opinion at deposition in discovery. The court concluded, "there is no basis for Defendant's contention that inadmissibility at trial means that Dr. Malik's current opinion is not reasonably calculated to lead to the discovery of other admissible evidence." Id. at *6. Accordingly, plaintiff was permitted to re-depose the physician with defendant ordered to pay the cost of the second appearance fee for the videographer and court reporter. Id. at *9. The court found "the better practice is to allow the deposition to proceed and deal with objections before trial." Id. at *8.

In Cravath, the Lackawanna County Court of Common Pleas ordered a defendant physician to submit to a re-deposition and respond to opinion-related inquiries. Defense counsel had objected on 59 separate occasions and directed the defendant doctor not to answer plaintiff counsel's questions. Upon review of the deposition transcript and record, and applying the standards of Pa.R.C.P. 4003.1 and 4011, Judge Mazzoni opined, "[t]he discovery deposition of a defendant physician is not limited to his treatment, as Defense Counsel suggests. It is clear that a defendant physician can be asked opinion question and properly-ground hypothetical questions as well." Cravath, at *5 citing Neal v. Lu, M.D., 530 A.2d 103 (Pa. Super. 1987). The court concluded, "[a] plaintiff has a right to depose a defendant physician as to facts he knows and opinions he holds." Cravath at *5.[20]

This Court finds the reasoning of Karim to be well-grounded and concludes that Dr. Thomas may be questioned on his opinion related to the timing of delivery. In conjunction with Pennsylvania Rules of Civil Procedure 4003.1 and 4011, and the underlying persuasive precedent of Pentrancosta and Cravath, this Court holds that defendant expert opinions are discoverable regardless of whether said opinions will be ultimately admissible at trial.

As such, a deponent physician may be examined, in discovery, of his professional opinion or the standard of care related to the timing of delivery for a patient that was in his medical practice's care. The Special Motions Discovery Court does not prejudge nor address the admissibility of any such opinion obtained in discovery – that is a matter addressed by the trial court.[21]

III. Records Custodian Objection / Instruction Not to Answer

During deposition, Defense Counsel objected that Dr. Thomas was not a records custodian and instructed the deponent not to answer a question in a line of questions about worksheets from the medical record. (Dr. Thomas dep. 94:7-97-21). This Court finds no basis for Defense Counsel to instruct the witness not to answer. The question did not relate to a privilege or preclusion from a prior order of court. Albeit Dr. Thomas may not be a "records custodian," but Defense Counsel's characterization is not a substantive basis for an objection to question the witness's knowledge about the patient's medical record. As the transcript indicates, Dr. Thomas eventually did answer the question. (Id. at 97:10-21)("there is nothing in the worksheets that is not part of the ultrasound images or the formal report.").

Even if Plaintiffs Counsel's questioning related to qualifying Dr. Thomas as a "records custodian," which it did not, this is still not an appropriate objection to direct a witness not to answer. Merely questioning a witness about the medical records with regard to how they are prepared generated or maintained is not improper especially when the witness has knowledge as to these specific items. As is indicated by Dr. Thomas' answer, he understood the Plaintiffs Counsel's questions and was able to answer.

This Court acknowledges there are valid and strategic reasons for counsel to place objections on the record. This Court further acknowledges the prior caselaw on discovery in Allegheny County promoted and encouraged such objections.[22] However, absent privilege or prior court order, an instruction to a deponent not to answer a question without a good faith basis[23] will subject the obstructionist to risk of sanction.[24] To obstruct the answer to a question defeats the purpose of a discovery deposition and disregards the inherent protections afforded by Rule 4016(b) which preserves valid objections for consideration at trial.

Hall v. Clifton Precision, 150 F.R.D. 525, 530 (E.D. Pa. 1993) provides guidance on the issue of speaking objections and interjections requiring that an objection be concise and non-suggestive.[25] As summarized in Association of Trial Lawyers of America, July, 2004, ATLA Annual Convention Reference Materials, Volume 2, Advocacy Track: Discovery: Overcoming Obstacles in Getting to the Truth, § III. Speaking Objections:

> The [Hall] court reasoned that allowing speaking objections and interjections could become a tool for defending attorneys to effectively circumvent the no-consultation rule and interrupt the flow of a deposition. Hall, 150 F.R.D. at 530. The court further prohibited an attorney from instructing a witness not to answer a question unless the objection is on the ground that the witness's potential answer is "protected by a privilege or a limitation on evidence directed by the court." Id. at 531.

See Ethical Issues in Depositions, 2 Ann.2004 ATLA-CLE 1461 (2004).

While counsel may object at deposition to identify an issue as a transcript place-marker, the objection is not to be an instructional speaking objection nor an instruction not to answer. As set forth earlier in this Opinion, this Court has detailed the objections by Defense Counsel. It is clear all the objections were speaking objections. It is not necessary for objecting counsel to make such lengthy and detailed objections.

Pa.R.C.P. 4016(b), Taking of Depositions. Objections, provides instructive guidance:

> Objections to the competency of a witness or to the competency, relevancy, or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which was known to the objecting party and which might have been obviated or removed if made at that time.

A close and thorough reading of Pa.R.C.P. 4016 confirms the fundamental distinction between Pa.R.C.P. 4016(b) and 4016(c) as applied to deposition objections.[26] When both subsections (b) and (c) are read in conjunction, it is evident under Rule 4016(b) that objections to the "competency, relevancy, or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition" unless the ground for the objection might have been "obviated or removed."

As a practical matter, discovery is a dynamic process searching for information that may lead to admissible evidence. Oft-times the grounds for an objection cannot be determined at the time of deposition because, by its very nature, discovery is an ongoing process. In discovery, information is being developed. Therefore, a party cannot be charged in those circumstances to register an objection and/or have the responding party obviate or remove the objection contemporaneous with the deposition.

This Court sitting as Special Motions Discovery Judge has no special powers of foreseeability as to eventual substantive issues that will be presented at trial and has no mystical faculty to count evidentiary angels dancing on the head of a mid-discovery pin. Moreover, pursuant to Pa.R.C.P. 4003.1 and 4020(a) and (c) "any information gathered during discovery is still subject to the rules of evidence regarding its admissibility." Bennett v. Graham, 714 A.2d 393, 396 (Pa. 1998). As such, admissibility of evidence at trial remains subject to the authority of the trial court. As stated in Rule 4003.1(b), and additionally referenced at 5 West's Pa. Prac., Discovery §10:4, "it is not grounds for objection that the information sought (for example, hearsay) will be inadmissible at trial if the information appears reasonably calculated to lead to discovery of admissible evidence." Plainly assessed, Rule 4016(b) applies to the substance of the elicited testimony.

In contrast, Rule 4016(c) commands that errors or irregularities "in the form of oral questions or answers . . . . are waived unless seasonable objection is made at the taking of the deposition." Objections to the form include compound, questions that are ambiguous, unintelligible, misstatements of evidence or testimony, argumentative, assuming facts not in evidence, calling for speculation and deponent answers that are non-responsive. See 5 West's Pa. Prac., Discovery §10:9. The underlying rationale for objections as to form being waived if not raised at deposition is that counsel is provided opportunity to obviate or remove the error or irregularity contemporaneous with the transcribed record of testimony. In other words, once etched in stone the testimony as recorded will not change unless counsel objects to preserve the issue and provides the responding party synchronous opportunity to cure.[27]

As affirmed in this Opinion, the objection shall be stated succinctly identifying the proper grounds for the objection without argument. See also, Id. at §10:13.

To further clarify the parameters of deposition objections in Allegheny County, this Court adopts the guidance of Lackawanna County Local Rule of Civil Procedure 4007.1(a), that counsel making any objection during an oral deposition shall state the word "objection," and briefly state the legal basis for the objection without argument.

IV. Repetitive Deposition Questions

As identified above, the deposition transcript is replete with objections. Upon detailed review of Defendant's Response, Exhibit B (ECF 52 at Exh. B containing four-page list with 61 line items) and Dr. Thomas's entire deposition transcript, this Court

disagrees with Defense Counsel that the questioning was repetitive. Although the deposition was lengthy, considerable time and effort was expended on counsels' competitive rejoinders regarding the discoverable nature of the questions asked and appropriateness of follow-through questions.

Accordingly, follow-through questions are permissible. Plaintiffs' Counsel may ask reasonable follow-up questions that arise from Dr. Thomas' previous answer to a question. See also, Cravath v. Mercy Hospital, 2013 WL 6991989 (Lacka. Co. 2013)(court grants re-deposition of physician after deponent was instructed on 59 occasions not to answer plaintiff counsel's inquiries):

> The scope of this deposition will be limited to the questions deemed permissible and any relevant follow-up questions which reasonably flow from the answers received from the initial response. We caution Counsel, however, not to expand the scope of the inquiries and further caution Counsel not to direct the deponent to refuse to testify on matters that have been deemed "permissible," qualified or otherwise.

Id. at *5. (emphasis omitted).

As adopted herein, counsel making any objection during an oral deposition shall state the word "objection," and briefly state the legal basis for the objection without argument, nor instruct the witness not to answer. Plainly put, "Objection. Asked and answered," will comply with this Court's standard henceforth.[28]

In addition, this Court does note that Defense Counsel properly objected to a repetitive line of questioning related to the baby being oxygenated and neurologically intact on September 23, as asked and answered. (Dr. Thomas dep. at 118:2-119:13). Plaintiffs' Counsel is precluded from further inquiry on this issue.

As adopted herein, the fact that a question is repetitive or irrelevant is not an appropriate ground for instructing a witness not to answer a question, since it does not involve a matter of privilege or limitation from a prior court order. The proper procedure to follow when an objection is raised to a question propounded in a deposition is for the attorney who raises the objection to note his objection but to allow the question to be answered.

Counsel herein and litigants before the Court of Common Pleas of Allegheny County are well-advised to heed the admonishment quoted above from Cravath relating to the parameters of permissible and relevant follow-up questions in depositions.

Conclusion

As stated earlier, this Court is aware of the standards applicable to depositions established by Judge Gawthrop in Hall v. Clifton Precision, a Div. of Litton Systems, Inc., 150 F.R.D. 525, 531, 62 USLW 2103, 27 Fed.R.Serv.3d 10 (E.D. Pa. 1993).

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.

Hall at 528.

This Court is cognizant of the April 22, 1994 Opinion by Judge Wettick in Acri v. Golden Triangle Mgmt. Acceptance Co., GD93-12188, 1994 Pa. Dist. & Cnty. Dec. LEXIS 150, 1994 WL 1691957, printed in 142 Pittsburgh Legal J. 225 (Alleg. Co. 1994) where the court acknowledged that "[w]e need not turn the lawyer for the deponent into a fly on the wall in order to protect litigants' rights to obtain information from a witness. . ." Acri at *17.

In essence Judge Wettick in Acri rejected all the mandates of Hall. This Court adopts the following analysis of the Hall opinion:

1. Any objection shall be stated concisely in a non-argumentative and non-suggestive manner; and

2. Counsel shall not direct or request that a witness not answer a question unless counsel has objected on the ground that the answer is protected by a privilege or a limitation on evidence directed by the Court.

This Court finds the above two proposals from Hall persuasive and practical as applied to deposition discovery in Allegheny County. "In short, depositions are to be limited to what they were and are intended to be: question-and-answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit." Id. at 531.

Henceforth, this Court parts company with Judge Wettick's rationale in Acri wherein he concluded, "I choose not to follow the Hall v. Clifton Precision guidelines[.]" In short, choosing not to follow the practical application of Hall to discovery depositions in Allegheny County has permitted the discovery court tail to wag the trial court dog. This shall no longer be the case. For the reasons set forth, this Court now adopts the deposition guidelines stated herein.[29]

The unilateral termination of a deposition must be supported by a good faith factual or legal basis that, by necessity, could not be addressed by preserving an objection on the record or by submitting a prior motion for protective order. The absence of a good faith factual or legal basis to unilaterally end a deposition shall result in sanction.

This standard does not preclude nor limit counsel from raising or preserving an objection as to admissibility at the time of trial pursuant to the Pennsylvania Rules of Evidence, including the filing of a Motion in Limine. The preservation of the objection should not disrupt the fair examination of the deponent while, at the same time, provide protection on the issue of admissibility for trial.

Finally, this Court does not now, and in the future will not, condone any type of conduct which reduces or denigrates the level of legal professionalism to unnecessary argumentative barbs or other less than professional behavior. Suffice it to say once:

> Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly[.]

Hall v. Clifton Precision, a Div. of Litton Systems, Inc., 150 F.R.D. 525, 531, 62 USLW 2103, 27 Fed.R.Serv.3d 10 (E.D. Pa. 1993). A word to the wise shall be sufficient for all counsel bringing discovery deposition matters before this Court.

An Order of Court shall follow, this 30th day of March, 2021.

BY THE COURT:
/s/Ignelzi, J.

[1] "ECF" means electronic court filing identified on the Department of Court Records docket.

[2] This Court currently presides as the assigned Special Motions Judge for pretrial discovery matters before the Court of Common Pleas of Allegheny County ("CCPAC"). See Allegh. L. R. 208.3(a)(5). CCPAC employs a master calendar list with designated procedures for the disposition of motions, including a Calendar Control Judge (Rule 208.3(a)(3); Motions Judge (Rule 208.3(a)(4); and Special Motions Judge (Rule 208.3(a)(5). This Court also presides over General Docket trials and is also assigned to the Commerce and Complex Litigation Center pursuant to Allegh. L. R. 249.
See also https://www.alleghenycourts.us/civil/commerce_complex_litigation.aspx

Pursuant to Allegh. L. R. 208(a)(5)(c):

> All uncontested matters may be presented to the Special Motions Judge on Fridays at 10:00 A.M., 12:00 Noon, and 2:00 P.M. For contested motions, the moving party may obtain a Friday argument date and time, in person or by telephone, from the Assignment Room (700 City–County Building, 412–350–5463) between 1:30 P.M. and 4:30 P.M.; or the moving party may place the matter on a 2:00 P.M. Add–On List any time after 8:30 A.M. on the Friday on which it will be argued. The Add–On List is located in the Courtroom of the Special Motions Judge.

[3] The designated times to present motions are euphemistically known among local counsel as "Happy Hour." Regrettably, while "Happy Hour" may be perceived as an efficient pre-COVID-19 manner to address discovery issues, provide counsel court-time and social opportunity, it spawned a veritable cottage guild of litigants seeking the Special Motions Judge's intervention oft-times to mediate issues related to counsel's behavior, counsel's (in)ability to properly ascertain the governing Rules of Discovery Procedure, to compel counsel to professionally confer and consult with opposing counsel to resolve issues, or to compel counsel to make reasonable efforts to expedite litigation consistent with the interests of the client. Experience suggests counsel, at times, used ready-access to "Happy Hour" as opportunity for informal continuing legal education, such as requiring the court to sift through voluminous and/or excessive poorly-drafted interrogatories, answers, requests for admission/production, and/or responses.

Any continuing acceptance of informal "Happy Hour" norms undermines judicial economy by compelling a party to seek court intervention to, in effect, have the Court examine and edit a party's lax work product. "Happy Hour" motion practice is not a substitute for meeting and conferring beforehand to resolve issues.

As a result, the Court has proposed an amendment to Allegheny Local Rule 208.3(a)(4)(b) to promote that counsel confer and consult before presenting a Motion. The proposed amendment at Rule 208.3(a)(4)(b)(ii) reads as follows:

> (b) Presentation:
>
> (ii) Absent compelling circumstances, the Court requires the parties to conduct a meaningful "meet and confer" prior to presentation of any contested motion. The Court will inquire into the specifics of the meet and confer during the hearing.

[4] As of February 8, 2021, the Court has posted this requirement in the Remote Discovery Court Procedures – Civil Discovery Motions, Fifth Judicial District of Pennsylvania, Allegheny County. See https://www.alleghenycourts.us/Civil/DiscoveryMotions.aspx. While this Court is not requiring a certification, it is this Court's intent to capture and apply the spirit of Federal Rule of Civil Procedure addressing parties' failure to make disclosures or to cooperate in discovery and apply sanctions. As Fed.R.Civ.P. 37(a)(1) in pertinent part states: "The [discovery] motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." This Court is henceforth adopting the well-reasoned standard underlying the duty of counsel in good faith to confer and consult. At hearing, counsel will be accountable for the specifics of their meaningful efforts to meet and confer.

As per this Opinion, the previous herein described "Happy Hour" norms are no longer acceptable and offending counsel will be sanctioned for egregious conduct. Henceforth, counsel at bar in Allegheny County is well-informed to exercise professional discretion in applying the proper discovery rules to the appropriate discovery vehicle (interrogatories, production requests, admissions, and depositions) when submitting notices, requests or responses to opposing counsel before a party is compelled to seek court intervention. For example, voluminous and repetitive written interrogatories are not an expedient substitute for simply noticing a deposition and asking the questions directly of the deponent without the need to appear at Happy Hour to reconcile the dispute related to counsel's choice or manner of discovery. To be clear, this guidance is not intended to chill the zealous advocacy of any party or to seek resolution of legitimate discovery disputes. It is intended to establish a new norm for motions practice in the Court of Common Pleas of Allegheny County before the Special Motions Judge.

To assist in this transition, this Court acknowledges the wit of Mark Twain who stated that humor is mankind's greatest blessing. Heeding Samuel Clemens' adage – and to create a new local euphemism to encapsulate this transformation – this Court announced on its first day assigned as Special Motions Judge, that its stated goal is to convert "Happy Hour" into "Happy Minute." As the injection of appropriate humor is necessary so that advocates and jurists not take themselves too seriously, it is the expectation that by adopting this simple new "Happy Minute" moniker, this quip will be a blessing for lawyers and judges to acknowledge their respective roles to effect judicial economy and resolve discovery issues by meeting and conferring before presentation of a motion.

[5] Plaintiffs subsequently filed a First Amended Complaint (ECF 23), Second Amended Complaint (ECF 31), and a Third Amended Complaint (ECF 38).

[6] Defendant's Response in Opposition to Plaintiff's Motion to Overrule Objection and Reconvene Deposition (ECF 52) contains at Exhibit A: Dr. Thomas' August 5, 2020 Deposition Transcript and Exhibit B: Defendant's List of instances of Plaintiff's repetitive questioning at Dr. Thomas' Deposition.

[7] For the specific purpose of addressing the Motion and Response before this Court, the Court takes judicial notice of public information at Ronald L Thomas, MD | Find A Doctor | Allegheny Health Network (ahn.org). At said website, Dr. Thomas' areas of

expertise are listed as: Genetics, Gestational Diabetes, High Risk Obstetrics, Maternal-Fetal Medicine, Miscarriage, OB/GYN Ultrasounds, and Recurrent Pregnancy Loss.

[8] This Court notes that Judge Nealon's Opinions in Howarth-Gadomski, infra and Karim, infra address at length Judge Wettick's Opinions in Lattaker v. McGee Women's Hosp. of UPMC, 2016 WL 3678620 (Alleg. Co. 2016); McLane v. Valley Medical Facilities, Inc., 2009 WL 6471086 (Alleg. Co. 2009); and Belan v. Ward, 67 Pa. D. & C. 4th 529 (Alleg. Co. 2004). This Court incorporates by reference and adopts the reasoning and conclusions of Judge Nealon in Howarth-Gadomski and Karim as applied to the above-referenced J. Wettick Opinions as will be discussed herein.

[9] Deposition transcript citations are in the following format: page number : line number.

[10] Pa.R.C.P. 4003.1(a) states:

> Subject to the provisions of Rules 4003.2 to 4003.5 inclusive and Rule 4011, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. (emphasis added).

[11] Pa.R.C.P. 4003.1(b) states: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." On a practical note, discovery is akin to "peeling an onion." Delving further into discovery, layers are removed and one learns facts the party did not know at an earlier stage of discovery. Thus, later discovered items may render an item which did not appear reasonably calculated to lead to the discovery of admissible evidence to be the exact opposite.

[12] See Judge Nealon's thorough analysis of the varying trial court applications of the Rule related to discovery of defendant expert opinions. Howarth-Gadomski, infra at *6-8. It is worth noting one Court of Common Pleas permitted plaintiffs' counsel to ask opinion questions of a treating physician who was not a party defendant in the case. Accord Bosciano v. Centre Medical & Surgical Associates, 82 Pa. C. & C. 4th 201, 2006 WL 472241 (Centre Co. 2006) (stating "the Jistarri principle allies to admissibility, not discoverability").

[13] See Matthew P. Keris, It Ain't Over 'Til It's Over: Judge Wettick Affirms Practice of Limiting Deposition Opinions of Defendant Physicians, Defense Digest, Vol 22, No. 4 (December 2016):

> As it currently stands, the issue of doctors' opinions at depositions can be argued both ways, at least until an appellate court offers further guidance. Until then, if defense counsel does not want a client to be compelled to provide standard of care testimony at deposition, he or she can continue the practice of having them state on the deposition record that they will not serve as an expert at the time of trial and instruct their client not to provide answers to those questions if asked. This protective practice ain't over until an appellate court says it's over.

[14] To simplify reference these three opinions shall be identified hereinafter as Lattaker-McLane-Belan, the "Wettick Trilogy."

[15] Protestations including counsel's unnecessary instructions for a witness not to answer (absent privilege or other reason by court order as set forth herein) are counterproductive to the discovery process. Moreover, the unjustified refusal to answer and subsequent compelled intervention of the Special Motions Court is a strain on judicial economy. In effect, counsel's overzealous conduct would have the Special Motions Court engage in prognostic folly to determine admissible evidence before the conclusion of discovery. Moreover, the additional expenditure of counsel's time and court resources to provide an unnecessary prognostic ruling far outweighs the witness simply answering the question at deposition and preserving the objection for the time of trial, after all discovery has concluded. To conclude otherwise would flip judicial economy on its head and place the Court in an obligatory position to babysit legal professionals over myriad nuanced discovery disputes. Special Motions Court or "Happy Hour" is not the judicial mechanism for presupposing the materiality of one's claim or defense and/or is not the forum for a party seeking premature admissibility determinations. See n.2, infra. The Rules of Evidence provide recourse for the parties at the time of trial.

[16] Pa.R.C.P. No. 4011, Limitation of Scope of Discovery:

No discovery, including discovery of electronically stored information, shall be permitted which
(a) is sought in bad faith;
(b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party;
(c) is beyond the scope of discovery as set forth in Rules 4003.1 through 4003.6;
(d) is prohibited by any law barring disclosure of mediation communications and mediation documents; or
(e) would require the making of an unreasonable investigation by the deponent or any party or witness.

[17] 5.50 (Civ)
FAILURE OF A PARTY TO TESTIFY—ADVERSE INFERENCE

The [plaintiff] [defendant] did not testify during the trial. You may find that [his] [her] testimony would have been unfavorable to [his] [her] case, unless [his] [her] failure to testify is satisfactorily explained.

[18] The physician's opinion related to areas within his expertise that are founded on claims or defenses in the subject lawsuit are open for discovery. In the matter before this Court, the deponent physician is qualified in the areas of Genetics, Gestational Diabetes, High Risk Obstetrics, Maternal-Fetal Medicine, Miscarriage, OB/GYN Ultrasounds, and Recurrent Pregnancy Loss. See n.7, infra.

In modern obstetrics medical practice, the sole practitioner is rare as many doctors in an obstetrics practice are involved with the pregnant patient from initial date of diagnosis through delivery. It is not unusual that differing physicians from the same practice may interact with the patient on different dates. It is possible that the physician that delivers the child may have never met the mother patient before delivery, particularly in emergent circumstances. See also Danforth's Obstetrics and Gynecology, Tenth Edition, Chapter 1., Prenatal Care, LWW-OBGYN 10TH CH 01 Vern L. Katz, June 2010 (discussion of various factors related to pregnancy and interaction of patient and care providers throughout gestation).

The patient does not solely make the decision for the timing of delivery. It is the medical practice in consultation with other members of the clinical team guided by principles, in conjunction with the unique circumstances attendant to the patient, which determine the timing of delivery. Thus, members of the clinical team – in the area of their expertise – and within the realm of the particular physician's qualifications, knowledge, skill, experience, training, or education may express a professional opinion on the timing of delivery – regardless of whether or not the specific physician actually delivers the baby.

> There are several important principles to consider in the timing of delivery. First, the decisions regarding delivery timing are complex and must take into account relative maternal and newborn risks, practice environment, and patient preferences. Second, late-preterm or early-term deliveries may be warranted for maternal benefit or newborn benefit, or both. In some cases, health care providers will need to weigh competing risks and benefits for the woman and her fetus. For these reasons, and because the recommendations for timing of delivery are based on limited data, decisions regarding timing of delivery always should be individualized to the needs of the patient. Additionally, recommendations for timing of delivery before 39 weeks of gestation are dependent on an accurate determination of gestational age.

"Medically indicated late-preterm and early-term deliveries," ACOG Committee Opinion No. 818, American College of Obstetricians and Gynecologists, Obstet. Gynecol. 2021; 137:e29–33 (February 2021).

[19] This applied standard in no manner prejudges whether the defendant expert's responses will be favorable or unfavorable to any party. Moreover, it does not preclude any party from filing Motion(s) in Limine or objections at the time of trial related to admissibility or other legal issues. However, defense counsel may not use such an objection as a basis for the witness not to answer at deposition.

[20] In ruling upon a standard of care question, the Cravath court at *3-4 citing Buckman v. Verazin, 54 A.3d 956 (Pa. Super. 2012) stated:

> 2. Inquiry: "If a patient was experiencing chest pain after an angioplasty procedure, do you understand that the standard of care requires you to determine whether a patient's chest pain is relived by physical exertion, meaning walking or sitting up before discharge?" (N.T. 70-83).
>
> Ruling: Not Permissible—this inquiry interjects a standard of care that the doctor is asked to accept. As stated in Buckman, what the doctor believed to be the standard of care is of "no moment."

This Court takes exception with the Cravath court's statement of the holding in Buckman and the Cravath court's conclusion as applied to the standard of care inquiry above. This Court holds that a physician is well-adept in their education, training, skills, and experience to answer such a question; albeit to agree, disagree, accept, reject, modify, amend, explain, or otherwise condition their response.

[21] By way of example, while Dr. Thomas was not asked to interpret fetal monitoring strips applicable to the time of delivery, it would be permissible upon re-deposition to question him about the strips. This discovery standard is consistent with the holding of Karim.

[22] This Court is professionally familiar with Defense Counsel in this case. As a trial lawyer, this jurist had litigated cases against Defense Counsel and as a jurist has had the honor and privilege of presiding over a case tried by Defense Counsel before this Court. Simply stated, Defense Counsel is a superb, highly qualified, and ethical lawyer. Defense Counsel was only advocating that which was heretofore permissible in Allegheny County during depositions.

[23] This Court acknowledges that there may be regrettable circumstances where deposition questions might be sought in bad faith or other circumstances that would be oppressive to the deponent. However, based on this Court's experience as a civil trial lawyer for twenty-two years and three years as a Judge in the Civil Division, this is the exception and not the norm of practitioners in Allegheny County. This Court is loath to create rules to remedy exceptions. Such circumstances do not preclude objecting counsel's good faith prerogative to seek court intervention for the protection of the deponent pursuant to Pa.R.C.P. 4012(a).

[24] "A common tactic in depositions is to impede the questioning lawyer's progress with objections or instructions not to answer." A. Darby Dickerson, The Law of Ethics and Civil Depositions, 57 MD. L. REV. 273, 345 (1998) citing to Hall, 150 F.R.D. at 531 (addressing improper "strategic interruptions, suggestions, statements, and arguments of counsel").

[25] As set forth hereinafter, this Court provides a detailed analysis on its adoption of some of the standards discussed by Judge Gawthrop in Hall.

[26] Pa.R.C.P. No. 4016

Rule 4016. Taking of Depositions. Objections

. . . .

(b) Objections to the competency of a witness or to the competency, relevancy, or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which was known to the objecting party and which might have been obviated or removed if made at that time.

(c) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of oral questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might have been obviated, removed, or cured if objections had been promptly made, are waived unless seasonable objection is made at the taking of the deposition.

. . . .

[27] While the Court is absolutely confident of the Court's interpretation of Pa.R.C.P. 4016, counsel can avoid any confusion or misinterpretation by both counsel stipulating at the commencement of the deposition to preserve all objections until trial, except to those objections as to form. See Talmadge v. Ervin, 236 A.3d 1154, 1160 (Pa. Super. 2020) citing Starner v. Wirth, 269 A.2d 674, 677 (Pa. 1970) (case involved trial recorded deposition testimony of an expert witness which was recorded for use at trial). To be clear, the matter sub judice is related to a discovery deposition of a party defendant.

[28] See Lacka. Co. R.C.P. 4007.1(a), "Counsel making an objection during an oral deposition shall state the word 'objection,' and briefly state the legal basis for the objection without argument," adopted herein.

[29] The "Hall Standards" have been recognized by courts throughout the country. See Armstrong v. Hussmann Corp., 163 F.R.D. 299, 301–05, 66 Empl. Prac. Dec. (CCH) P 43707 (E.D. Mo. 1995); In re ML-Lee Acquisition Fund II, L.P. and ML-Lee Acquisition Fund (Retirement Accounts) II, L.P. Securities Litigation, 848 F. Supp. 527, 567, Fed. Sec. L. Rep. (CCH) P 98,198 (D. Del. 1994); Bucher v. Richardson Hosp. Authority, 160 F.R.D. 88, 94 (N.D. Tex. 1994); Holland v. Fisher, 3 Mass. L. Rptr. 167, 1994 WL 878780 (Mass. Super. Ct. 1994); Van Pilsum v. Iowa State University of Science and Technology, 152 F.R.D. 179, 180–81, 28 Fed. R. Serv. 3d 574 (S.D. Iowa 1993); Johnson v. Wayne Manor Apartments, 152 F.R.D. 56, 58–59, 28 Fed. R. Serv. 3d 508 (E.D. Pa. 1993); Deutschman v. Beneficial Corp., 132 F.R.D. 359, Fed. Sec. L. Rep. (CCH) P 95895 (D. Del. 1990); In re Amezaga, 195 B.R. 221, 35 Fed. R. Serv. 3d 163 (Bankr. D. P.R. 1996); Damaj v. Farmers Ins. Co., 164 F.R.D. 559 (N.D. Okla. 1995); Bucher v. Richardson Hosp. Authority, 160 F.R.D. 88 (N.D. Tex. 1994); Odone v. Croda Intern. PLC., 170 F.R.D. 66, 37 Fed. R. Serv. 3d 157 (D.D.C. 1997);Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 55, Fed. Sec. L. Rep. (CCH) P 98063 (Del. 1994); Dominick v. Troscoso, 1996 WL 408769 (Mass. Super. Ct. 1996): Burrows v. Redbud Community Hosp. Dist., 187 F.R.D. 606 (N.D. Cal. 1998); Quantachrome Corp. v. Micromeritics Instrument Corp., 189 F.R.D. 697, 46 Fed. R. Serv. 3d 253 (S.D. Fla. 1999); Collins v. International Dairy Queen, Inc., 1998 WL 293314 (M.D. Ga. 1998): Chapsky v. Baxter V. Mueller Div., Baxter Healthcare Corp., 1994 WL 327348 (N.D. Ill. 1994); Sinclair v. Kmart Corp., 1996 WL 748038 (D. Kan. 1996); Boyd v. University of Maryland Medical System, 173 F.R.D. 143, 38 Fed. R. Serv. 3d 1030 (D. Md. 1997); Metayer v. PFL Life Ins. Co., 1999 WL 33117063 (D. Me. 1999). Phinney v. Paulshock, 181 F.R.D. 185, 42 Fed. R. Serv. 3d 244 (D.N.H. 1998), aff'd, 199 F.3d 1, 45 Fed. R. Serv. 3d 1328 (1st Cir. 1999); Mruz v. Caring, Inc., 107 F. Supp. 2d 596 (D.N.J. 2000), order rev'd on other grounds, 166 F. Supp. 2d 61 (D.N.J. 2001); U.S., for Use and Benefit of Boucher, v. Murphy, 11 F. Supp. 572 (W.D. Mich. 1935); and Teletel, Inc. v. Tel-Tel US Corp., 2000 WL 1335872 (S.D. N.Y. 2000); Plaisted v. Geisinger Medical Center, 210 F.R.D. 527, 54, 54 Fed. R. Serv. 3d 191 (M.D. Pa. 2002) ("We believe that Hall has established clear, workable guidelines."). 2 Leighton, Litigating Premises Security Cases, Chapter 8 Discovery, § 8:14 Motion and memorandum for deposition protocol (December 2020).

I.L., a minor, by Ashley Lau and Justin Keating, Guardians, and Ashley Lau and Justin Keating, Individually v. Allegheny Health Network; et al.

ORDER OF COURT

AND NOW, to wit, this 30th day of March, 2021, it is hereby ORDERED:

1. Within sixty (60) days of the date of this Order, Defendant Dr. Ronald Thomas shall present for a re-deposition in this matter. Counsel shall comply with the mandates developed in this Court's Opinion and the terms herein;

2. Plaintiffs' Counsel is permitted to question Dr. Thomas in all areas which were interrupted by objections and/or areas Plaintiffs' Counsel was not permitted to develop because of instructions to the deponent not to answer question(s);

3. Re-deposition of Dr. Thomas shall include any other areas of questioning which were precluded by Defense Counsel's termination of the initial deposition;

4. Plaintiffs' Counsel shall not question areas which were covered in the initial deposition; and

5. Failure of any party to comply with the terms of this Opinion and Order of Court shall subject the offending party to risk of sanction.

BY THE COURT:
/s/Ignelzi, J.

Pennsylvania Bar Association Legal Ethics Hotline

Informal Opinion Number 98-134

Ethics Inquiry No. 98-134

March 18, 1999

Dear Inquirer,

You contacted the Pennsylvania Bar Association Legal Ethics Hotline with the following query: whether you violated any ethical rules by attempting to speak with witnesses for the Commonwealth prior to a preliminary hearing in a criminal matter.

The following is a summary of the facts you related to me by telephone, and that you included in your written query to the Ethics Coordinator. You are a licensed Pennsylvania attorney who is regularly appointed to represent indigent persons in criminal matters. Recently, prior to a preliminary hearing scheduled before a member of the minor judiciary in a Pennsylvania county, you attempted to speak with persons you knew to be witnesses called by the Commonwealth.

During your brief conversation, you stated that you were the attorney for the defendant, and you did not attempt to persuade the witnesses not to testify. Nevertheless, your attempt to talk with these witnesses was interrupted by the attorney for the Commonwealth, who informed you that he felt you had no right to converse with these persons, and that if you persisted, he would file an ethical complaint against you. The attorney for the Commonwealth was adamant in his position, and you subsequently brought the instant inquiry.

To summarize my analysis of this situation briefly, I will state that as you presented the facts above, you violated no ethical duties, and it appears that instead it was the prosecutor who may have failed to conform to the Pennsylvania Rules of Professional Conduct.

First, it is clear that you have a duty to explore all legal avenues of possibly relevant information in representing your client. Pa. R.P.C. 1.1, 1.3. This duty definitely includes interviewing the witnesses for the opposing party, who in this case is the Commonwealth. Your responsibility in interviewing these witnesses is limited to making certain that these witnesses are not under the impression that you are a neutral or disinterested observer of the proceedings, or that you are giving them legal advice. Pa. R.P.C. 4.3. If you identified yourself as the attorney representing the defendant, and did not state or imply that you were giving them legal advice, you fulfilled your duties under Rule 4.3.

The second issue concerns whether you attempted to procure the witnesses' unavailability, as prohibited under Pa. R.P.C. 3.4(a), which provides that "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence …" Provided you did not attempt to tell the witnesses not to testify for the Commonwealth, it appears your contact with them was ethically proper.

The more important issue is whether the attorney for the Commonwealth violated his duty under Pa. R.P.C. 3.4(d). This provision reads:

A lawyer shall not:

…

(d) 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 the client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and such conduct is not prohibited by Rule 4.2.

One of the clearest propositions in Pennsylvania criminal practice is that the attorney for the Commonwealth, in his or her role as such, has a much greater responsibility than simply as an attorney for a private party. See, e.g., Pa. R.P.C. 3.8, "Special Responsibilities of a Prosecutor." It is likewise well-established that a prosecutor is not the attorney for the victim, or for witnesses. While the prosecutor, under Pennsylvania statutory provisions, has certain special responsibilities to crime victims, see 71 P.S. § 180-9.7, these are not identical with responsibilities to a client, nor is the victim a client under any definition of that term in ethical authorities.

Accordingly, it is improper for an attorney for the Commonwealth to tell a victim not to speak with a defense attorney, under Pa. R.P.C. 3.4, let alone attempt to interfere with your attempt to interview other witnesses. All the authorities this writer has consulted have been unanimous in stating that, as a general rule, it is completely improper for a prosecutor to interfere with defense counsel's access to relevant information from witnesses, including victims. "Proceeding on either constitutional, statutory, ethical, other or unspecified rationales, the courts in the reported decisions have almost invariably recognized a defense right to interrogate witnesses prior to trial without interference by the prosecution." Annot. "Interference by Prosecution with Defense Counsel's Pretrial Interrogation of Witnesses" 90 A.L.R. 3d 1231, 1237 (footnotes omitted).

Other authorities support this view of the issue. For example, the respected treatise The Law of Lawyering states that it is improper for a prosecutor to request a police officer and a witness to refuse to talk to a defense attorney. Hazard & Hodes, The Law of Lawyering, §3.4:705. Similarly, the ABA/ BNA Lawyers' Manual on Professional Conduct states that prosecutors may not discourage witnesses from speaking to defense counsel. ABA/ BNA Lawyers' Manual on Professional Conduct 61:614, 715-716. This conclusion was recently supported by noted ethics commentator and Pennsylvania attorney Samuel Stretton, who stated in a recent column that, "[i]t is absolutely clear without any gray area that a witness cannot be told or instructed not to speak to the lawyer for the defendant." Stretton, "Ethics Forum", Pennsylvania Law Weekly, December 7, 1998, p.25.

Thus, in light of the foregoing, it is my opinion that under the facts presented, you did not violate any ethical duty, but the attorney for the Commonwealth appears to have violated Pa. R.P.C. 3.4(d).

CAVEAT: The above represents the advisory opinion of only one member, and is not a Formal Opinion of the Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Association. This opinion is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania, or of any court or other tribunal. It will only be given such weight as a reviewing body sees fit to give it.

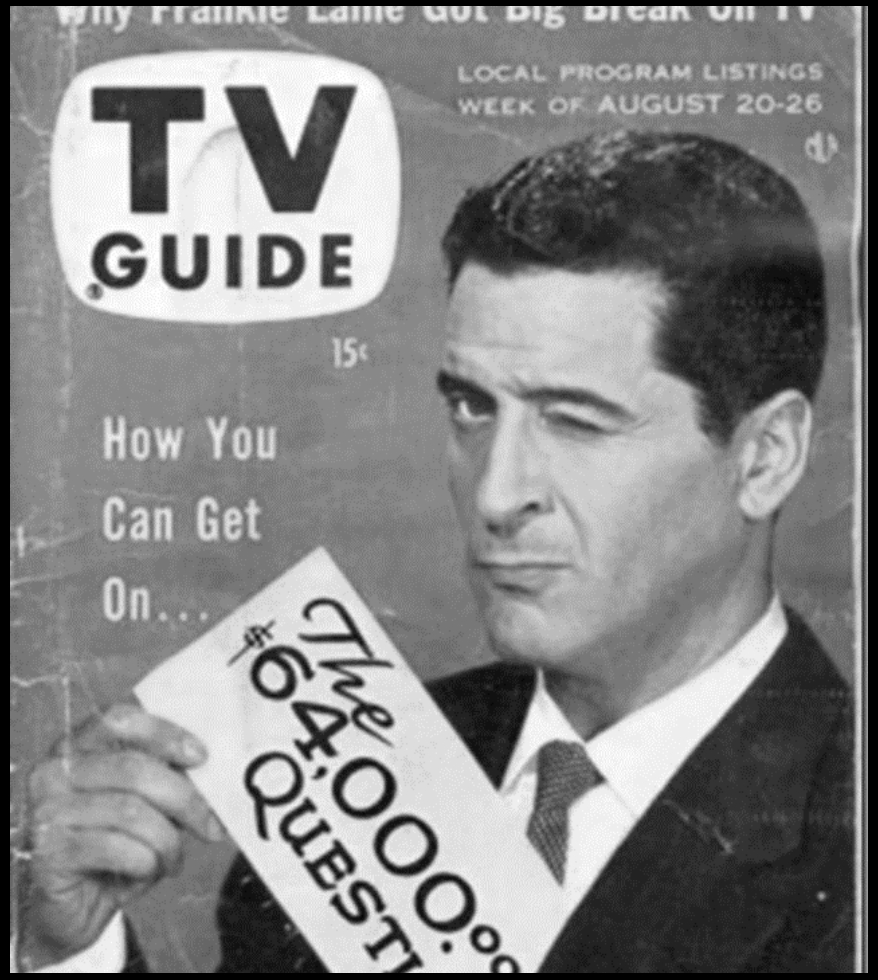
Inns of Court
Ethics Presentation

Pupillage Group
January 27, 2022

Hon. Joy Flowers Conti
Nick Bell, Esq.
Joe Charlton, Esq.
Megan Farrell, Esq.
Matthew Gailey, Esq.
Dawne Hickton, Esq.
Andrew Horowitz, Esq.
Joel Hurt, Esq.

Zoom Recommendations for viewing

- Please remember to stay on mute
- Select speaker view in the top right corner for best viewing
- Please stay off camera if you are not a presenter
- Please be prepared to use the chat feature to respond to presenter questions throughout the presentation



▶*or the $665,795.82 QUESTION in 2022 Dollars

Inns of Court - Ethics & Duties Owed to Third Parties: A Criminal Defense/Prosecution Perspective

- A defendant is charged with a Felony and has a preliminary hearing scheduled in front of a magistrate judge.
- A vital witness to the prosecution's case has information that is pertinent to a defense asserted by the Defendant.
- Prior to the hearing, the witness is waiting for the hearing to begin in the waiting room of the magistrate's office.
- The Defense Attorney begins to speak with the witness to discuss the facts of the case.
- The prosecutor approaches them, interrupts the conversation and directs the Defense Attorney to stop talking with the witness.
- The prosecutor stated to the Defense Attorney that he felt that the Defense Attorney had no right to talk with the witness and stated that if he persisted, he would file an ethics complaint against the Defense Attorney.

Inns of Court - Ethical Application/Rules of Professional Conduct

Rule 4.3. Dealing with Unrepresented Person

a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

b) During a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

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

Rule 3.4. Fairness to Opposing Party and Counsel – *A lawyer shall not:*

a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act; …

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

   a) the person is a relative or an employee or other agent of a client; and

   b) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and such conduct is not prohibited by Rule 4.2.

Inns of Court – Interviewing Corporate Employees

- 2012 - During incurred cost audit, Defense Contract Audit Agency (DCAA) questions costs incurred by company employees on a time & materials federal contract
- DCAA alleges employees in question did not have the qualifications required by the contract
- DCAA forwards findings to Defense Contract Management Agency who questions practices of labor assignment
- Outside consultants recommend revising labor assignment policy & gov notification of labor assignment issues
- 2014 - Company changeover in personnel, including CFO, Legal Counsel, and Compliance
- 2015 - Whistleblower alleges company may not be assigning employees correctly on its government contracts
- 2015 - Company makes mandatory disclosure of a material overbill to US Gov, opens internal investigation
- During investigation, jr. procurement employee providing data to the investigation notifies current counsel that leaders knew about issue 3 years ago and provides presentation from outside consultants describing problem
- Investigation counsel arranges to interview current and former employees
- Investigation points to two former employees who have historical knowledge of what transpired in 2012-2013
- Prior to the interview, Upjohn warnings are read to the employees
- One employee refuses interview, one claims no memory of events although internal emails show otherwise
- 2017 - DOJ accuses company of intentionally violating False Claims Act, subpoenas docs, demands ~$21M fine
- Having testimony from the two former employees is key in defending DOJ claims

Inns of Court – Ethical Rule

- **Upjohn Warning -** aka Corporate Miranda Warning:
  - In-house counsel should provide employees an "Upjohn" warning informing the employee that in-house counsel represents the company and not the interviewee. Failure to do so could be a breach of attorneys' ethical obligations to the interviewee and at the same time a dilemma is presented because some employees will choose to not answer questions, hindering the investigation.

- **Yates Memo**:
  - The DOJ Yates memo gives companies credit during sentencing or civil penalty phases of a DOJ enforcement action if the company turns over the responsible employees. A company legal department may also advise when employees should retain their own counsel and at times have paid for counsel.

Inns of Court - Ex Parte Contact with Current and Former Employees of Defendant

- IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA – CIVIL DIVISION

MEGAN FARRELL, on behalf of herself and others similarly situated,
Plaintiffs,
v.
TESLA, INC.
Defendant.

CLASS ACTION
NO. GD-22-123456

Inns of Court – Ex Parte Contact with Current and Former Employees of Defendant

Rule 4.2 Communication with Person Represented by Counsel

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment 7 states that, where the represented person is an organization, the no contact rule extends to any constituent of the organization who:

- Supervises, directs or regularly consults with the organization's lawyer concerning the matter;
- Has authority to obligate the organization with respect to the matter; or
- Whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Comment 7 further states that:

- Consent of the organization's lawyer is not required for communication with a former constituent.
- If a constituent of the organization is represented in the matter by her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Inns of Court - Ex Parte Contact with Current and Former Employees of Defendant

Comment 4 to Rule 4.2 states that:

- Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.
- But a lawyer may not make a communication prohibited by this Rule through the acts of another.

Comment 8 states that the no-contact rule only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed.

- This means that the lawyer has actual knowledge of the fact of the representation.
- Such actual knowledge may be inferred from the circumstances.
- The lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

Rule 4.4 Respect for Rights of Third Persons

- Subsection (a) states that, 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.

Inns of Court – Ex Parte Contact with Current and Former Employees of Defendant

Rule 4.3 Dealing with Unrepresented Person

- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
- During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.
- When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

Rule 3.4 Fairness to Opposing Party and Counsel

- Subsection (d) provides that a lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  - The person is a relative or an employee or other agent of a client; and
  - The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and such conduct is not prohibited by Rule 4.2

Inns of Court - Ignelzi Opinion, Fairness to Opposing Party and Counsel, and Candor Toward the Tribunal

Ignelzi's recent opinion on the proper bounds of objections during depositions implicates Rules 3.3, 3.4, and 3.5 of the Pennsylvania Rules of Professional Conduct as they relate to lawyers' behavior as officers of the Court, as well as demonstrating fairness to opposing parties and counsel.

Opinion from last year was a shot across the bow for practitioners in Allegheny County to be vigilant that overly aggressive deposition conduct will not be tolerated by the bench going forward

While the opinion does not reference particular Rule of Professional Conduct, we think some of the deposition conduct could run afoul of Rules 3.3, 3.4, and/or 3.5. Let's see what you think!

Inns of Court - Rule 3.3: Candor Toward the Tribunal

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 or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer

- Comment 12 Preserving Integrity of Adjudicative Process:
  - Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure, if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Inns of Court - Rule 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not:

a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act.

Comment 1 and 2:

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

Inns of Court – Rule 3.5: Impartiality and Decorum of the Tribunal

A lawyer shall not:

d) engage in conduct intended to disrupt a tribunal

Comment 5:

- The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.

Inns of Court – Scenario

- Steve Slipper, Esq. slips and falls while exiting opposing counsel's office after a particularly contentious deposition. Believing the old adage, "the lawyer who represents himself has a fool for a client," Attorney Slipper retains Albert Chaser, Esq. to represent him in suing opposing counsel's firm, White & Shoe, LLP. White & Shoe's insurance company assigns the defense to Katherine Captive, Esq., it's in-house defense counsel.
- Both Attorney Slipper and White & Shoe are difficult clients. Deep inside, Slipper is excited to be part of exciting courtroom drama, since his practice area is incredibly boring. Slipper therefore insists on being apprised of every development in the case as soon as it happens. Chaser responds to this by copying his overbearing client on all correspondence related to the case, including with opposing counsel. Meanwhile, White & Shoe becomes frustrated that Captive's high-volume practice does not allow her to subject all of her emails and other written work product to 47 levels of internal review as is the practice at White & Shoe. White & Shoe therefore attempts to micromanage Captive and insists that its managing partner, Mario Nike, be copied on all correspondence. Meanwhile, Slipper continues to have numerous cases against White & Shoe attorneys that require him to appear for depositions at White & Shoe's office on a regular basis. He appears holding a cane and walking with an exaggerated limp. During breaks from depositions, he expounds to opposing counsel about how much his hip hurts and makes comments to White & Shoe's legal assistants about how the firm was so cheap in failing to use the latest anti-slip technology developed by NASA in building its front steps. Managing Partner Nike responds by sending an email to both Slipper and Chaser asking that Slipper refrain from discussing his case and related matters with any White & Shoe personnel and instead direct all such communications to Captive.

Inns of Court – Analysis

PA R.P.C. 4.2 Communication with Person Represented by Counsel:

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
- PA Bar Association Formal Opinion 2017-200 takes the position that because of Rule 4.2's plain language, "in representing a client…," a lawyer who is represented by another attorney in a matter is not representing a client and therefore not prohibited from discussing the subject matter of his attorney's representation of him with the opposing party under Rule 4.2. Other ethics authorities have taken the opposite position.
- Formal Opinion 2017-200 also provides that an attorney who is representing himself pro se is representing a client (himself) and therefore is barred by Rule 4.2 from communicating with an opposing represented party regarding the subject of representation.

Inns of Court – Analysis cont'd

- PA Bar Association Formal Opinion 2020-100 addresses ethical considerations in copying clients on emails to opposing counsel. While the opinion stops short of holding that it is a violation of any rule to copy a client on such correspondence, it outlines multiple reasons that this is a bad practice. Most importantly, it invites opposing counsel to "reply all" to the email, which would result in opposing counsel emailing the attorney's client regarding the subject of representation. It also creates the risk that the client will accidentally copy opposing counsel on a reply to the attorney. Whether copying a client on an email to opposing counsel is deemed to be consent to a "reply all" that includes the client depends on the context. The Committee explained, "In order to determine if consent to respond to a represented client in a transactional matter may be implied, lawyers should consider (1) how the communication is initiated; (2) the prior course of conduct between or among the lawyers and their clients; (3) potential that the response might interfere with the client-lawyer relationship; and (4) whether the specific content of the email is appropriate to send directly to a represented client."

Inns of Court – Law Firms and Associations

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

1. A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
2. 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.
3. A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
4. the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
5. the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Inns of Court – The Ethics

- ***5.2 Responsibilities of a Subordinate Lawyer***

1. A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acts at the direction of another person.
2. 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.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

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

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16 to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case; but a lawyer may pay, cause to be paid, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for the witness' loss of time in attending or testifying; and,

(3) a reasonable fee for the professional services of an expert witness;

(c) when appearing before a tribunal, assert the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or,

(d) 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 and such conduct is not prohibited by Rule 4.2.

Comment:

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

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

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

[4] Paragraph (d) 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 Rules 4.2 and 4.3(b).

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

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

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or,

(3) the communication involves misrepresentation, coercion, duress or harassment; or

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

Comment:

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

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

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order

Comment:

[1] It is intended that the required "prior judicial approval" will normally be withheld unless, after a hearing conducted with due regard for the need for appropriate secrecy, the court finds (1) the information sought is not protected from disclosure by Rule 1.6, the attorney-client privilege or the work product doctrine; (2) the evidence sought is relevant to the proceeding; (3) compliance with the subpoena would not be unreasonable or oppressive; (4) the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and (5) there is no other feasible alternative to obtain the information sought.

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 aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment:

Misrepresentation

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

Statements of Fact

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

Crime or Fraud by Client

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

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment:

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

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

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

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Rule 4.3 Dealing with Unrepresented Person

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

(b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

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

Comment:

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

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Rule 4.4 Respect for Rights of Third Persons

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

(b) A lawyer who receives a document, including electronically stored information, relating to the representation of the lawyer's client and knows or reasonably should know that the document, including electronically stored information, was inadvertently sent shall promptly notify the sender.

Comment:

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

[2] Paragraph (b) recognizes that lawyers sometimes receive a document, including electronically stored information, that was mistakenly sent or produced by opposing parties or their lawyers. A document,

including electronically stored information, is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document, including electronically stored information, is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document, including electronically stored information, was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document, including electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document, including electronically stored information, has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document, including electronically stored information, that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document, including electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

LAW FIRMS AND ASSOCIATIONS

Rule 5.1 Responsibilities of Partners, Managers and Supervisory Lawyers

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

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

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

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

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

Comment:

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

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

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RULES OF PROFESSIONAL CONDUCT

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August 25, 2021

PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT

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PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A Lawyer's Responsibilities

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

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

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

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

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

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

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

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

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

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

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

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

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

SCOPE

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

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

[16] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be

established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

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

[18] 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.

[19] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra disciplinary consequences of violating such a duty.

[20] These Rules were first derived from the Model Rules of Professional Conduct adopted by the American Bar Association in 1983 as amended. Those Rules were subject to thorough review and restatement through the work of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission"), and have been subject to certain modifications in their adoption in Pennsylvania. The Rules omit some provisions that appear in the ABA Model Rules of Professional Conduct. The omissions should not be interpreted as condoning behavior proscribed by the omitted provision.

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

Rule 1.0 Terminology

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

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

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

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

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

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

(g) "Partner" denotes an equity owner in a law firm, whether in the capacity of a partner in a partnership, a shareholder in a professional corporation, a member in a limited liability company, a beneficiary of a business trust, a member of an association authorized to practice law, or otherwise.

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

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

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

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

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

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

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

Comment:

Confirmed in Writing

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

Firm

[2] The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of a rule that the same lawyer should not represent opposing parties in litigation, e.g., Rules 1.7(a), 1.10(a), while it might not be so regarded for purposes of a rule that information acquired by one lawyer is attributed to another, e.g., Rule 1.10(b).

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

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

Fraud

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

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a), 1.7(b), 1.8(a)(3), (b), (f) and (g), 1.9(a) and (b), 1.10(d), 1.11(a)(2) and (d)(2)(i), 1.12(a) and 1.18(d)(1). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. Rule 1.8(a) requires that a client's consent be obtained in a writing signed by the client. For a definition of "signed," see paragraph (n). The term informed consent in Rule 1.0 and the guidance provided in the Comment should be understood in the context of legal ethics and is not intended to incorporate jurisprudence of medical malpractice law.

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12, or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances.

To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

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

Rule 1.1 Competence

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

Comment:

Legal Knowledge and Skill

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

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. 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 impracticable. 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 particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2, 1.4, 1.6, and 5.5(a). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's

own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. To provide competent representation, a lawyer should be familiar with policies of the courts in which the lawyer practices, which include the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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

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

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

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.

Comment:

Allocation of Authority between Client and Lawyer

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

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense

to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

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

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

Independence from Client's Views or Activities

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

Agreements Limiting Scope of Representation

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

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

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

Criminal, Fraudulent and Prohibited Transactions

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

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

insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

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

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

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

Rule 1.3 Diligence

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

Comment:

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

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

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

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

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American

Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Rule 1.4 Communication

(a) A lawyer shall:

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

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

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

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

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

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

(c) A lawyer in private practice shall inform a new client in writing if the lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance, and shall inform existing clients in writing at any time the lawyer's professional liability insurance drops below either of those amounts or the lawyer's professional liability insurance is terminated. A lawyer shall maintain a record of these disclosures for six years after the termination of the representation of a client.

Comment:

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

Communicating with Client

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

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

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response

is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

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

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

Withholding Information

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

Disclosures Regarding Insurance

[8] Paragraph (c) does not apply to lawyers in full-time government practice or full-time lawyers employed as in-house counsel and who do not have any private clients.

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

(i) No insurance or insurance below required amounts when retained: "Pennsylvania Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year and if, at any time, a lawyer's professional liability insurance drops below either of those amounts or a lawyer's professional liability insurance coverage is terminated. You are therefore advised that (name of attorney or firm) does not have professional liability insurance coverage of at least $100,000 per occurrence and $300,000 in the aggregate per year."

(ii) Insurance drops below required amounts: "Pennsylvania Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year and if, at any time, a lawyer's professional liability insurance drops below either of those amounts or a lawyer's professional liability insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s professional liability insurance dropped below at least $100,000 per occurrence and $300,000 in the aggregate per year as of (date)."

(iii) Insurance terminated: "Pennsylvania Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year and if, at any time, a lawyer's professional liability insurance drops below either of those amounts or a lawyer's professional

liability insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s professional liability insurance has been terminated as of (date)."

[10] A lawyer or firm maintaining professional liability insurance coverage in at least the minimum amounts provided in paragraph (c) is not subject to the disclosure obligations mandated by the rule if such coverage is subject to commercially reasonable deductibles, retention or co-insurance. Deductibles, retentions or co-insurance offered, from time to time, in the marketplace for professional liability insurance for the size of firm and coverage limits purchased will be deemed to be commercially reasonable.

Rule 1.5 Fees

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. The factors to be considered in determining the propriety of a fee include the following:

(1) whether the fee is fixed or contingent;

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

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

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

(5) the amount involved and the results obtained;

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

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

(8) the experience, reputation, and ability of the lawyer or lawyers performing the services.

(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:

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

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

(e) A lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm unless:

(1) the client is advised of and does not object to the participation of all the lawyers involved; and,

(2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered the client.

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. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

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

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

Division of Fee

[4] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee if the total fee is not illegal or excessive and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

Successor Counsel in Contingency Fee Matters

[5] Unlike the situation in [4], which addresses division of fee between lawyers from different firms who are simultaneously representing a client, there may arise a situation where a client enters a contingent fee agreement with one lawyer ("predecessor counsel"), terminates that lawyer's services without cause, and enters a new contingent fee agreement with a different lawyer ("successor counsel"). In such a situation, and pursuant to a lawyer's duties as set forth in paragraphs (b) and (c), successor counsel must notify the client, in writing, that some portion of the fee may be due to or claimed by predecessor counsel for services performed prior to the termination, and should discuss with the client the effect of that claim on successor counsel's proposed fee agreement. If successor counsel will be involved in negotiating fees with predecessor counsel on the client's behalf, successor counsel should evaluate whether the circumstances give rise to a conflict of interest with the client and, if so, must obtain appropriate informed consent to the conflict as set forth in Rule 1.7. If a dispute arises regarding distribution of the recovery, successor counsel must hold the disputed portion of the funds in trust pending resolution, in accordance with Rule 1.15(f). *See* ABA Formal Opinion 487 (June

18, 2019) (relating to successive contingent fee agreements). While part II.A of Formal Opinion 487 would require the client's written informed consent, Rule 1.7 does not require a writing. However, if informed consent is deemed necessary under the circumstances, written consent may benefit both the client and successor counsel for the reasons set forth in Explanatory Comment [20] to Rule 1.7.

Disputes over Fees

[6] 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.

[7] It is Disciplinary Board policy that allegations of excessive fees charged are initially referred to Fee Dispute Committees for resolution.

Rule 1.6 Confidentiality of Information

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

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

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

(2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another;

(3) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used;

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

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

(6) to effectuate the sale of a law practice consistent with Rule 1.17;

(7) to detect and resolve conflicts of interest from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client; or,

(8) to comply with other law or court order.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Comment:

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

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

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

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

[5] A lawyer has duties of disclosure to a tribunal under Rule 3.3(a) that may entail disclosure of information relating to the representation. Rule 1.6(b) recognizes the paramount nature of this obligation.

Authorized Disclosure

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

Detection of Conflicts of Interests

[7] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends or learn that the client has caused serious harm to another person. However, to the extent that a lawyer is required or permitted to disclose a client's purposes or conduct, the client may be inhibited from revealing facts that would enable the lawyer effectively to represent the client. Generally, the public interest is better served if full disclosure by clients to their lawyers is encouraged rather than inhibited. With limited exceptions, information relating to the representation must be kept confidential by a lawyer, as stated in paragraph (a).

[8] Where human life is threatened, the client is or has been engaged in criminal or fraudulent conduct, or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer's knowledge about and relationship to the conduct in question.

[9] Several situations must be distinguished:

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

[11] Second, paragraph (c)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime that is reasonably certain to result in substantial injury to the financial or property interests of another. Disclosure is permitted under paragraph (c)(2) only where the lawyer reasonably believes that such threatened action is a crime; the lawyer may not substitute his or her own sense of wrongdoing for that of society at large as reflected in the applicable criminal laws. The client can, of course, prevent such disclosure by refraining from the wrongful conduct.

[12] Third, a lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). To avoid assisting a client's criminal or fraudulent conduct, the lawyer may have to reveal information relating to the representation. Rule 1.6(c)(3) permits doing so.

[13] Fourth, a lawyer may have been innocently involved in past conduct by a client that was criminal or fraudulent. In such a situation, the lawyer did not violate Rule 1.2(d). However, if the lawyer's services were made an instrument of the client's crime or fraud, the lawyer has a legitimate and overriding interest in being able to rectify the consequences of such conduct. Rule 1.6(c)(3) gives the lawyer professional discretion to reveal information relating to the representation to the extent necessary to accomplish rectification.

[14] Fifth, where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[15] Sixth, a lawyer entitled to a fee is permitted by paragraph (c)(4) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[16] Seventh, a lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (c)(5) permits such disclosure because of the importance of a lawyer’s compliance with the Rules of Professional Conduct.

[17] Eighth, it is recognized that the due diligence associated with the sale of a law practice authorized under Rule 1.17 may necessitate the limited disclosure of certain otherwise confidential information. Paragraph (c)(6) permits such disclosure. However, as stated above, the lawyer must make every effort

practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having a need to know it, and to obtain appropriate arrangements minimizing the risk of disclosure.

[18] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (c)(8) permits the lawyer to make such disclosures as are necessary to comply with the law.

[19] Paragraph (c)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [4]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[20] Any information disclosed pursuant to paragraph (c)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (c)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (c)(7). Paragraph (c)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [6], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[21] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, paragraph (c)(8) permits the lawyer to comply with the court's order.

[22] Paragraph (c) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[23] Paragraph (c) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (c)(1) through (c)(8). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (c) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (c). See Rules

1.2(d), 4.1(b), 8.1, and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Withdrawal

[24] 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). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Acting Competently to Preserve Confidentiality

[25] Pursuant to paragraph (d), a lawyer should act in accordance with court policies governing disclosure of sensitive or confidential information, including the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania. Paragraph (d) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (d) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

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

Former Client

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

Lobbyists

[28] A lawyer who acts as a lobbyist on behalf of a client may disclose information relating to the representation in order to comply with any legal obligation imposed on the lawyer-lobbyist by the Legislature, the Executive Branch or an agency of the Commonwealth, or a local government unit which are consistent with the Rules of Professional Conduct. Such disclosure is explicitly authorized to carry out the representation. The Disciplinary Board of the Supreme Court shall retain jurisdiction over any violation of this Rule.

Rule 1.7 Conflict of Interest: Current Clients

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

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

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

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

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

(2) the representation is not prohibited by law;

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

(4) each affected client gives informed consent.

Comment:

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For the definition of "informed consent," see Rule 1.0(e).

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

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

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

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation,

as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

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

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

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

Lawyer's Responsibilities to Former Clients and Other Third Persons

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

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 5.8 for specific Rules that prohibit or restrict a lawyer's involvement in the offer, sale, or placement of investment products regardless of an actual conflict or the potential for conflict. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

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

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph 1.7(b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

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

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

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

Informed Consent

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

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

Confirming Consent

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client to a concurrent conflict of interest. The client's consent need not be confirmed in writing to be effective. Rather, a writing tends to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing. See also Rule 1.0(b) (writing includes electronic transmission).

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

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

Conflicts in Litigation

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

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

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

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

Nonlitigation Conflicts

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

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

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

Special Considerations in Common Representation

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

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach.

Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

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

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

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

Organizational Clients

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

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

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

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

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

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

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

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

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

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

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

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

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

(1) the client gives informed consent;

(2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and,

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

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

(h) A lawyer shall not

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

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

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

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

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual relationship existed between them when the client-lawyer relationship commenced.

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

Comment:

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. But see Rule 5.8 for specific Rules that prohibit or restrict a lawyer's involvement in the offer, sale, or placement of investment products regardless of an actual conflict or the potential for conflict. Rule 1.8 also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

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

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

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

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to

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

Gifts to Lawyers

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

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

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

Literary Rights

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

Financial Assistance

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

Person Paying for a Lawyer's Services

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

professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

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

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

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

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

Acquiring Proprietary Interest in Litigation

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

originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

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

Rule 1.9 Duties to Former Clients

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

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

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

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

unless the former client gives informed consent.

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

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

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

Comment:

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

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

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

Lawyers Moving Between Firms

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

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

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge information protected by Rules 1.6 and 1.9(c). 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 related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer becomes associated with a firm, including screening provisions. See Rule 1.10(c) for the restrictions on a firm once a lawyer has terminated association with the firm.

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

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

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

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

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, or unless permitted by Rules 1.10(b) or (c).

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless:

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

(2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.

(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 and not currently represented by the firm, unless:

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

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

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

(e) While lawyers are associated in a firm, a prohibition in paragraphs (a) through (i) of Rule 1.8 that applies to any one of them shall apply to all of them.

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

(g) The disqualification of lawyers in a firm with a former judge, arbitrator, mediator or other third-party neutral is governed by Rule 1.12.

(h) Where a lawyer in a firm is disqualified from a matter due to consultation with a prospective client pursuant to Rule 1.18(b) and (c), disqualification of other lawyers in the same firm is governed by Rule 1.18(d).

(i) The disqualification of a lawyer when another lawyer in the lawyer's firm is likely to be called as a witness is governed by Rule 3.7.

Comment:

Definition of "Firm"

[1] For the purposes of the Rules of Professional Conduct, the term ''firm'' denotes lawyers in law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or in the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition depends on specific facts. See Rule 1.0, Comments [2]-[4].

Principles of Imputed Disqualification

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

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

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

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

[6] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

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

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

[9] The disqualification of lawyers in a firm with a former judge, arbitrator, mediator or other third-party neutral is governed by Rule 1.12.

[10] Where a lawyer is disqualified from a matter as a result of a consultation with a prospective client pursuant to Rule 1.18(b) and (c), disqualification of the other lawyers in the firm is governed by Rule 1.18(d).

[11] The disqualification of a lawyer when another lawyer in the lawyer's firm is likely to be called as a witness is governed by Rule 3.7.

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

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

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

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

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

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

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term

"confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

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

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

(2) shall not:

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

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

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

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

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

Comment:

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

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

[3] Paragraphs (c) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a)(2). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the

government. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus, a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

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

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

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

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

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

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

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

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

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

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

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

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

Comment:

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that the former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other judicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2), and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding relating thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

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

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

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

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

Rule 1.13 Organization as Client

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and,

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

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

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

Comment:

The Entity as the Client

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

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

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[5] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3, or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

[6] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [17]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[7] 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.

[8] 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

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

Derivative Actions

[10] 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.

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

Rule 1.14 Client with Diminished Capacity

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

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

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

Comment:

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

[2] The fact that a client suffers a diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

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

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

Taking Protective Action

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

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

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

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

Emergency Legal Assistance

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

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

Rule 1.15 Safekeeping Property

(a) The following definitions are applicable to Rule 1.15:

(1) *Eligible Institution*. An Eligible Institution is a Financial Institution which has been approved as a depository of Trust Accounts pursuant to Pa.R.D.E. 221(h).

(2) *Fiduciary.* A Fiduciary is a lawyer acting as a personal representative, guardian, conservator, receiver, trustee, agent under a durable power of attorney, or other similar position.

(3) *Fiduciary Funds*. Fiduciary Funds are Rule 1.15 Funds which the lawyer holds as a Fiduciary. Fiduciary Funds may be either Qualified Funds or Nonqualified Funds.

(4) *Financial Institution*. A Financial Institution is an entity which is authorized by federal or state law and licensed to do business in the Commonwealth of Pennsylvania as one of the following: a bank, bank and trust company, trust company, credit union, savings bank, savings and loan association, or foreign banking corporation, the deposits of which are insured by an agency of the federal government, or as an investment adviser registered under the Investment Advisers Act of 1940 or with the Pennsylvania Securities Commission, an investment company registered under the Investment Company Act of 1940, or a broker dealer registered under the Securities Exchange Act of 1934.

(5) *Interest On Lawyer Trust Account* (*IOLTA) Account.* An IOLTA Account is an income producing Trust Account from which funds may be withdrawn upon request as soon as permitted by law. Qualified Funds are to be held or deposited in an IOLTA Account.

(6) *IOLTA Board.* The IOLTA Board is the Pennsylvania Interest On Lawyers Trust Account Board.

(7) *Non-IOLTA Account.* A Non-IOLTA Account is an income producing Trust Account from which funds may be withdrawn upon request as soon as permitted by law in which a lawyer deposits Rule 1.15 Funds. Only Nonqualified Funds are to be held or deposited in a Non-IOLTA Account. A Non-IOLTA Account shall be established only as:

(i) a separate client Trust Account for the particular client or matter on which the net income will be paid to the client or third person; or

(ii) a pooled client Trust Account with sub-accounting by the Eligible Institution or by the lawyer, which will provide for computation of net income earned by each client's or third person's funds and the payment thereof to the client or third person.

(8) *Nonqualified Funds*. Nonqualified Funds are Rule 1.15 Funds, whether cash, check, money order, or other negotiable instrument*,* which are not Qualified Funds.

(9) *Qualified Funds.* Qualified Funds are Rule 1.15 Funds which are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient income will not be generated to justify the expense of administering a segregated account.

(10) *Rule 1.15 Funds*. Rule 1.15 Funds are funds which the lawyer receives from a client or third person in connection with a client-lawyer relationship, or as an escrow agent, settlement agent or representative payee, or as a Fiduciary, or receives as an agent, having been designated as such by a client or having been so selected as a result of a client-lawyer relationship or the lawyer's status as such. When the term "property" appears with "Rule 1.15 Funds," it means property of a client or third person which the lawyer receives in any of the foregoing capacities.

(11) *Trust Account*. A Trust Account is an account in an Eligible Institution in which a lawyer holds Rule 1.15 Funds. A Trust Account must be maintained either as an IOLTA Account or as a Non-IOLTA Account.

(b) A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded.

(c) *Required records.* Complete records of the receipt, maintenance, and disposition of Rule 1.15 Funds and property shall be preserved for a period of five years after termination of the client-lawyer or Fiduciary relationship or after distribution or disposition of the property, whichever is later. A lawyer shall maintain the writing required by Rule 1.5(b) (relating to the requirement of a writing communicating the basis or rate of the fee) and the records identified in Rule 1.5(c) (relating to the requirement of a written fee agreement and distribution statement in a contingent fee matter). A lawyer shall also maintain the following books and records for each Trust Account and for any other account in which Fiduciary Funds are held pursuant to Rule 1.15(l):

(1) all transaction records provided to the lawyer by the Financial Institution or other investment entity, such as periodic statements, cancelled checks in whatever form, deposited items, and records of electronic transactions; and

(2) check register or separately maintained ledger, which shall include the payee, date, purpose and amount of each check, withdrawal and transfer, the payor, date, and amount of each deposit, and the matter involved for each transaction; provided, however, that where an account is used to hold funds of more than one client, a lawyer shall also maintain an individual ledger for each trust client, showing the source, amount and nature of all funds received from or on behalf of the client, the description and amounts of charges or withdrawals, the names of all persons or entities to whom such funds were disbursed, and the dates of all deposits, transfers, withdrawals and disbursements.

(3) The records required by this Rule may be maintained in hard copy form or by electronic, photographic, or other media provided that the records otherwise comply with this Rule and that printed copies can be produced. Whatever method is used to maintain required records must have a backup so that the records are secure and always available. If records are kept only in electronic form, then such records shall be backed up on a separate electronic storage device at least at the end of any day on which entries have been entered into the records. These records shall be readily accessible to the lawyer and available for production to the Pennsylvania Lawyers Fund for Client Security or the Office of Disciplinary Counsel in a timely manner upon a request or demand by either agency made pursuant to the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board Rules, the Pennsylvania Lawyers Fund for Client Security Board Rules and Regulations, agency practice, or subpoena.

(4) A regular trial balance of the individual client trust ledgers shall be maintained. The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in trust for the client, and deducting the total of all moneys disbursed. On a monthly basis, a lawyer shall conduct a reconciliation for each fiduciary account. The reconciliation is not complete if the reconciled total cash balance does not agree with the total of the client balance listing. A lawyer shall preserve for a period of five years copies of all records and computations sufficient to prove compliance with this requirement.

(d) Upon receiving Rule 1.15 Funds or property which are not Fiduciary Funds or property, a lawyer shall promptly notify the client or third person, consistent with the requirements of applicable law. Notification of receipt of Fiduciary Funds or property to clients or other persons with a beneficial interest in such Fiduciary Funds or property shall continue to be governed by the law, procedure and rules governing the requirements of confidentiality and notice applicable to the Fiduciary entrustment.

(e) Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property, including but not limited to Rule 1.15 Funds, 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 the property; Provided, however, that the delivery, accounting, and disclosure of Fiduciary Funds or property shall continue to be governed by the law, procedure and rules governing the requirements of Fiduciary administration, confidentiality, notice and accounting applicable to the Fiduciary entrustment.

(f) When in possession of funds or property in which two or more persons, one of whom may be the lawyer, claim an interest, the funds or property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property, including Rule 1.15 Funds, as to which the interests are not in dispute.

(g) The responsibility for identifying an account as a Trust Account shall be that of the lawyer in whose name the account is held. Only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a Trust Account or any other account in which Fiduciary Funds are held pursuant to Rule 1.15(l).

(h) A lawyer shall not deposit the lawyer's own funds in a Trust Account except for the sole purpose of paying service charges on that account, and only in an amount necessary for that purpose.

(i) A lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner.

(j) At all times while a lawyer holds Rule 1.15 Funds, the lawyer shall also maintain another account that is not used to hold such funds.

(k) All Nonqualified Funds which are not Fiduciary Funds shall be placed in a Non-IOLTA Account or in another investment vehicle specifically agreed upon by the lawyer and the client or third person which owns the funds.

(l) All Fiduciary Funds shall be placed in a Trust Account (which, if the Fiduciary Funds are also Qualified Funds, must be an IOLTA Account) or in another investment or account which is authorized by the law applicable to the entrustment or the terms of the instrument governing the Fiduciary Funds.

(m) All Qualified Funds which are not Fiduciary Funds shall be placed in an IOLTA Account.

(n) A lawyer shall be exempt from the requirement that all Qualified Funds be placed in an IOLTA Account only upon exemption requested and granted by the IOLTA Board. If an exemption is granted, the lawyer must hold Qualified Funds in a Trust Account which is not income producing. Exemptions shall be granted if:

(1) the nature of the lawyer's practice does not require the routine maintenance of a Trust Account in Pennsylvania;

(2) compliance with this paragraph would work an undue hardship on the lawyer or would be extremely impractical, based either on the geographical distance between the lawyer's principal office and the closest Eligible Institution or on other compelling and necessitous factors; or

(3) the lawyer's historical annual Trust Account experience, based on information from the Eligible Institution in which the lawyer deposits funds, demonstrates that the service charges on the account would significantly and routinely exceed any income generated.

(o) An account shall not be considered an IOLTA Account unless the Eligible Institution at which the account is maintained shall:

(1) Remit at least quarterly any income earned on the account to the IOLTA Board;

(2) Transmit to the IOLTA Board with each remittance and to the lawyer who maintains the IOLTA Account a statement showing at least the name of the account, service charges or fees deducted, if any, the amount of income remitted from the account, and the average daily balance, if available; and

(3) Pay a rate of interest or dividends no less than the highest interest rate or dividend generally available from the Eligible Institution to its non-IOLTA customers when the IOLTA Account meets the same minimum balance or other eligibility qualifications, and comply with the Regulations of the IOLTA Board with respect to service charges, if any.

(p) A lawyer shall not be liable in damages or held to have breached any fiduciary duty or responsibility because monies are deposited in an IOLTA Account pursuant to the lawyer's judgment in good faith that the monies deposited were Qualified Funds.

(q) There is hereby created the Pennsylvania Interest On Lawyers Trust Account Board, which shall administer the IOLTA program. The IOLTA Board shall consist of nine members who shall be appointed by the Supreme Court. Two of the appointments shall be made from a list provided to the Supreme Court by the Pennsylvania Bar Association in accordance with its own rules and regulations. With respect to these two appointments, the Pennsylvania Bar Association shall submit three names to the Supreme Court, from which the Court shall make its final selections. The term of each member shall be three years and no member shall be appointed for more than two consecutive three-year terms. The Supreme Court shall appoint a Chairperson. In order to administer the IOLTA program, the IOLTA Board shall promulgate rules and regulations consistent with this Rule for approval by the Supreme Court.

(r) The IOLTA Board shall comply with the following:

(1) The IOLTA Board shall prepare an annual audited statement of its financial affairs.

(2) The IOLTA Board shall submit to the Supreme Court for its approval a copy of its audited statement of financial affairs, clearly setting forth in detail all funds previously approved for disbursement under the IOLTA program and the IOLTA Board's proposed annual budget, designating the uses to which IOLTA Funds are recommended.

(3) Upon approval of the Supreme Court, the IOLTA Board shall distribute and/or expend IOLTA Funds.

(s) Income earned on IOLTA Accounts (IOLTA Funds) may be used only for the following purposes:

(1) delivery of civil legal assistance to the poor and disadvantaged in Pennsylvania by non-profit corporations described in section 501(c)(3) of the Internal Revenue Code of 1986, as amended;

(2) educational legal clinical programs and internships administered by law schools located in Pennsylvania;

(3) administration and development of the IOLTA program in Pennsylvania; and

(4) the administration of justice in Pennsylvania.

(t) The IOLTA Board shall hold the beneficial interest in IOLTA Funds. Monies received in the IOLTA program are not state or federal funds and are not subject to Article VI of the act of April 9, 1929 (P.L. 177, No. 175) known as The Administrative Code of 1929, or the act of June 29, 1976 (P.L. 469, No. 117).

(u) Every attorney who is required to pay an active annual assessment under Rule 219 of the Pennsylvania Rules of Disciplinary Enforcement (relating to annual registration of attorneys) shall pay an additional annual fee of $30.00 for use by the IOLTA Board. Such additional assessment shall be added to, and collected with and in the same manner as, the basic annual assessment. All amounts received pursuant to this subdivision shall be credited to the IOLTA Board.

(v) Unclaimed or Unidentifiable IOLTA Funds

(1) When a lawyer or law firm cannot, using reasonable efforts for a minimum of two (2) years, identify or locate the owner of funds in either its Pennsylvania IOLTA account or the Pennsylvania IOLTA account of a deceased lawyer whose estate is represented by the lawyer or law firm, it shall pay the funds to the Pennsylvania IOLTA Board. At the time such funds are remitted, the lawyer or law firm shall submit to the IOLTA Board the name and last known address of each person appearing from the lawyer's or law firm's records to be entitled to the funds, and the amount of unclaimed funds to which each owner is entitled, if known; the amount of any unidentifiable funds; and a description of the efforts undertaken to identify and locate the owner(s).

(2) If, after making a payment of unclaimed or unidentifiable funds to the Pennsylvania IOLTA Board, the lawyer or law firm identifies and locates the owner of funds paid, the IOLTA Board shall refund the sum to the lawyer or law firm. The lawyer or law firm shall submit to the IOLTA Board a verification attesting that the funds have been returned to the owner. The IOLTA Board shall review claims submitted by purported owners of funds when the lawyer or law firm that originally remitted the funds to the IOLTA Board is no longer available. The IOLTA Board shall maintain a sufficient reserve to pay all claims for such funds.

(3) Should the Pennsylvania Lawyers Fund for Client Security pay an award to a former client of a lawyer, law firm, or deceased lawyer who has remitted funds under this Rule to the IOLTA Board, the Pennsylvania Lawyers Fund for Client Security may pursue a reimbursement of such award from unclaimed funds remitted by the lawyer, law firm, or deceased lawyer to the IOLTA Board in which the former client held an ownership interest. In no event would a reimbursement to the Pennsylvania Lawyers Fund for Client Security exceed the amount of funds remitted to the IOLTA Board by the subject lawyer, law firm, or deceased lawyer.

(4) A lawyer shall not be liable in damages or held to have breached any fiduciary duty or responsibility as a result of his or her good faith adherence to the unclaimed or unidentifiable IOLTA fund requirements in this subsection.

Comment:

[1] A lawyer should hold property of others with the care required of a professional fiduciary. The obligations of a lawyer under this Rule apply when the lawyer has come into possession of property of clients or third persons because the lawyer is acting or has acted as a lawyer in a client-lawyer relationship, or when the lawyer is acting as a Fiduciary, or as an escrow agent, a settlement agent or a representative payee, or as an agent, having been designated as such by a client or having been so selected as a result of a client-lawyer relationship or the lawyer's status as such. Securities should be appropriately safeguarded. All property which is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if Rule 1.15 Funds, in one or more Trust Accounts, or, if a Fiduciary entrustment, in an investment or account authorized by applicable law or a governing instrument. The responsibility for identifying an account as a Trust Account shall be that of the lawyer in whose name the account is held. Whenever a lawyer holds Rule 1.15 Funds, the lawyer must maintain at least two accounts: one in which those funds are held and another in which the lawyer's own funds may be held.

[2] A lawyer should maintain on a current basis books and records in accordance with sound accounting practices consistently applied and comply with any recordkeeping rules established by law or court order, including those records identified in paragraph (c). With little exception, funds belonging to a client or third party must be deposited into a Trust Account as defined in paragraph (a)(11), and funds belonging to the lawyer must be deposited in a business operating account maintained pursuant to paragraph (j). Thus, unless the client gives informed consent, confirmed in writing, to a different manner of handling funds advanced by the client to cover fees and expenses, the lawyer must deposit those funds into a Trust Account pursuant to paragraph (i). If the lawyer pools such funds belonging to more than one client, under paragraph (c)(2) the lawyer must keep a ledger for each individual client, regularly recording all funds received from the client and their purpose, and all disbursements of earned fees and expenses incurred. As fees become earned, the lawyer must promptly transfer those funds to the operating account. If the lawyer pools client funds after settlement or verdict in a single Trust Account, the lawyer must maintain a ledger of receipts and disbursements for each individual client, regularly recording the dates of each transaction, the identity of payors and payees, and the purpose of each disbursement, withdrawal or transfer of funds. The requirement of monthly reconciliations should deter situations where an attorney's Trust Account contains a shortfall for any significant period of time. Additionally, if a lawyer fails to maintain the records identified in paragraph (c) or to perform the required monthly reconciliations, later claims by the lawyer that a shortfall (i.e., misappropriation) resulted from negligence, even if credible, will necessarily be balanced against the lawyer's abdication of responsibility to comply with essential requirements associated with acting as a fiduciary and serving in a position of trust. The failure to maintain or timely produce the records required by paragraph (c) hampers rule-mandated or agency-promulgated investigative inquiries by the Pennsylvania Lawyers Fund for Client Security and the Office of Disciplinary Counsel and may serve as a basis for emergency temporary suspension of the lawyer's license to practice law. See Pa.R.D.E. 208(f)(1), 208(f)(5), 213(g)(2) and 221(g)(3).

[3] While normally it is impermissible to commingle the lawyer's own funds with Rule 1.15 Funds, paragraph (h) provides that it is permissible when necessary to pay service charges on that account. Accurate records must be kept regarding the funds.

[4] A lawyer's obligations with respect to funds of clients and third persons depend on the capacity in which the lawyer receives them, on whether they are Fiduciary Funds as defined in paragraph (a)(3) and on whether they are Nonqualified Funds or Qualified Funds as defined in paragraphs (a)(8) or (9) respectively. If the lawyer receives them in one of the capacities identified in paragraph (a)(10), the obligations in paragraphs (b) through (h), such as safeguarding, notification, and recordkeeping, apply. Nonqualified Funds other than Fiduciary Funds are to be placed in a Non-IOLTA Account, as defined in paragraph (a)(7), in an Eligible Institution, as defined in paragraph (a)(1), unless the client or third person specifically agrees to another investment vehicle for the benefit of the client or third person. Qualified Funds other than Fiduciary Funds must, subject to certain exceptions, be placed in an IOLTA Account defined in paragraph (a)(5).

[5] If the funds, whether Qualified Funds or Nonqualified Funds, are Fiduciary Funds, they may be placed in an investment or account authorized by the law applicable to the entrustment or authorized by the terms of the instrument governing the Fiduciary Funds. In such investment or account they shall be subject to the obligations of safeguarding, notification, and recordkeeping. This Rule is not intended to change the substantive law or procedural rules that govern Fiduciary Funds or property with the exception of the specific recordkeeping requirements, segregation of Fiduciary Funds or property, and where Fiduciary Funds are kept in an Eligible Institution, overdraft reporting pursuant to Pa.R.D.E. 221, to the extent that those requirements underscore or supplement the requirements regarding Fiduciary Funds or property. The goal of the amendments is to require all attorneys to keep appropriate records of entrusted funds, segregate such funds from the attorney's funds, account to those with an interest in the funds, and distribute the funds when due, and to permit the disciplinary system to respond when lawyers fail to comply with these standards.

[6] This Rule does not require a Fiduciary to liquidate entrusted investments or investments made in accordance with applicable law or a governing instrument or to transfer non-income producing fiduciary account balances to an IOLTA Account. This Rule does not prohibit a Fiduciary from making an investment in accordance with applicable law or a governing instrument. Funds which are controlled by a non-lawyer professional co-fiduciary shall not be considered to be Rule 1.15 Funds for the purposes of this Rule.

[7] Lawyers often receive funds from which the lawyer's fee will be paid. Unless the fee is non-refundable, it should be deposited to a Trust Account and drawn down as earned. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a Trust Account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

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

[9] Other applicable law may impose pertinent obligations upon a lawyer independent of and in addition to the obligations arising from this Rule. For example, a lawyer who receives funds as an escrow agent, a representative payee, or a Fiduciary remains subject to the law applicable to the entrustment, such as the Probate, Estates and Fiduciaries Code, Orphans' Court Rules, the Social Security Act, and to the terms of the governing instrument*.* If, during the final year of a Fiduciary entrustment, the lawyer who is serving as a Fiduciary reasonably expects that the funds cannot earn income for the client or third person in excess of the cost incurred to secure such income while the funds are held, the lawyer may, in the discretion of the lawyer, deposit the funds into the IOLTA Account of the lawyer, or may arrange to discontinue the payment of interest on the segregated Trust Account.

[10] A lawyer must participate in the Pennsylvania Lawyers Fund for Client Security established in Rule 503 of the Pennsylvania Rules of Disciplinary Enforcement. It is 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.

[11] Paragraphs (q) through (t) provide for the Interest on Lawyer Trust Account (IOLTA) program. There are further instructions relating to the IOLTA program in Rules 219 and 221 of the Pennsylvania Rules of Disciplinary Enforcement and in the Regulations of the Interest On Lawyers Trust Account Board, 204 Pa. Code, § 81.1 et seq., which are referred to as the IOLTA Regulations.

(12) For purposes of subsection (v), unidentifiable funds refers to funds accumulated in an IOLTA account that cannot be reasonably documented as belonging to a client, former client, third party, or the lawyer or law firm. Unclaimed funds refers to funds for which a client, former client, or third party appear to have an interest, but have not responded to the lawyer or law firm's reasonable efforts to encourage the client, former client, or third party to claim their rightful funds. A lawyer or law firm's reasonable efforts to identify the owner of funds include a review of transaction records, client ledgers, case files, and any other relevant fee records. Reasonable efforts to locate the owner of funds include periodic correspondence of the type contemplated by the lawyer or law firm's relationship with the client, former client, or third party. Should such correspondence prove unsuccessful, a lawyer or law firm's reasonable efforts include efforts similar to those

that would be undertaken when attempting to locate a person for service of process, such as examinations of local telephone directories, courthouse records, voter registration records, local tax records, motor vehicle records, or the use of consolidated online search services that access such records. Lawyers must maintain records of the disposition of unclaimed or unidentifiable funds and make such records available for production to the Pennsylvania Lawyers Fund for Client Security or the Office of Disciplinary Counsel in accordance with Pa. R.P.C. 1.15(c). The IOLTA Board shall make a standardized form with instructions available on the IOLTA Board's website or by request for use by lawyers submitting unclaimed or unidentifiable funds to the IOLTA Board. Conservators appointed pursuant to Pa.R.D.E. 321 should follow the procedure in Pa.R.D.E. 324(c)(1) for distributing unclaimed and unidentifiable funds.

Rule 1.16 Declining or Terminating Representation

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

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or,

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

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

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

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

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

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

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

(7) other good cause for withdrawal exists.

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

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

Comment:

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

completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

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

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 self-representation by the client.

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

Optional Withdrawal

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

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Rule 1.17 Sale of Law Practice

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

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in Pennsylvania; however, the seller is not prohibited from assisting the purchaser in the orderly transition of active client matters for a reasonable period after the closing without a fee.

(b) The seller sells the entire practice, or the entire area of practice, to one or more lawyers or law firms.

(c) The seller gives written notice to each of the seller's clients, which notice must include at a minimum:

(1) notice of the proposed transfer of the client's representation, including the identity and address of the purchaser;

(2) a statement that the client has the right to representation by the purchaser under the preexisting fee arrangements;

(3) a statement that the client has the right to retain other counsel or to take possession of the file; and

(4) a statement that the client's consent to the transfer of the representation will be presumed if the client does not take any action or does not otherwise object within 60 days of receipt of the notice.

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

(d) The fees charged clients shall not be increased by reason of the sale. Existing agreements between the seller and the client concerning fees and the scope of work must be honored by the purchaser, unless the client gives informed consent confirmed in writing.

(e) The agreement of sale shall include a clear statement of the respective responsibilities of the parties to maintain and preserve the records and files of the seller's practice, including client files.

(f) In the case of a sale by reason of disability, if a proceeding under Rule 301 of the Pennsylvania Rules of Disciplinary Enforcement has not been commenced against the seller, the seller shall file the notice and request for transfer to voluntary inactive status, as of the date of the sale, pursuant to Rule 219(j) thereof.

(g) The sale shall not be effective as to any client for whom the proposed sale would create a conflict of interest for the purchaser or who cannot be represented by the purchaser because of other requirements of the Pennsylvania Rules of Professional Conduct or rules of the Pennsylvania Supreme Court governing the practice of law in Pennsylvania, unless such conflict, requirement or rule can be waived by the client and the client gives informed consent.

(h) For purposes of this Rule, the term "seller" means an individual lawyer or a law firm that sells a law practice or an area of law practice, and includes both the personal representative or estate of a deceased or disabled lawyer and the deceased or disabled lawyer, as appropriate.

(i) Admission to or withdrawal from a law partnership or professional association, retirement plan or similar arrangement or a sale limited to the tangible assets of a law practice is not a sale or purchase for purposes of this Rule 1.17.

Comment:

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or a law firm ceases to engage in the private practice of law or ceases to practice in an area of law in Pennsylvania and other lawyers or firms take over the representation of the clients of the seller, the seller, including the personal representative or estate of a deceased or disabled lawyer, may obtain compensation for the reasonable value of the practice similar to

withdrawing partners of law firms. See Rules 5.4 and 5.6. Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

Termination of Practice by the Seller

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

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

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

Sale of Entire Practice or Entire Area of Practice

[5] This Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee generating matters. The purchasers are required to undertake all client matters in the practice, or practice area, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of nonwaivable conflicts of interest, other requirements of these Rules or rules of the Supreme Court governing the practice of law in Pennsylvania, the requirement is nevertheless satisfied.

Client Confidences

[6] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms with respect to which client consent is not required. See Rule 1.6(c)(6) and (7). Providing the purchaser access to the client-specific detailed information relating to the representation, such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given written notice of the contemplated sale and file transfer including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 60 days. If notice is given, and the client makes no response within the 60 day period, client consent to the sale will be presumed.

[5] The Rule provides the minimum notice to the seller's clients necessary to make the sale effective under the Rules of Professional Conduct. The person responsible for notice is encouraged to give sufficient information concerning the purchasing law firm or lawyer who will handle the matter so as to provide the client adequate information to make an informed decision concerning ongoing representation by the purchaser. Such information may include without limitation the buyer's background, education, experience with similar matters, length of practice, and whether the lawyer(s) are currently licensed in Pennsylvania.

[6] No single method is provided for the giving of actual written notice to the client under paragraph (c). It is up to the person undertaking to give notice to determine the most effective and efficient means for doing so. For many clients, certified mail with return receipt requested will be adequate. However, with regard to other clients, this method may not be the best method. It is up to the person responsible for giving notice to make this decision.

Notice and Consent

[7] Once an agreement is reached between the seller and the purchaser, the client must be given written notice of the contemplated sale and file transfer including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 60 days. If notice is given, and the client makes no response within the 60 day period, client consent to the sale will be presumed. The Rule provides the minimum notice to the seller's clients necessary to make the sale effective under the Rules of Professional Conduct. The seller is encouraged to give sufficient information concerning the purchasing law firm or lawyer who will handle the matter so as to provide the client adequate information to make an informed decision concerning ongoing representation by the purchaser. Such information may include without limitation the purchaser's background, education, experience with similar matters, length of practice, and whether the purchaser is currently licensed in Pennsylvania.

[8] No single method is provided for the giving of written notice to the client under paragraph (c). It is up to the seller to determine the most effective and efficient means for doing so. For many clients, certified mail with return receipt requested will be adequate. However, with regard to other clients, this method may not be the best method. It is up to the seller to make this decision.

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

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged to the clients of the practice. This protection is underscored by both paragraph (c)(2) and paragraph (d). Existing agreements between the seller and the client as to the fees and the scope of the work must be honored by the purchaser, unless the client gives informed consent confirmed in writing.

Other Applicable Ethical Standards

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

[12] If approval of the substitution of the purchasing attorney for the selling attorney is required by the Rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale. See Rule 1.16.

Applicability of the Rule

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

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

Rule 1.18 Duties to Prospective Clients

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

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal information which may be significantly harmful to that person, except as Rule 1.9 would permit with respect to information of a former client.

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

(d) When a lawyer has learned information as defined in paragraph (c), representation is permissible if:

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

(2) all of the following apply:

(i) the disqualified lawyer took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client;

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

(iii) written notice is promptly given to the prospective client.

Comment:

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer, such as in an unsolicited e-mail or other communication, in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer without any reasonable expectation that a client-lawyer relationship will be established, and is thus not a "prospective client." A person who participates in an initial consultation**,** or communicates information, with the intent to disqualify a lawyer from representing a client with materially adverse interests is not entitled to the protections of paragraphs (b) or (c) of this Rule. A person's intent to disqualify may be inferred from the circumstances.

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing

significantly harmful information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

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

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

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

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(ii) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

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

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

Rule 1.19 Lawyers Acting as Lobbyists

(a) A lawyer acting as lobbyist, as defined in any statute, resolution passed or adopted by either house of the Legislature, regulation promulgated by the Executive Branch or any agency of the Commonwealth of Pennsylvania, or ordinance enacted by a local government unit, shall comply with all regulation, disclosure, or other requirements of such statute, resolution, regulation or ordinance which are consistent with the Rules of Professional Conduct.

(b) Any disclosure of information relating to representation of a client made by the lawyer-lobbyist in order to comply with such statute, resolution, regulation or ordinance is a disclosure explicitly authorized to carry out the representation and does not violate Rule 1.6.

Comment:

[1] A "local government unit" includes county and municipal or local authorities in the Commonwealth.

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

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

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

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

Rule 2.2 [Reserved]

Rule 2.3 Evaluation for Use by Third Persons

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

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

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

Comment:

Definition

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

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

Duties Owed to Third Person and Client

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

Scope of Evaluation

[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 which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Confidential Information

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

Financial Auditors' Requests for Information

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

Rule 2.4 Lawyer Serving as Third-Party Neutral

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

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

Comment:

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

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

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

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

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

ADVOCATE

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment:

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

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

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

Rule 3.2 Expediting Litigation

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

Comment:

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

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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary

proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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

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

Comment:

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

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

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the

persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

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

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16 to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case; but a lawyer may pay, cause to be paid, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for the witness' loss of time in attending or testifying; and,

(3) a reasonable fee for the professional services of an expert witness;

(c) when appearing before a tribunal, assert the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or,

(d) 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 and such conduct is not prohibited by Rule 4.2.

Comment:

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

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

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

[4] Paragraph (d) 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 Rules 4.2 and 4.3(b).

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

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

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or,

(3) the communication involves misrepresentation, coercion, duress or harassment; or

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

Comment:

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

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

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order

but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

Rule 3.6 Trial Publicity

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

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

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

(2) information contained in a public record;

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

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

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

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

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

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

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

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

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

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

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

Comment:

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

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

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

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

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

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

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

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

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

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

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

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

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

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

Rule 3.7 Lawyer as Witness

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

(1) the testimony relates to an uncontested issue;

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

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

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

Comment:

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

Advocate-Witness Rule

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

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

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9, and 1.10 have no application to this aspect of the problem.

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

Conflict of Interest

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

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

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

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

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

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

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

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

Comment:

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable

law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

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

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

Rule 3.9 Advocate in Nonadjudicative Proceedings

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

Comment:

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers 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 must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4 and 3.5.

[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 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 only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer’s client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client’s compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client’s affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

Rule 3.10 Issuance of Subpoenas to Lawyers

A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.

Comment:

[1] It is intended that the required "prior judicial approval" will normally be withheld unless, after a hearing conducted with due regard for the need for appropriate secrecy, the court finds (1) the information sought is not protected from disclosure by Rule 1.6, the attorney-client privilege or the work product doctrine; (2) the evidence sought is relevant to the proceeding; (3) compliance with the subpoena would not be unreasonable or oppressive; (4) the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and (5) there is no other feasible alternative to obtain the information sought.

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 aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment:

Misrepresentation

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

Statements of Fact

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

Crime or Fraud by Client

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

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment:

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

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

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

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Rule 4.3 Dealing with Unrepresented Person

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

(b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

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

Comment:

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

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Rule 4.4 Respect for Rights of Third Persons

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

(b) A lawyer who receives a document, including electronically stored information, relating to the representation of the lawyer's client and knows or reasonably should know that the document, including electronically stored information, was inadvertently sent shall promptly notify the sender.

Comment:

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

[2] Paragraph (b) recognizes that lawyers sometimes receive a document, including electronically stored information, that was mistakenly sent or produced by opposing parties or their lawyers. A document,

including electronically stored information, is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document, including electronically stored information, is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document, including electronically stored information, was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document, including electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document, including electronically stored information, has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document, including electronically stored information, that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document, including electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

LAW FIRMS AND ASSOCIATIONS

Rule 5.1 Responsibilities of Partners, Managers and Supervisory Lawyers

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

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

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

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

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

Comment:

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

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

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

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

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

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

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

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

Rule 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acts 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 Assistance

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

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

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

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

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

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

Comment:

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 and Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

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

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1, 1.2, 1.4, 1.6, 5.4(a), and 5.5(a). When retaining or directing

a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

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 portion 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;

(4) a lawyer or law firm may purchase the practice of another lawyer or law firm from an estate or other eligible person or entity consistent with Rule 1.17; and,

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

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

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

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

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

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

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

(4) in the case of any form of association other than a professional corporation, the organic law governing the internal affairs of the association provides the equity owners of the association with greater liability protection than is available to the shareholders of a professional corporation.

Subparagraphs (1), (2), and (4) shall not apply to a lawyer employed in the legal department of a corporation or other organization.

Comment:

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment.

[2] 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.

[3] Paragraph (a)(4) incorporates the authorization for the sale of a law practice pursuant to Rule 1.17. Fees may be shared between a lawyer purchasing a law practice and the estate or representative of the lawyer when a law practice is sold.

[4] Paragraph (a)(5) adds a new dimension to the current Rule by specifically permitting sharing of fees with a nonprofit organization. It is a practice approved in ABA Formal Opinion 93-374.

[5] These Rules do not restrict the organization of a private law firm to certain specified forms, such as a general partnership or a professional corporation. It is permissible to organize a private law firm using any form of association desired, including, without limitations such nontraditional forms as a limited partnership, registered limited liability partnership, limited liability company or business trust, so long as all of the restrictions in paragraph (d) are satisfied.

[6] Paragraph (d)(1) recognizes that the owners of a private law firm may choose to organize their firm in such a way that it has more than one level of ownership such as, for example, a partnership composed of or including professional corporations. An ownership structure with more than one level will be permissible as long as all of the beneficial owners (as opposed to record owners) are lawyers, subject to the exception for estate administration.

[7] Underlying the restriction in paragraph (d)(4) is a recognition that there are a variety of organizational forms that may be used by a law firm that provide some level of protection from personal liability for their owners. The use of such a form of organization is permissible so long as the limitation on liability provided by that form is no more extensive than that available through the professional corporation form. See 15 Pa.C.S. § 2925. Implicit in paragraph (d)(4) is a recognition that, so long as the owners have the personal liability preserved by the professional corporation law, a limitation on other personal liability is appropriate and should be respected. The result in *First Bank & Trust Co. v. Zagoria*, 250 Ga. 844, 302 S.E.2d 674 (1983), and similar cases is rejected.

[8] Although the last sentence of subsection (d) recognizes that the restrictions in paragraph (d)(1), (2) and (4) are not properly applicable to a lawyer employed in the legal department of a corporation or other organization, it is still important to preserve the professional independence of a lawyer in that situation and thus the restriction in paragraph (d)(3) will apply to such a lawyer.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice Of Law

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

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

(1) except as authorized by these Rules, Pa.B.A.R. 302 or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

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

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

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

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

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

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

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may, subject to the requirements of Pa.B.A.R. 302, provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission, except that this paragraph (d) does not authorize a lawyer who is not admitted in this jurisdiction and who is employed by the Commonwealth, any of its political subdivisions or any of their organizational affiliates to provide legal services in this jurisdiction; or,

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

Comment:

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person’s jurisdiction.

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

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

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

[5] There are occasions in which lawyers admitted to practice in another foreign or United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

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

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any foreign or United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. It is also intended to allow military lawyers to practice law on a pro bono basis for members of the military in civil matters. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

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

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

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

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

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

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

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the

legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. A lawyer employed by the Commonwealth or one of its organizational affiliates, however, is not entitled to the exemption provided by paragraph (d) with respect to legal services provided in this jurisdiction. In the relatively rare instance that a lawyer employed by the Commonwealth or an organizational affiliate only provides legal services outside of the Commonwealth, paragraph (d) will be applicable and the lawyer will not be required to be admitted in this jurisdiction. But in most instances, lawyers employed by the Commonwealth or one of its organizational affiliates must be admitted in this jurisdiction.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

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

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

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

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

Rule 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement or an agreement for the sale of a law practice consistent with Rule 1.17; or

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

Comment:

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such 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.

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

Rule 5.7 Responsibilities Regarding Nonlegal Services

(a) A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the Rules of Professional Conduct with respect to the provision of both legal and nonlegal services.

(b) A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(c) A lawyer who is an owner, controlling party, employee, agent, or is otherwise affiliated with an entity providing nonlegal services to a recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(d) Paragraph (b) or (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.

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

Comment:

[1] For many years, lawyers have provided to their clients nonlegal services that are ancillary to the practice of law. Examples of nonlegal services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax return preparation, and patent, medical or environmental consulting. A broad range of economic and other interests of clients may be served by lawyers participating in the delivery of these services.

The Potential for Misunderstanding

[2] Whenever a lawyer directly provides nonlegal services, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the nonlegal services are performed may fail to understand that the services may not carry with them the protection normally afforded by the client-lawyer relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter.

Providing Nonlegal Services that Are Not Distinct from Legal Services

[3] Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, confusion by the recipient as to when the protection of the client-lawyer relationship applies is likely to be unavoidable. Therefore, Rule 5.7(a) requires that the lawyer providing the nonlegal services adhere to all of the requirements of the Rules of Professional Conduct.

[4] In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees, comply in all respects with the Rules of Professional Conduct. When a lawyer is obliged to accord the recipients of such nonlegal services the protection of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(b) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the nonlegal services must also in all respects comply with Rule 5.8 relating to prohibitions and restrictions on dealing in investment products, and with Rules 7.1 through 7.3, dealing with advertising and solicitation.

[5] Rule 5.7(a) applies to the provision of nonlegal services by a lawyer even when the lawyer does not personally provide any legal services to the person for whom the nonlegal services are performed if the person is also receiving legal services from another lawyer that are not distinct from the nonlegal services.

Avoiding Misunderstanding when a Lawyer Directly Provides Nonlegal Services that Are Distinct from Legal Services

[6] Even when the lawyer believes that his or her provision of nonlegal services is distinct from any legal services provided to the recipient, there is still a risk that the recipient of the nonlegal services will misunderstand the implications of receiving nonlegal services from a lawyer; the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship. Where there is such a risk of misunderstanding, Rule 5.7(b) requires that the lawyer providing the nonlegal services adhere to all the Rules of Professional Conduct, unless exempted by Rule 5.7(d).

Avoiding Misunderstanding when a Lawyer Is Indirectly Involved in the Provision of Nonlegal Services

[7] Nonlegal services also may be provided through an entity with which a lawyer is somehow affiliated, for example, as owner, employee, controlling party or agent. In this situation, there is still a risk that the recipient of the nonlegal services might believe that the recipient is receiving the protection of a client-lawyer relationship. Where there is such a risk of misunderstanding, Rule 5.7(c) requires that the lawyer involved with the entity providing nonlegal services adhere to all the Rules of Professional Conduct, unless exempted by Rule 5.7(d).

Avoiding the Application of Paragraphs (b) and (c)

[8] Paragraphs (b) and (c) specify that the Rules of Professional Conduct apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services if there is a risk that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship. Neither the Rules of Professional Conduct nor paragraphs (b) or (c) will apply, however, if pursuant to paragraph (d), the lawyer takes reasonable efforts to avoid any misunderstanding by the recipient. In this respect, Rule 5.7 is analogous to Rule 4.3(c).

[9] In taking the reasonable measures referred to in paragraph (d), the lawyer must communicate to the person receiving the nonlegal services that the relationship will not be a client-lawyer relationship. The communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication, and preferably should be in writing.

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

The Relationship Between Rule 5.7 and Other Rules of Professional Conduct

[11] Even before Rule 5.7 was adopted, a lawyer involved in the provision of nonlegal services was subject to those Rules of Professional Conduct that apply generally. For example, Rule 8.4(c) makes a lawyer responsible for fraud committed with respect to the provision of nonlegal services. Such a lawyer must also comply with Rule 1.8(a). Nothing in this rule is intended to suspend the effect of any otherwise applicable Rule of Professional Conduct such as Rule 1.7(b), Rule 1.8(a) and Rule 8.4(c).

[12] In addition to the Rules of Professional Conduct, principles of law external to the Rules, for example, the law of principal and agent, may govern the legal duties owed by a lawyer to those receiving the nonlegal services.

Rule 5.8 Dealing in Investment Products: Prohibitions and Restrictions

(a) A lawyer shall not broker, offer to sell, sell, or place any investment product unless separately licensed to do so.

(b) A lawyer shall not recommend or offer an investment product to a client or any person with whom the lawyer has a fiduciary relationship, or invest funds belonging to such a person in an investment product, if the lawyer or a person related to the lawyer:

(1) has an interest in compensation paid or provided by a person other than the client or person with whom the lawyer has a fiduciary relationship; or,

(2) has an ownership interest in the entity that sponsors, insures, underwrites, manages, or issues the investment product.

(c) For purposes of this Rule:

(1) the term "investment product" includes: an annuity contract; a life insurance contract; a commodity; a swap; an investment fund, including but not limited to a collective trust fund, a common trust fund, a real estate investment fund, and registered investment company; a security, whether or not the security is registered with any federal or state securities regulator; or an investment adviser's, bank's, trust company's, insurance company's, or other financial institution's service as an investment manager or investment adviser;

(2) "person related to the lawyer" includes a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer maintains a close familial relationship; and,

(3) the term "ownership interest" does not include shares of an issuer that has registered the shares under federal securities laws, the issuer's shares are traded on a securities exchange that is registered under federal securities laws, and the lawyer's aggregate interest in shares of all classes is less than one percent of the issuer's outstanding common shares.

Comment:

[1] Paragraph (a) prohibits a lawyer from brokering, offering to sell, selling, or placing any investment product, as defined in paragraph (c)(1), unless separately licensed to do so. Licensing and registration requirements vary by state. Before offering or selling any investment product in relation to the provision of legal services, a lawyer must consult all applicable federal and state laws to determine eligibility, licensing and regulatory requirements. Paragraph (a) neither addresses the giving of investment advice nor is intended to supplant or otherwise affect federal and state laws that either require licensing and registration in order to give investment advice or exempt lawyers from their regulatory scheme.

[2] Paragraph (b) prohibits investment situations that are fraught with a potential for a conflict of interest or that provide an opportunity for the lawyer to control or unduly influence the use or management of the funds throughout the course of the investment. Clients who place their trust in their lawyer and assume or expect that the lawyer will protect them from harm are likely to feel deceived if substantial sums of money are lost on investments pursued at the lawyer's recommendation or prompting and the lawyer or a person related to the lawyer either receives compensation or a pecuniary benefit from a person other than the client

or has an ownership interest in the entity that sponsors, insures, underwrites, manages, or issues the investment product, even when the reason for the loss is limited to unexpected market conditions. The prohibition of paragraph (b) is not imputed to other lawyers in the lawyer's firm or those lawyers' relatives.

[3] This Rule applies to a lawyer under any circumstance—whether the lawyer is providing legal services, nonlegal services that are not distinct from legal services, or nonlegal services that are distinct from legal services. See Rule 5.7(e) for the meaning of the term "nonlegal services." The prohibition of paragraph (b) is in addition to the restrictions imposed by Rules 1.7(a)(2), 1.8(a), and 5.7.

PUBLIC SERVICE

Rule 6.1 Voluntary Pro Bono Publico Service

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Comment:

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

[2] The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

[3] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession 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.

[4] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

Rule 6.2 Accepting Appointments

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

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

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or,

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

Comment:

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

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 unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

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

Rule 6.3 Membership in Legal Services Organization

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 or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or,

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

Comment:

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

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

Rule 6.4 Law Reform Activities Affecting Client Interests

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

Comment:

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

association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

Rule 6.5 Nonprofit and Court Appointed Limited Legal Services Programs

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

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

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

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

Comment:

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

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

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

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

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

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1 Communications Concerning a Lawyer's Services

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

Comment:

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

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

Rule 7.2 Advertising

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through written, recorded or electronic communications, including public media, not within the purview of Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used. This record shall include the name of at least one lawyer responsible for its content.

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

(1) the reasonable cost of advertisements or written communications permitted by this Rule;

(2) the usual charges of a lawyer referral service or other legal service organization; and,

(3) for a law practice in accordance with Rule 1.17.

(d) No advertisement or public communication shall contain an endorsement by a celebrity or public figure.

(e) An advertisement or public communication that contains a paid endorsement shall disclose that the endorser is being paid or otherwise compensated for his or her appearance or endorsement.

(f) A non-lawyer shall not portray a lawyer or imply that he or she is a lawyer in any advertisement or public communication; nor shall an advertisement or public communication portray a fictitious entity as a law firm, use a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated together in a law firm if that is not the case.

(g) An advertisement or public communication shall not contain a portrayal of a client by a non-client; the re-enactment of any events or scenes; or, pictures or persons, which are not actual or authentic, without a disclosure that such depiction is a dramatization.

(h) Every advertisement that contains information about the lawyer's fee shall be subject to the following requirements:

(1) Advertisements that state or indicate that no fee shall be charged in the absence of recovery shall disclose that the client will be liable for certain expenses in addition to the fee, if such is the case; and,

(2) A lawyer who advertises a specific fee or hourly rate or range of fees for a particular service shall honor the advertised fee for at least ninety (90) days; provided that for advertisements in media published annually, the advertised fee shall be honored for no less than one (1) year following initial publication unless otherwise stated as part of the advertisement.

(i) All advertisements and written communications shall disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside the city or town, the county in which the office is located must be disclosed.

(j) A lawyer shall not, directly or indirectly (whether through an advertising cooperative or otherwise), pay all or any part of the costs of an advertisement by a lawyer not in the same firm or by any for-profit entity other than the lawyer's firm, unless the advertisement discloses the name and principal office address of each lawyer or law firm involved in paying for the advertisement and, if any lawyer or law firm will receive referrals from the advertisement, the circumstances under which referrals will be made and the basis and criteria on which the referral system operates.

(k) A lawyer shall not, directly or indirectly, advertise that the lawyer or his or her law firm will only accept, or has a practice limited to, particular types of cases unless the lawyer or his or her law firm handles, as a principal part of his, her or its practice, all aspects of the cases so advertised from intake through trial. If a lawyer or law firm advertises for a particular type of case that the lawyer or law firm ordinarily does not handle from intake through trial, that fact must be disclosed. A lawyer or law firm shall not advertise as a pretext to refer cases obtained from advertising to other lawyers.

Comment:

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

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

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising,

against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic 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. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.

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

Record of Advertising

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

Paying Others to Recommend a Lawyer

[6] Subject to the limitations set forth under paragraphs (c) and (j), a lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (c)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the cost of print, directory listings, online directory listings, newspaper ads, television and radio air time, domain name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public relations personnel, business development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) and 5.4, and the lead generator's communications are consistent with Rule 7.1. To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of non-lawyers and Rule 8.4(a). This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

Endorsements

[7] Paragraphs (d) and (e) require truthfulness in any advertising in which an endorsement of a lawyer or law firm is made. The prohibition against endorsement by a celebrity or public figure is consistent with the purpose of Rule 7.1 to avoid the creation of an unjustified expectation of a particular legal result on the part of a prospective client.

Portrayals

[8] Paragraphs (f) and (g), similarly, require truth in advertising when portrayals are made part of legal advertising. A portrayal, by its nature, is a depiction of a person, event or scene, not the actual person, event or scene itself. Paragraphs (f) and (g) were added to ensure that any portrayals used in advertising legal services are not misleading or overreaching. Creating the impression that lawyers are associated in a firm where that is not the case was considered inherently misleading because it suggests that the various lawyers involved are available to support each other and contribute to the handling of a case. Paragraph (f) accordingly prohibits advertisements that create the impression of a relationship among lawyers where none

exists, such as by using a fictitious name to refer to the lawyers involved if they are not associated together in a firm.

Disclosure of Fees and Client Expenses

[9] Consistent with the public's need to have an accurate dissemination of information about the cost of legal services, paragraph (h) requires disclosure of a client's responsibility for payment of expenses in contingent fee matters when the client will be required to pay any portion of expenses that will be incurred in the handling of a legal matter.

[10] Under the same rationale, paragraph (h) imposes minimum periods of time during which advertised fees must be honored.

Disclosure of Geographic Location of Practice

[11] Paragraph (i) requires disclosure of the geographic location in which the advertising lawyer's primary practice is situated. This provision seeks to rectify situations in which a person seeking legal services is misled into concluding that an advertising lawyer has his or her primary practice in the client's hometown when, in fact, the advertising lawyer's primary practice is located elsewhere. Paragraph (i) ensures that a client has received a disclosure as to whether the lawyer he or she ultimately chooses maintains a primary practice located outside of the client's own city, town or county.

Disclosure of Payment of Advertising Costs

[12] Paragraph (j) prohibits lawyers and law firms from paying advertising costs of independent lawyers or other persons unless disclosure is made in the advertising of the name and address of each paying lawyer or law firm, as well as of the business relationship between the paying parties and the advertising parties.

[13] Advertisements sponsored by advertising cooperatives (where lawyers or law firms pool resources to buy advertising space or time) are considered advertisements by each of the lawyers participating in the cooperative and accordingly will be subject generally to all of the provisions of these Rules on advertising. Advertising cooperatives have been referred to expressly in paragraph (j) to make clear that references to ''indirect'' actions are intended to have a wide scope and include advertising cooperatives and similar arrangements. Thus, advertising cooperatives and similar arrangements are permissible, but only if the required disclosures are made. In the case of cooperative arrangements, the required disclosures must include the basis or criteria on which lawyers or law firms participating in the cooperative will be referred cases, e.g., chronological order of calls, geographic location, etc.

[14] Paragraph (k) prohibits a lawyer from misleading the public by giving the impression in an advertisement that the lawyer or his or her law firm specializes in a particular area of the law unless the lawyer or his or her law firm handles the type of case advertised as a principal part of the practice of the lawyer or law firm. For example, where a lawyer advertises for ''personal injury cases'' or ''serious personal injury cases'' or ''death cases only'' those types of cases must, in fact, constitute a principal part of the practice of the lawyer or his or her firm.

[15] Paragraph (k) also prohibits advertising for the primary purposes of obtaining cases that can be referred or brokered to another lawyer. Obviously, a lawyer is permitted and encouraged to refer cases to other lawyers where that lawyer does not have the skill or expertise to properly represent a client. However, it is misleading to the public for a lawyer or law firm, with knowledge that the lawyer or law firm will not be handling a majority of the cases attracted by advertising, to nonetheless advertise for those cases only to refer the cases to another lawyer whom the client did not initially contact. In addition, a lawyer who advertises for a particular type of case may not mislead the client into believing that the lawyer or law firm will fully represent that client when, in reality, the lawyer or law firm refers all of its non-settling cases to another law firm for trial.

Rule 7.3 Solicitation of Clients

(a) A lawyer shall not solicit in-person or by intermediary professional employment from a person with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's

doing so is the lawyer's pecuniary gain, unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. The term "solicit" includes contact in-person, by telephone or by real-time electronic communication, but, subject to the requirements of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements.

(b) A lawyer may contact, or send a written communication to, the target of the solicitation for the purpose of obtaining professional employment unless:

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

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer;

(3) the communication involves coercion, duress, or harassment; or,

(4) the communication is a solicitation to a party who has been named as a defendant or respondent in a domestic relations action. In such cases, the lawyer shall wait until proof of service appears on the docket before communication with the named defendant or respondent.

Comment:

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of a trained advocate, in a direct interpersonal encounter. The person who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person's judgment.

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

[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule

7.3(a) is not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(3), or which involves contact with someone who has made known to the lawyer desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(2) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).

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

[8] In this instance, the term "domestic relations actions" includes the actions governed by the Family Court Rules, *see* Pa.R.C.P. No. 1931(a), and actions pursuant to the Protection of Victims of Sexual Violence or Intimidation Act, s*ee* 42 Pa.C.S. §§ 62A03 *et seq*. In such cases, a defendant/respondent party's receipt of a lawyer's solicitation prior to being served with the complaint can increase the risk of a violent confrontation between the parties. The prohibition in RPC 7.3(b)(4) against any solicitation prior to proof of service appearing on the docket is intended to reduce any such risk and allow for the plaintiff to take any appropriate steps.

Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state that the lawyer is a specialist except as follows:

(1) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;

(2) a lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty," or a substantially similar designation;

(3) a lawyer who has been certified by an organization approved by the Supreme Court of Pennsylvania as a certifying organization in accordance with paragraph (b) may advertise the certification during such time as the certification of the lawyer and the approval of the organization are both in effect;

(4) a lawyer may communicate that the lawyer is certified in a field of practice only when that communication is not false or misleading and that certification is granted by the Supreme Court of Pennsylvania.

(b) Upon recommendation of the Pennsylvania Bar Association, the Supreme Court of Pennsylvania may approve for purposes of paragraph (a) an organization that certifies lawyers, if the Court finds that:

(1) advertising by a lawyer of certification by the certifying organization will provide meaningful information, which is not false, misleading or deceptive, for use of the public in selecting or retaining a lawyer; and

(2) certification by the organization is available to all lawyers who meet objective and consistently applied standards relevant to practice in the area of the law to which the certification relates.

The approval of the certifying organization shall be for such period not longer than five (5) years as the Court shall order, and may be renewed upon recommendation of the Pennsylvania Bar Association.

Comment:

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services; for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a ''specialist'' is not permitted unless the lawyer has been certified as a specialist by a certifying organization approved under the procedure of paragraph (b). The standards in paragraph (b)(1) and (2) are intended to comply with the requirements for advertising claims of specialization set forth in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U. S. 91, 110 L.Ed.2d 83, 110 S.Ct. 2281 (1990).

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, government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1. If otherwise lawful a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.

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

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

(d) Lawyers shall not state or imply that they practice in a partnership or other organization unless that is the fact.

Comment:

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

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

Rule 7.6 [Reserved]

Rule 7.7 Lawyer Referral Service

(a) A lawyer shall not accept referrals from a lawyer referral service if the service engaged in communication with the public or direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer.

(b) A "lawyer referral service" is any person, group of persons, association, organization or entity that receives a fee or charge for referring or causing the direct or indirect referral of a potential client to a lawyer drawn from a specific group or panel of lawyers.

Comment:

[1] This Rule prevents a lawyer from circumventing the Rules of Professional Conduct by using a lawyer referral service or similar organization which would not be subject to the Rules of Professional Conduct. A lawyer may pay the usual charges of a lawyer referral service. A lawyer may not, however, share legal fees with a non-lawyer. See Rule 5.4(a).

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 person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment:

[1] The duty imposed by this Rule extends to persons seeking admission 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 to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and 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, including Rule 1.6 and, in some cases, Rule 3.3.

Rule 8.2 Statements Concerning Judges and Other Adjudicatory Officers

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

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct and/or the Rules Governing Standards of Conduct for Magisterial District Judges, as applicable.

Comment:

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

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

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

Rule 8.3 Reporting Professional Misconduct

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

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

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment:

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

[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 obligated 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 duty to report involves only misconduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

[4] While a lawyer may report professional misconduct at any time, the lawyer must report misconduct upon acquiring actual knowledge of misconduct. The discretionary reporting of misconduct should not be undertaken for purposes of tactical advantage over another lawyer, to punish or inconvenience another for a personal or professional slight, or to harass another lawyer.

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

[6] 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.

[7] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and to the public. The Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

[8] In addition to reporting a violation of another lawyer, a lawyer is required by the Pennsylvania Rules of Disciplinary Enforcement to self-report in certain circumstances. Pa.R.D.E. 214(a) provides that an attorney convicted of a crime shall report the fact of that conviction within 20 days to the Office of Disciplinary Counsel. For purposes of that rule, the term "crime" means an offense that is punishable by imprisonment in the jurisdiction of conviction, whether or not a sentence of imprisonment is actually imposed. It does not include parking violations or summary offenses, both traffic and non-traffic, unless a term of imprisonment is actually imposed.

[9] Likewise, Pa.R.D.E. 216(e) requires an attorney who has been transferred to disability inactive status or disciplined in another court or by any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys by any state or territory of the United States or of the District of Columbia, a United States court, or by a federal administrative agency or a military tribunal, by suspension, disbarment, or revocation of license or pro hac vice admission, or who has resigned from the bar or otherwise relinquished his or her license to practice while under disciplinary investigation in another jurisdiction, to report the fact of that transfer, suspension, disbarment, revocation or resignation to the Disciplinary Board of the Supreme Court of Pennsylvania within 20 days after the date of the order, judgment or directive imposing or confirming the discipline or transfer to disability inactive status.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

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

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

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

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

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

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

(g) in the practice of law, knowingly engage in conduct constituting harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

Comment:

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

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

[3] For the purposes of paragraph (g), conduct in the practice of law includes (i) interacting with witnesses, coworkers, court personnel, lawyers, or others, while appearing in proceedings before a tribunal or in connection with the representation of a client; (ii) operating or managing a law firm or law practice; or (iii) participation in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal education credits are offered. The term "the practice of law" does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in (i)-(iii).

[4] "Harassment" means conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g). "Harassment" includes sexual harassment, which includes but is not limited to sexual advances, requests for sexual favors, and other conduct of a sexual nature that is unwelcome.

[5] "Discrimination" means conduct that a lawyer knows manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in paragraph (g); to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.

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

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

Rule 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 not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

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

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

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

Comment:

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See Pennsylvania Rules of Disciplinary Enforcement 201(a)(6) and 216(d). A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

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. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

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

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

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

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

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

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Excerpts from "General Information for Victims & Witnesses" by the United States Attorney's Office for the Northern District of Illinois

4. Discussing the case with others

United States Attorney's Offices often receive calls from witnesses asking about their rights if a defense attorney or a defense investigator contacts them. Witnesses do not belong to either side of a criminal case. Thus, even though you may first be subpoenaed by the prosecution or by the defense, it is proper for the other side to try to talk to you. While it is the prosecution that is asking for your cooperation in this case, you may be contacted by the defense lawyer or an investigator for the defendant for an interview. While you may discuss the case with them if you wish to do so, you also have the right not to talk to them. The choice is entirely yours.

If you do agree to an interview with a representative of the government or defense, here are some suggestions on how to deal with it.

First and foremost, you should always tell the truth, the whole truth, and nothing but the truth.

If you are asked to give a statement or to discuss the case, you have the right to know if the person asking you is working for the prosecution or the defendant. You have the right to see and keep a copy of that person's business card.

If you give a statement to a lawyer or an investigator for the government or the defense, you do not have to sign the statement. However, any statement that you make during an interview, even if not signed, may be used to try to challenge or discredit your testimony in court if your testimony differs from that statement. This applies even to oral statements that are not reduced to writing at all.

If you decide to sign a statement, make sure you read it over very carefully beforehand and correct any mistakes.

Ask to have a copy of any statement that you make. Whether you sign the statement or not, you may tell the lawyer or investigator that you will refuse to give a statement unless you receive a copy of it.

If you elect to have an interview with the defendant's lawyer or investigator, you may want to have present an additional person chosen by you to witness the interview. If you have an interview with the defendant's lawyer or investigator, please let the United States Attorney's Office know about the interview before it happens.

Before the trial begins, you may discuss the case with anyone you wish. The choice is yours. Be sure you know to whom you are talking when you discuss the case. We encourage you not to discuss the case with members of the press, since you are a potential witness in a criminal case and the rights of the government and the defendant to a fair trial could be jeopardized by pretrial publicity.

Once the trial begins, witnesses may not tell each other what was said during the testimony until after the case is over. Thus, do not ask other witnesses about their testimony and do not volunteer information about your own.