Immigration, Love, and Ethics — Who Could Ask for More ?

A New York American Inn of Court Presentation

Virtually Presented Courtesy of

Berry Appleman & Leiden LLP

May 19, 2021

Please see attached Immigration Form I-485, Section 8, and Excerpts (next pages)

Suggested Additional Reading

a. Nathan M. Crystal, Developing a Philosophy of Lawyering, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75 (2000).

b. Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," Seton Hall Law Review: Vol. 45 : Iss. 2 , Article 3.

c. Kenneth Craig Dobson, "Yes, No, or Maybe: The Importance of Developing a Philosophy of Lawyering in an Era of Immigration Upheaval." AILA Doc. No. 17092920, (2017).

http://www.ailany.org/wp-content/uploads/2017/10/2017-10-3-Craigs-Philosophy-of-Lawyering-Article.pdf

d. Cyrus Mehta Blog Post - Crime Without Punishment: Have You Ever Committed A Crime For Which You Have Not Been Arrested?
http://blog.cyrusmehta.com/2012/07/crime-without-punishment-have-you-ever_29.html

e. NEW YORK RULES OF PROFESSIONAL CONDUCT

https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCRR%20Part%201200.pdf

25. Have you **EVER** been arrested, cited, charged, or detained for any reason by any law enforcement official (including but not limited to any U.S. immigration official or any official of the U.S. armed forces or U.S. Coast Guard)?

☐ Yes ☐ No

26. Have you **EVER** committed a crime of any kind (even if you were not arrested, cited, charged with, or tried for that crime)?

☐ Yes ☐ No

27. Have you **EVER** pled guilty to or been convicted of a crime or offense (even if the violation was subsequently expunged or sealed by a court, or if you were granted a pardon, amnesty, a rehabilitation decree, or other act of clemency)?

☐ Yes ☐ No

28. Have you **EVER** been ordered punished by a judge or had conditions imposed on you that restrained your liberty (such as a prison sentence, suspended sentence, house arrest, parole, alternative sentencing, drug or alcohol treatment, rehabilitative programs or classes, probation, or community service)?

☐ Yes ☐ No

29. Have you **EVER** been a defendant or the accused in a criminal proceeding (including pre-trial diversion, deferred prosecution, deferred adjudication, or any withheld adjudication)?

☐ Yes ☐ No

30. Have you **EVER** violated (or attempted or conspired to violate) any controlled substance law or regulation of a state, the United States, or a foreign country?

☐ Yes ☐ No

Part 8. General Eligibility and Inadmissibility Grounds (continued)

Answer **Item Numbers 14. - 80.b.** Choose the answer that you think is correct. If you answer "Yes" to any questions **(or if you answer "No," but are unsure of your answer)**, provide an explanation of the events and circumstances in the space provided in **Part 14. Additional Information**.

14. Have you **EVER** been denied admission to the United States? ☐ Yes ☐ No

15. Have you **EVER** been denied a visa to the United States? ☐ Yes ☐ No

16. Have you **EVER** worked in the United States without authorization? ☐ Yes ☐ No

17. Have you **EVER** violated the terms or conditions of your nonimmigrant status? ☐ Yes ☐ No

18. Are you presently or have you **EVER** been in removal, exclusion, rescission, or deportation proceedings? ☐ Yes ☐ No

19. Have you **EVER** been issued a final order of exclusion, deportation, or removal? ☐ Yes ☐ No

20. Have you **EVER** had a prior final order of exclusion, deportation, or removal reinstated? ☐ Yes ☐ No

21. Have you **EVER** held lawful permanent resident status which was later rescinded? ☐ Yes ☐ No

22. Have you **EVER** been granted voluntary departure by an immigration officer or an immigration judge but failed to depart within the allotted time? ☐ Yes ☐ No

23. Have you **EVER** applied for any kind of relief or protection from removal, exclusion, or deportation? ☐ Yes ☐ No

24.a. Have you **EVER** been a J nonimmigrant exchange visitor who was subject to the two-year foreign residence requirement? ☐ Yes ☐ No

If you answered "Yes" to **Item Number 24.a.**, complete **Item Numbers 24.b. - 24.c.** If you answered "No" to **Item Number 24.a.**, skip to **Item Number 25.**

24.b. Have you complied with the foreign residence requirement? ☐ Yes ☐ No

24.c. Have you been granted a waiver or has Department of State issued a favorable waiver recommendation letter for you? ☐ Yes ☐ No

Criminal Acts and Violations

For **Item Numbers 25. - 45.**, you must answer "Yes" to any question that applies to you, even if your records were sealed or otherwise cleared, or even if anyone, including a judge, law enforcement officer, or attorney, told you that you no longer have a record. You must also answer "Yes" to the following questions whether the action or offense occurred here in the United States or anywhere else in the world. If you answer "Yes" to **Item Numbers 25. - 45.**, use the space provided in **Part 14. Additional Information** to provide an explanation that includes why you were arrested, cited, detained, or charged; where you were arrested, cited, detained, or charged; when (date) the event occurred; and the outcome or disposition (for example, no charges filed, charges dismissed, jail, probation, community service).

25. Have you **EVER** been arrested, cited, charged, or detained for any reason by any law enforcement official (including but not limited to any U.S. immigration official or any official of the U.S. armed forces or U.S. Coast Guard)? ☐ Yes ☐ No

26. Have you **EVER** committed a crime of any kind (even if you were not arrested, cited, charged with, or tried for that crime)? ☐ Yes ☐ No

27. Have you **EVER** pled guilty to or been convicted of a crime or offense (even if the violation was subsequently expunged or sealed by a court, or if you were granted a pardon, amnesty, a rehabilitation decree, or other act of clemency)? ☐ Yes ☐ No

NOTE: If you were the beneficiary of a pardon, amnesty, a rehabilitation decree, or other act of clemency, provide documentation of that post-conviction action.

28. Have you **EVER** been ordered punished by a judge or had conditions imposed on you that restrained your liberty (such as a prison sentence, suspended sentence, house arrest, parole, alternative sentencing, drug or alcohol treatment, rehabilitative programs or classes, probation, or community service)? ☐ Yes ☐ No

29. Have you **EVER** been a defendant or the accused in a criminal proceeding (including pre-trial diversion, deferred prosecution, deferred adjudication, or any withheld adjudication)? ☐ Yes ☐ No

30. Have you **EVER** violated (or attempted or conspired to violate) any controlled substance law or regulation of a state, the United States, or a foreign country? ☐ Yes ☐ No

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Developing a Philosophy of Lawyering

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DEVELOPING A PHILOSOPHY OF LAWYERING

NATHAN M. CRYSTAL*

Almost all significant ethical decisions that lawyers face in the practice of law involve discretion. For some of these decisions, no rules or standards guide lawyers. A lawyer's decisions as to type of practice, location, and organizational form (solo practice, law firm, corporation, or government office) are examples of standardless discretionary decisions. Even decisions involving clients to which rules of professional conduct[1] apply typically provide lawyers either with unlimited discretion or with discretion guided only by general standards. Consider, for example, a lawyer's decision about whether to represent a client,[2] or how to counsel a client (if at all) about nonlegal considerations that might affect a client's decision.[3]

Because discretion is so pervasive in the practice of law, lawyers develop, either thoughtfully or haphazardly, a general approach for making these decisions. I use the term "philosophy of lawyering" to refer to the basic principles that a lawyer uses to deal with the discretionary decisions that the lawyer faces in the practice of law.[4]

For a number of years scholars of the legal profession have debated the merits of various philosophies of lawyering. The beginning point for this debate has been called "neutral partisanship" or the "dominant view" of the lawyer's role. Under a philosophy of neutral partisanship, lawyers zealously represent their

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1. In this article I use the current version of the American Bar Association's Model Rules of Professional Conduct. More than 40 states have adopted the Model Rules, although most states have approved some variations from the ABA's Model Rules. For a listing of the states that have adopted the Model Rules, the dates of their adoption, and a summary of variations from the ABA's Model Rules, see LAWYERS MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 1:3 (1998). New York's Code of Professional Responsibility is based in form on the ABA's 1969 Code, but actually is a medley of the Code, the Model Rules, and provisions unique to New York. California has adopted its own Rules of Professional Conduct that vary considerably from the ABA's Model Rules.

2. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 cmt. 1 (1997).

3. *See id.* Rule 2.1.

4. *See infra* notes 57-63 and accompanying text.

clients without moral responsibility for their actions. The only restraints on neutral partisans are specific legal and professional obligations.

Critics of neutral partisanship have proposed a number of alternative philosophies. In broad terms, these alternative philosophies draw their inspiration from moral values or from social or professional norms.[5] William Simon's *The Practice of Justice*[6] is the most recent comprehensive presentation of a philosophy of lawyering. Despite this extensive debate, no philosophy of lawyering has been able to gain consensus within the profession, and none appears likely to do so.

This state of affairs has created an individual and professional conundrum. The discretionary nature of practice demands that lawyers adopt a philosophy of lawyering. Yet, the lack of professional consensus means that lawyers receive little guidance as to how to go about developing such a philosophy.

Part I of this paper describes the wide range of discretionary decisions that lawyers face. Part II presents the concept of a philosophy of lawyering and summarizes the major scholarly efforts to present and defend different philosophies of lawyering. Part III offers a mechanism by which the organized bar can provide institutional support for lawyers to develop philosophies of lawyering without at the same time mandating a choice among different philosophies. The approach has four central elements: (1) bar application statement of a philosophy of lawyering; (2) annual certification and revision of a lawyer's philosophy of lawyering; (3) required notification to clients of a lawyer's philosophy of lawyering; (4) disciplinary actions against lawyers for flagrant violation of the terms of their philosophy of lawyering. I conclude with responses to criticisms that I expect to be leveled against my proposal.

I. Discretion in the Practice of Law

Almost all significant ethical decisions that lawyers face related to the practice of law involve discretion. I use the term "discretion" loosely to refer to a relative degree of freedom to decide how to act, as opposed to decisions based on specific rules.[7] The rules of ethics requiring written contingent fee

5. *See infra* notes 71-94 and accompanying text.

6. William H. Simon, The Practice of Justice: A Theory of Lawyers' Ethics (1998).

7. The modern critique of legal formalism has called into question the proposition that rules can ever determine results. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 Harv. L. Rev. 468 (1990). The validity of this critique is

agreements[8] or prohibiting commingling of funds are two examples of specific rules that are designed to eliminate discretion.[9] Within the general category of discretion, distinctions can be drawn based on the degree of discretion that lawyers possess. Sometimes lawyers have very broad discretion that is unrestricted by a standard. Lawyers' choice of area of practice and their amount of pro bono work are examples. In other situations, lawyers have weaker discretion, restricted by or "grounded" in a general standard.[10] The conflict of interest rules provide an example.[11]

The first decision that a lawyer faces in connection with a legal matter is whether to represent the potential client. Rules of professional conduct provide lawyers broad, largely unrestricted discretion in the decision to undertake representation. The comment to Model Rule 6.2 provides: "A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant."[12] The rule and its comments recognize two narrow qualifications to this broad grant of discretion. The rule states: "A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause."[13] The comment provides that "[a]ll lawyers have a responsibility to assist in providing pro bono publico service."[14] Rule 6.1, which deals with pro bono work, however, is itself aspirational and discretionary rather than mandatory.[15]

While a lawyer's decision about who to represent is largely unrestricted by rules, the institutional context in which lawyers practice may limit or eliminate their discretion to accept or reject cases. For example, associates in law firms are generally required to handle matters assigned by their employers. A firm may tolerate occasional complaints or refusals to accept cases, but associates who persist in such conduct will be told to seek employment elsewhere.

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not essential, however, to my argument. If the critique is correct in whole or in part, then lawyers have an even broader area of discretion than described in this article. If the critique is false, lawyers nonetheless have a substantial degree of discretion, particularly with regard to important ethical decisions.

8. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(c) (1997).

9. *See id.* Rule 1.15(a).

10. *See* Bruce A. Green, *The Role of Personal Values in Professional Decision-making*, 11 GEO. J. LEGAL ETHICS 19 (1997).

11. *See infra* notes 17-21 and accompanying text.

12. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 cmt. 1 (1997).

13. *Id.* Rule 6.2.

14. *Id.* Rule 6.2 cmt. 1.

15. *See id.* Rule 6.1.

Unrestricted discretion like that exercised by lawyers in choosing clients may be challenged and, over time, may become subject to restrictions. *Stropnicky v. Nathanson*[16] is an example of such a development. In *Stropnicky*, a hearing commissioner with the Massachusetts Commission Against Discrimination sanctioned a female domestic relations lawyer under the state's public accommodations law for declining to represent a male party in divorce proceedings.

Assuming that a lawyer is willing to represent a client, the lawyer must decide whether the representation involves a conflict of interest. The two principal conflicts of interest rules are Model Rules 1.7 and 1.9. Rule 1.7 deals with conflicts of interest among current clients or when the lawyer has a personal conflicting interest, while Rule 1.9 regulates representation against former clients. Many lawyers may decide not to undertake representation against a current or former client pursuant to their general discretionary authority to refuse to handle a matter. For some lawyers, this decision may be a matter of principle; they believe that it is unseemly and disloyal to undertake representation against a current or former client. Other lawyers may base such a refusal on self-protection; they realize that if they represent a party against a current or former client, they increase the risk that they will be subject to a disqualification motion, a disciplinary charge, or a malpractice suit.

Even if a lawyer decides that she is not opposed to undertaking representation against a current or former client, either as a matter of principle or prudence, the lawyer must still analyze the application of the conflict of interest rules. A lawyer may undertake representation against a current client despite the existence of an actual or potential conflict if "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client" and each client consents after consultation.[17] However, "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."[18] "Consultation," as defined by the Model Rules, "denotes communication of information reasonably sufficient to

16. No. 91-BPA-0061 (Mass. Comm'n Against Discrimination Feb. 25, 1997). *See* Steve Berenson, *Politics and Plurality in a Lawyer's Choice of Clients: The Case of* Stropnicky v. Nathanson, 35 SAN DIEGO L. REV. 1 (1998); Symposium, *A Duty to Represent? Critical Reflections on* Stropnicky v. Nathanson, 20 W. NEW ENG. L. REV. 5 (1998).

17. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1997).

18. *Id.* Rule 1.7 cmt. 5.

permit the client to appreciate the significance of the matter in question."[19] Lawyers must exercise discretion in deciding whether a "disinterested lawyer" would refuse to handle the matter and in determining what information is reasonably sufficient to permit the client to make an informed decision about consenting to the representation.

A lawyer may not undertake representation against a former client "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."[20] The generality of this standard requires the exercise of professional discretion. In particular, courts have adopted widely differing definitions of the "substantial relationship" test.[21]

During the course of representation, lawyers must counsel their clients about various issues. The Model Rules provide lawyers a wide range of discretion about the scope of advice they give: "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."[22] The comments elaborate on the scope of lawyers' discretion. Lawyers should not be deterred from giving advice because it may be "unpalatable" to clients.[23] Lawyers may refer to moral and ethical considerations because purely technical advice is often inadequate.[24] Lawyers may often need to raise issues on their own, even when clients have not asked for advice.[25] Even when a matter involves issues within the expertise of other professionals, a lawyer may need to help the client choose among conflicting opinions.[26]

In litigation, decisions must be made about the objectives of representation and the means used to achieve those objectives. Decisions about objectives of representation (for example, whether to plead guilty in a criminal case or to accept an offer of settlement in a civil case) are for the client to make after consul-

19. *Id.* Terminology.

20. *Id.* Rule 1.9(a).

21. *See* Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677 (1997).

22. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1997). For an example of the wide range of discretion available to lawyers in compliance counseling, see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 26-30 (1988).

23. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. 1 (1997).

24. *See id.* cmt. 2.

25. *See id.* cmts. 3, 5.

26. *See id.* cmt. 4.

tation with the lawyer.[27] Decisions about tactical matters, the means to be used to achieve the client's objectives, are within the province of the lawyer after consultation with the client when feasible.[28] Thus lawyers have discretion about matters such as the formulation of legal theories, the nature and scope of discovery, witnesses and documents to introduce at trial, and objections to admissibility of evidence.[29]

The rules dealing with false evidence illustrate the scope of lawyer discretion. A lawyer *shall not* offer evidence the lawyer "knows" is false.[30] However, a lawyer *may* refuse to offer evidence that the lawyer "reasonably believes is false."[31] Because lawyers will rarely know when evidence is false,[32] the discretionary rule will apply in almost all cases.

In some cases, particularly ones in which there is substantial public interest, lawyers may face decisions about whether to engage in trial publicity on behalf of their clients. Model Rule 3.6 regulates extrajudicial statements by lawyers, but the rule imposes only modest restrictions on such communications. Lawyers are prohibited from making extrajudicial statements only when those statements have "a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[33] In addition, lawyers have a right to reply to prejudicial pretrial publicity to the extent necessary to mitigate such publicity.[34] Thus the wisdom, timing, and content of extrajudicial statements are largely within lawyers' discretion.[35]

A lawyer's discretion with regard to tactical matters is, of course, restricted, not unbounded. A client can discharge a lawyer if the client does not approve of the way the lawyer is han-

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27. *See id.* Rule 1.2(a).

28. *See id.*

29. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32(3) cmt. e (Proposed Final Draft No. 1, 1996).

30. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1997).

31. *Id.* Rule 3.3(c).

32. Most courts and the Restatement have taken the view that the test for knowledge is whether the lawyer has a "firm factual basis" for believing the evidence is false. *See, e.g.*, United States v. Long, 857 F.2d 436, 445 (8th Cir. 1988); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 180 cmt. c (Tentative Draft No. 8, 1997). Some courts have suggested an even higher standard of beyond a reasonable doubt. *See, e.g.*, Shockley v. State, 565 A.2d 1373, 1379 (Del. 1989).

33. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1997).

34. *See id.* Rule 3.6(c).

35. *See* Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627 (1996) (discussing factors that lawyers should consider in their discretionary decisions to engage in extrajudicial statements).

dling the case.[36] Lawyers who fail to exercise their discretion reasonably may also be subject to malpractice liability.[37]

The rules of professional conduct assume that lawyers normally deal with clients who are competent to make decisions when receiving advice from their lawyers. Many lawyers, however, regularly represent clients who have marginal capacity. Such incapacity can result from substance abuse, mental retardation, or youth. The Model Rules give lawyers a broad degree of discretion for dealing with such clients, providing that lawyers should attempt to maintain a normal client-attorney relationship as far as reasonably possible.[38] If the lawyer concludes that a client "cannot adequately act in the client's own interest," the lawyer may take such steps as the lawyer considers appropriate to protect the client's interest.[39] The comments note: "Evaluation of these considerations is a matter of professional judgment on the lawyer's part."[40]

One of the most difficult decisions a lawyer can face in practice deals with revelation of confidential information to prevent a client from committing a wrongful act or to rectify the consequences of a client's wrong. Unlike the rules discussed previously, Model Rule 1.6 provides lawyers with a quite restricted area of discretion to reveal confidential information. Rule 1.6 allows a lawyer to reveal confidential information "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[41] Under the rule, a lawyer does not have discretion to reveal confidential information to prevent a horrible injustice, such as punishment of an innocent person, because the revelation would not prevent the client from committing a criminal act.[42] The rule also does not allow a lawyer to reveal confidential information about a client's past criminal conduct even if the client's crimes have ongoing harmful ramifications.[43] Rule 1.6 would, however,

36. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(3) (1997).

37. *See generally* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE (4th ed. 1996).

38. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1997).

39. *Id.* Rule 1.14(b).

40. *Id.* Rule 1.14 cmt. 3.

41. *Id.* Rule 1.6(b)(1).

42. *See id.* The *Leo Frank* case is the most famous example of such a situation. For a discussion of the *Frank* case, see NATHAN M. CRYSTAL, AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY ch. 1 (1998). *See also* Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 LOY. L.A. L. REV. 1543 (1996).

43. Lawyers Frank Armani and Francis Belge faced such a situation in the famous "buried bodies" case. For a discussion of the case, see RICHARD ZITRIN

allow a lawyer to reveal confidential information if the client threatened to kill someone. The comments to Rule 1.6 emphasize the discretionary aspects of the lawyer's decision to reveal confidential information. The comments point out that it is often difficult for the lawyer to "know" whether the client intends to carry out a threat.[44] Because the exercise of discretion requires lawyers to weigh a number of factors, the lawyer's decision to reveal or not to reveal confidential information should not be reexamined.[45]

Many states do not follow Model Rule 1.6 and instead provide lawyers with a greater degree of discretion to reveal confidential information. More than half of the states have returned to the formulation of the confidentiality rule found in the Code of Professional Responsibility, giving lawyers discretion to reveal confidential information to prevent clients from committing crimes.[46] In addition, the American Law Institute has adopted a rule that would allow a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary "to prevent reasonably certain death or serious bodily harm to a person," without regard to whether the client was committing a criminal act.[47]

The rules dealing with withdrawal from representation also provide lawyers with a substantial amount of discretionary authority. Lawyers have the power to withdraw "if withdrawal can be accomplished without material adverse effect on the interests of the client."[48] In addition, lawyers may permissibly withdraw in six situations, the broadest of which occurs when "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."[49] The rules also authorize lawyers to withdraw when "the representation . . . has been rendered unreasonably difficult by the client."[50] A lawyer's power to withdraw is, of

& CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER ch. 1 (1999).

44. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 12 (1997).

45. *See id.* Rule 1.6 cmt. 13; *id.* Scope para. 8 ("lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination").

46. *See* SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY, Appendix A to Model Rules on Ethical Rules on Client Confidences (Thomas D. Morgan & Ronald D. Rotunda eds., 1999).

47. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117A (Proposed Final Draft No. 2, 1998).

48. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1997). For a criticism of this provision, see CRYSTAL, *supra* note 42, at 82-83.

49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1997).

50. *Id.* Rule 1.16(b)(5).

course, restricted in those cases when the matter is pending before a tribunal where court approval is required.

The degree to which lawyers become involved in pro bono service[51] and other professional activities is largely a matter of unrestricted discretion. The Model Rules do not speak to the lawyer's obligation regarding professional self-regulation except in a very limited way: "A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[52] A similar rule applies to reporting misconduct of judges.[53] As the comments recognize, application of the obligation to report requires the exercise of discretion:

> If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.[54]

The previous discussion does not by any means exhaust the areas of professional life in which lawyers have discretion. For example, lawyers' commercial activity is largely a matter of professional discretion. The rules dealing with legal fees provide that lawyers should charge "reasonable" fees,[55] but aside from this general standard and a few isolated rules dealing with contingent fee methods, the amounts of fees are a matter of professional discretion. Similarly, the rules dealing with advertising prohibit lawyers from engaging in false or misleading advertising,[56] but the decision of whether to advertise and the methods for communicating information about professional services are discretionary. The basic point is clear: decisions of professional responsibility, particularly the important ones, are overwhelmingly discretionary.

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51. *See id.* Rule 6.1.
52. *Id.* Rule 8.3(a).
53. *See id.* Rule 8.3(b).
54. *Id.* Rule 8.3 cmt. 3.
55. *Id.* Rule 1.5(a).
56. *See id.* Rule 7.1.

II. THE CONCEPT OF A PHILOSOPHY OF LAWYERING

Recall that the phrase "philosophy of lawyering" refers to the basic principles that a lawyer uses to deal with discretionary decisions. A philosophy of lawyering operates at three interrelated levels: the personal, the practice, and the institutional. When I refer to the personal level of a philosophy of lawyering, I mean the relationship between the lawyer's professional career and the lawyer's private life.

For most lawyers, the fundamental issue at the personal level is seeking some accommodation between competing goals of professional advancement and family life. In addressing this issue lawyers need to consider questions like the following:

> What type of practice do I see myself going into: civil litigation, corporate law, prosecution or defense of criminal cases, legal services? Large or small organization? What area of the country or the world?
>
> What types of ethical problems am I likely to encounter in this type of practice?
>
> What level of income do I aspire to have? Will the practice that I plan to undertake meet my economic aspirations?
>
> What kind of personal life do I wish to have? Will the demands of the type of practice that I envision allow me to have the kind of personal life I desire?
>
> Do I have enough information about the type of practice that I envision to answer these questions? If not, how am I going to get this information? If the type of practice that I contemplate will not allow me to meet either my income or personal desires, are there alternatives that I should consider?

In the practice of law, rules of professional conduct sometimes provide clear answers to questions of how a lawyer should act. For example, a lawyer may not ethically prepare a will for a client when the lawyer will receive a substantial bequest, unless the lawyer is related to the client.[57] Contingent fee agreements with clients must be in writing.[58] As Part I shows, however, the demanding questions of professional responsibility do not admit of such black-or-white answers. Lawyers often must make difficult judgments governed only by general standards in a context that involves the lawyer personally: Should I agree to handle this multimillion dollar case against a company that my firm did

57. *See id.* Rule 1.8(c).
58. *See id.* Rule 1.5(c).

some work for three years ago? Should I accept this malpractice case against one of my classmates when I think the case has merit, when the client has not been able to find another lawyer to take the case, and when the statute of limitations is about to run? How should I respond to a request for production of documents worded in such a way that I could, arguably, deny the existence of what was requested—even though I know what the other side wants? Resolving hard questions not only requires close attention to the rules of ethics and other standards of professional behavior, but also means that lawyers must develop an approach to handling such issues. This approach is the *practice component* of a philosophy of lawyering.

While the personal level of a philosophy of lawyering refers to the relationship between a lawyer's private life and the lawyer's professional role, the *institutional level* refers to the relationship between the lawyer's private and professional life and the broader institutional issues facing the profession as a whole.[59] The profession has faced and continues to face a number of significant and controversial issues, such as the effectiveness of the disciplinary process,[60] the adequacy of current mechanisms for delivery of legal services,[61] the actual or perceived decline in professionalism,[62] and relationships with other professionals through multidisciplinary practice.[63] The institutional level of a lawyer's philosophy of lawyering will identify and explain the lawyer's commitment to resolution of these broader issues.

How should lawyers develop a philosophy of lawyering? One way is to search for role models. Biographies of many prominent lawyers[64] or fictional portrayals of attorneys[65] can provide guidance for lawyers in their quest for a philosophy of lawyering.

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59. *See* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

60. *See* ABA Comm'n on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a New Century* (1992).

61. *See, e.g.*, Deborah L. Rhode, *The Delivery of Legal Services by Nonlawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990).

62. *See, e.g.*, Conference of Chief Justices, *A National Action Plan on Lawyer Conduct and Professionalism* (1998) [hereinafter *National Action Plan*] (discussing institutional and individual roles in promoting lawyer professionalism).

63. *See* ABA Comm'n on Multidisciplinary Practice, *Report to the House of Delegates* (visited Dec. 1, 1999) <http://www.abanet.org/cpr/mdpfinalreport.html>.

64. *See, e.g.*, JOHNNIE L. COCHRAN, JR. & TIM RUTTEN, JOURNEY TO JUSTICE (1996); VIRGINIA G. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY (1998); ARTHUR L. LIMAN & PETER ISRAEL, LAWYER: A LIFE OF COUNSEL AND CONTROVERSY (1998); PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM (1993); EVAN THOMAS, THE MAN TO SEE: EDWARD BENNETT WILLIAMS (1991); KEVIN TIERNEY, DARROW: A BIOGRAPHY (1979).

In addition to the examples of other lawyers, a substantial body of literature has developed, justified, and critiqued various philosophies of lawyering. In broad terms, philosophies of lawyering can be divided into three categories. The traditional view of the lawyer's role can be characterized as a *client-centered philosophy.* Professor Murray Schwartz set forth two principles that he argued accurately described the essence of client-centered lawyering.[66] First, lawyers act as zealous partisans on behalf of their clients, doing everything possible to enable their clients to prevail in litigation or to obtain their clients' objectives in nonlitigation matters, except to the extent that rules of professional conduct or legal principles clearly prohibit the lawyer's conduct. Under a client-centered philosophy, if doubt exists about the propriety of an action, the lawyer is justified in proceeding. Only clear violations of law or rules of ethics, like bribing witnesses, are prohibited. Schwartz referred to this idea as the Principle of Professionalism. Second, when acting in this professional role, lawyers are neither legally nor morally accountable for their actions. Schwartz called this concept the Principle of Nonaccountability.[67] Similarly, Professor William Simon has referred to two principles of conduct—neutrality and partisanship—as forming the core of what he called the "Ideology of Advocacy."[68] Following Simon, many writers now use the term "Neutral Partisanship" to refer to the standard conception of the lawyer's role. A more colloquial way of putting these ideas is that lawyers are "hired guns."

One can criticize a client-centered philosophy of lawyering for its incompleteness. This approach to lawyering provides attorneys with guidance on most difficult questions of professional ethics (what I have called the practice level): If I have discretion to act, do what is in my client's interest. A client-centered philosophy could also be applied at the personal and institutional levels, but even lawyers who are most committed to this philosophy in their practices would almost certainly find it intolerable when applied to their personal and institutional lives.

65. *See, e.g.*, HARPER LEE, TO KILL A MOCKINGBIRD (1960). For a critical view of Atticus Finch, see Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473 (1994).

66. *See* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543.

67. *See* DAVID LUBAN, LAWYERS AND JUSTICE 7 (1988) (relying on Schwartz's principles as the basis for a normative evaluation of the adversary system).

68. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 34-39.

While quite a few lawyers in fact subordinate their family lives to the practice of law, I doubt many of them would be willing to adopt this approach as a matter of principle. Similarly, I doubt many lawyers would agree that when serving on bar committees or other law reform organizations they should abandon ideas of the public interest or common good in favor of seeking "reform" which favors their clients' interests. Of course, situations may arise in which the interests of a lawyer's clients conflict with law reform proposals. Such a conflict may force the lawyer to recuse himself from the reform activity.[69] But nonparticipation because of a conflict with client interests is very different from continued participation to promote client interests.[70]

The most fundamental attack on the concept of a client-centered philosophy of lawyering is that it is morally unsound.[71] This philosophy requires lawyers in the course of representation of clients to engage in conduct that violates conventional morality:

> [The critics] claim that lawyers routinely do things for clients that harm third parties and would therefore be immoral, even in the lawyers' eyes, if done for themselves or for non-clients. Such actions constitute "role-differentiated behavior" in the sense that the actors, if asked to justify themselves, would claim that their role as a lawyer required them to "put to one side [moral] considerations . . . that would otherwise be relevant if not decisive." A lawyer's role-differentiated behavior could involve helping a client pursue a morally objectionable aim, or using a hurtful or unfair tactic to give a client an advantage. Specific examples might include invoking the statute of frauds to help a client avoid paying a debt he really owes, attacking an honest person's veracity in order to discredit him as

69. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.4 cmt. (1997).

70. *See* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (arguing that private legislatures like the American Law Institute and the National Conference of Commissioners on Uniform State Laws are subject to interest group politics often through the participation of lawyers).

71. Another thread of the critique of client-centered lawyering is that this philosophy ignores the importance of truthful resolution of legal disputes. In 1975, Judge Marvin Frankel noted that a litigator "is not primarily crusading after truth, but seeking to win." Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1039 (1975). *See also* MARVIN E. FRANKEL, PARTISAN JUSTICE (1980). Judge Frankel went on to propose a rule of professional ethics designed to force lawyers to give greater weight to the truth. *See* Frankel, *supra*, at 1057-58. For a critique of Judge Frankel's views, see MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 26-33 (1990).

> a witness, taking advantage of an opponent's misunderstanding of the applicable law in settlement negotiations, or suggesting that a corporate client lay off some of its workers until the Justice Department comes to see the merits of the company's merger proposal. Off duty, lawyers would presumably not think it appropriate to avoid repaying a debt, impugn a truthful person's honesty, take advantage of another's mistake, or exploit workers. On duty, the philosophers say, lawyers routinely do such things for their clients.[72]

These criticisms of the philosophy of neutral partisanship have generated a number of responses. One type of response is empirical: neutral partisanship does not accurately describe the behavior of lawyers.[73] Some empirical studies (although limited in number and scope) of the behavior of criminal defense lawyers, lawyers in small communities, lawyers in nonlitigation activities, and lawyers in large law firms cast doubt on the claim that neutral partisanship accurately describes the behavior of most lawyers. Indeed, some of these studies suggest that the problem with the way lawyers conceive of their role is the opposite of neutral partisanship; lawyers are not sufficiently zealous in representing their clients because they are concerned about protecting their reputations, preserving relationships with other lawyers, judges, or officials, or advancing their own interests.[74]

In addition, some scholars argue that neutral partisanship can be defended on moral grounds. Even lawyers who appear to be acting as neutral partisans may find such representation morally justified because the representation advances some higher principle—freedom of speech or due process of law, for example. An ACLU lawyer who defends the Nazi Party's right to march in a Jewish neighborhood may do so, not because he is

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72. Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1532-33. In PAUL G. HASKELL, WHY LAWYERS BEHAVE AS THEY DO (1998), Professor Haskell offers 23 examples of morally questionable behavior that are either clearly or arguably permissible for lawyers. The moral critique of the role of neutral partisanship is developed in ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 90-155 (1980); LUBAN, *supra* note 67; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Simon, *supra* note 68; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

73. *See* Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 120-129 (1990) (reviewing LUBAN, *supra* note 67); Schneyer, *supra* note 72.

74. *See* Schneyer, *supra* note 72, at 1544-50. For a response to the criticism that neutral partisanship does not accurately describe lawyer behavior, see LUBAN, *supra* note 67, at 393-403.

acting as a neutral partisan, but because he considers protecting the principle of free speech more important than restricting dissemination of their immoral views.[75] Further, many lawyers find moral value to the preservation of the attorney-client relationship. Professor Stephen Pepper has presented the most comprehensive defense of neutral partisanship on the basis of moral principle. He argues that the lawyer's amoral role is morally justified because the role assists clients in exercising autonomy. For lawyers to assert moral control over their clients would undermine that autonomy.[76]

The critics of neutral partisanship have offered an alternative philosophy, which can be referred to as a *philosophy of morality*.[77] Under this philosophy lawyers are morally accountable for the actions that they take on behalf of their clients and must be prepared to defend the morality of what they do.

Adoption of a philosophy of morality has a number of practical lawyering consequences. Lawyers would decline representation in more cases than they would under a client-centered philosophy, those cases in which the lawyer concluded that the representation was morally indefensible. Lawyers would withdraw from representation more frequently, for example, in cases in which clients demanded that lawyers pursue goals or tactics that the lawyer found to be morally unsound. Lawyers would take a broader view of their obligations as counselors, at a minimum raising moral issues with their clients and often trying to convince their clients to take what the lawyer considered to be

75. *See* Ellmann, *supra* note 73, at 126; Schneyer, *supra* note 72, at 1562-64.

76. *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613. For criticisms of this view and Professor Pepper's response, see Symposium on the Lawyer's Amoral Ethical Role, 1986 AM. B. FOUND. RES. J. 613. *See also* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

77. Probably the most comprehensive development of a philosophy of morality can be found in LUBAN, *supra* note 67. A number of other scholars have also offered their views on how moral values can be incorporated into the lawyer's role. *See generally* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994). *See also* GOLDMAN, *supra* note 72, at 138 (lawyers should only aid clients in exercising their moral rights); Leslie Griffin, *The Lawyer's Dirty Hands*, 8 GEO. J. LEGAL ETHICS 219 (1995) (calls for lawyers' conduct to be judged by common morality). Professor Serena Stier contends that the standard conception of the lawyer's role, in which professional conduct and morality are separate spheres, is fundamentally flawed. *See* Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551 (1991). She argues for an "integrity thesis" in which professional conduct and morality are integrated rather than distinct. *See id.*

the morally correct action. In situations in which lawyers had professional discretion about how to act, or in which the rules were unclear, a lawyer acting under a philosophy of morality would take the action that the lawyer believed to be indicated by principles of morality, even if this action was not necessarily in the client's interest.[78]

One difficulty with a philosophy of morality is that the sources of moral values are extensive and varied. Professor Luban bases his theory of morality on principles of moral philosophy. Other lawyers may turn to religion for the source of their values.[79] Some scholars, drawing on the work of Carol Gilligan, have attempted to develop a philosophy of lawyering based on an ethic of care.[80]

Other critics of client-centered lawyering have sought to develop approaches based on social values or norms rather than principles of morality. The major advantage of a *philosophy of social value* is that it is grounded in norms expressed in social institutions. Such values are likely to be seen as more objective and justified than moral values, which are often viewed as individual, subjective, and controversial. It should be noted that the philosophies of morality and social value are not inconsistent because social values often embody moral principles. For example, Professor Robert Gordon advocates a vision of law as a public profession and describes ways in which lawyers could implement that ideal in the conditions of modern practice.[81] Professor Bradley Wendel strives to develop a set of public values of lawyering derived from the "social function of lawyers and from the traditions and practices of the legal profession."[82] Professor Timothy Terrell and Mr. James Wildman examine the factors that have caused a crisis of professionalism for lawyers.[83] They argue that the true foundation of professionalism must be found in a commitment to the rule of law.[84] Terrell and Wildman identify six values that they believe lie at the core of professionalism:

78. *See* LUBAN, *supra* note 67, at 160, 173-74.

79. See Symposium, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1998).

80. *See, e.g.*, Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992).

81. *See* Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990).

82. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 7 (1999).

83. *See* Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism"*, 41 EMORY L.J. 403 (1992).

84. *See id.* at 423.

1. An Ethic of Excellence;
2. An Ethic of Integrity: A Responsibility to Say "No";
3. A Respect for the System and Rule of Law: A Responsibility to Say "Why";
4. A Respect for Other Lawyers and Their Work;
5. A Commitment to Accountability;
6. A Responsibility for Adequate Distribution of Legal Services.[85]

The most comprehensive statement of a philosophy of lawyering based on social values is found in the work of Professor William Simon.[86] He argues that the basic principle that should govern lawyer conduct is the following: "[T]he lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice."[87] Simon uses the term "justice" not in some abstract or philosophical sense, but rather as equivalent with "legal merit" of the case.[88] In deciding the legal merit of the case, the lawyer must exercise contextual or discretionary decisionmaking.[89] Simon identifies two dimensions to this approach. First, in deciding to represent a client, a lawyer should assess the "relative merit" of the client's claims and goals in relation to other clients that the lawyer might serve. Simon recognizes that financial considerations play a significant role in lawyers' decisions to represent clients, but he calls on lawyers to take into account relative merit in addition to financial considerations.[90] Second, in the course of representation, Simon calls on lawyers to assess the "internal merit" of their clients' claims. Simon rejects the view that lawyers should assume complete responsibility for determining the outcome of cases: "Responsibility to justice is not incompatible with deference to the general pronouncements or enactments of authoritative institutions such as legislatures and courts. On the contrary, justice often, perhaps usually, requires such deference."[91] However, when procedural defects exist, the lawyer's obligation to do justice requires the lawyer to assume responsibility for promoting the substantively just outcome: "[T]he more reliable the relevant procedures and institutions, the less direct responsibility the law-

85. *See id.* at 424-31.

86. Simon has developed his ideas in William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Simon, *supra* note 68. Simon expands and deepens these views in SIMON, *supra* note 6.

87. SIMON, *supra* note 6, at 9.

88. *Id.* at 10.

89. *See id.* ch. 6.

90. *See* Simon, *supra* note 86, at 1092-93.

91. SIMON, *supra* note 6, at 138. *See also* Simon, *supra* note 86, at 1096-97.

yer need assume for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she needs to assume for substantive justice."[92] Simon's theory has, of course, been subjected to extensive criticism, even among scholars who, like Simon, are critics of neutral partisanship.[93]

Numerous combinations and variations of the general approaches outlined above could be developed. For example, one could imagine a philosophy of lawyering that seeks to combine elements of neutral partisanship and social responsibility. Under such a philosophy, a lawyer would act in accordance with the tenets of neutral partisanship when representing clients, but would become a social and moral activist in her institutional role. Similarly, some lawyers could adopt the view that morality may be taken into account in the practice of law, but they could differ on the extent to which moral considerations become relevant.[94]

III. THE PROBLEM AND A PROPOSAL

A. *The Problem*

My survey of the scope of lawyer discretion under the Model Rules and of the various philosophies of lawyering available to guide lawyers in the exercise of that discretion has, I think, established two propositions. First, given the wide range of discretionary decisions that lawyers face, they need a philosophy of lawyering to assist them in making such decisions. Second, none of the available philosophies of lawyering has commanded (or appears likely to command) sufficient support within the academic community or the profession as a whole to be accepted institutionally. While critics of neutral partisanship have argued that this philosophy represents the prevailing ethic of the profession, if these critics are correct, it is because neutral partisanship is de facto rather than de jure the prevailing philosophy.[95] The Model Rules themselves certainly do not support the proposition

92. SIMON, *supra* note 6, at 140. *See also* Simon, *supra* note 86, at 1098.

93. *See* Symposium, 51 STAN. L. REV. 867 (1999).

94. *Compare* Monroe H. Freedman, *Must You be the Devil's Advocate?*, LEGAL TIMES, Aug. 23, 1993, at 19, *with* Michael E. Tigar, *Setting the Record Straight on the Defense of John Demjanjuk*, LEGAL TIMES, Sept. 6, 1993, at 22, *and* Monroe H. Freedman, *The Morality of Lawyering*, LEGAL TIMES, Sept. 20, 1993, at 22.

95. Professor Fred Zacharias agrees that the Code and the Model Rules authorize lawyers to incorporate moral factors in their representation of clients, but he argues that the ethos of the practice has developed to limit the exercise of objective judgment. He proposes a number of institutional changes that can help reintroduce objectivity into the lawyer's role. *See* Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995).

that lawyers should act as neutral partisans. The preamble to the Model Rules states:

> Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.[96]

As discussed in Part I, numerous rules of professional conduct are inconsistent with the concept of the lawyer as only a neutral partisan.[97]

The combination of lawyers' need for a philosophy of lawyering and the lack of institutional direction produces undesirable consequences. Because the profession is unable to develop a consensus on an appropriate philosophy of lawyering, lawyers are left to their own devices in developing their philosophies. A few lawyers may do so thoughtfully, but most will simply muddle through, developing an ad hoc philosophy of lawyering. Given the present structure of the profession, however, an ad hoc philosophy of lawyering will often become de facto a philosophy of neutral partisanship.[98] The economics of the profession favor neutral partisanship. Clients pay lawyers' fees, and lawyers are not compensated for protecting or even taking into account other interests. Moreover, psychologically, a number of factors point lawyers in the direction of neutral partisanship.[99]

In addition to the adverse impact on lawyers, the absence of philosophical direction is harmful to clients. Approaches to lawyering vary widely depending on factors such as practice setting

96. MODEL RULES OF PROFESSIONAL CONDUCT Preamble para. 8 (1997).

97. *See id.* Rule 1.2(a) (scope of representation); *id.* Rule 1.16(b) (standards for permissive withdrawal); *id.* Rule 2.1 (advisor); *id.* Rule 4.4 (respect for rights of third persons); *id.* Rule 6.1 (voluntary pro bono service); *id.* Rule 6.2 (accepting appointments); *id.* Rule 6.4 (law reform activities affecting client interests).

98. *See* Zacharias, *supra* note 95.

99. *See* Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547 (1998).

and client sophistication.[100] By word of mouth, some clients may gain a sense of the general approach of lawyers they hire. A few lawyers may take the trouble to explain to their clients their general approach or philosophy of representation. Clients, however, are entitled to more than word of mouth or the luck of the draw. Clients are entitled to receive from their lawyers a clear expression of the lawyer's philosophy of representation.

The professionalism movement represents, in my view, an effort by the organized bar to respond to lawyers' need for guidance in the exercise of discretion. The movement suffers, however, from two fundamental flaws: vagueness of the meaning of professionalism and lack of enforcement. What the bar means by professionalism is uncertain. For example, the Action Plan of the Conference of Chief Justices states:

> Professionalism is a much broader concept than legal ethics. For the purposes of this report, professionalism includes not only civility among members of the bench and bar, but also competence, integrity, respect for the rule of law, participation in pro bono and community service, and conduct by members of the legal profession that exceeds the minimum ethical requirements. Ethical rules are what a lawyer *must* obey. Principles of professionalism are what a lawyer *should* live by in conducting his or her affairs. Unlike disciplinary rules that can be implemented and enforced, professionalism is a personal characteristic.[101]

To the extent the bar attempts to make professionalism standards more specific, however, it creates another problem: favoritism of one approach to lawyering over others.[102] In addition, advocates of professionalism have declined to create a mechanism for enforcement of professionalism standards—but if no enforcement mechanism exists, how do we expect lawyers to take professionalism seriously?

B. *A Proposal*

In this section, I offer a proposal to deal with the problem I have identified in the previous section. The proposal has four

100. *See* Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101 (1996).

101. *See National Action Plan, supra* note 62, at 2. *See also* MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE 5-7 (1994) (listing eleven variations on the meaning of professionalism).

102. *See* Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995).

components: (1) bar application statement of a philosophy of lawyering; (2) annual certification and revision of a lawyer's philosophy of lawyering; (3) required notification to clients of a lawyer's philosophy of lawyering; (4) disciplinary actions against lawyers for flagrant violation of the terms of their philosophy of lawyering.

1. Bar Application Statement of a Philosophy of Lawyering

All applicants for admission to the bar will be required as part of their bar application to file a statement of their philosophy of lawyering. The instructions will state that there is no one correct philosophy of lawyering. Applicants may adopt a philosophy articulated by someone else or may craft their own philosophies. Applicants may choose to have different philosophies depending on the type of practice or the sophistication of the client, or they may decide to have a unitary philosophy that applies regardless of the type of practice.[103] The three essential components of such a statement are an articulation of general principles that form the basis of the philosophy of lawyering, a statement of justification for those principles, and the application of those principles to several major discretionary decisions that lawyers are likely to face in the practice of law.

How should bar admission officials treat these statements? There are several possibilities. One is that bar officials will do nothing with the statements; as discussed below, other regulatory mechanisms exist. If resources are sufficient, bar officials could do a limited screening of the statements to identify statements that are not seriously prepared or express a philosophy of lawyering not within the range of professional discretion. Statements that are not seriously prepared could be returned to applicants for resubmission. Some statements might express a philosophy of lawyering beyond the realm of reasonable professional discretion. In such cases, the committee could call the applicant in for an interview to discuss the applicant's philosophy. For reasons developed more fully below, the committee would not, however, have the power to reject an applicant based on the applicant's philosophy of lawyering, although applicants could be warned that adherence to such a philosophy could lead to disciplinary action in the future. For example, suppose an applicant stated that his philosophy of lawyering was founded on opposition to the federal income tax and that he would devote his practice to developing legal challenges to the constitutionality and enforcement of the federal income tax laws. The committee might warn

103. *See* SIMON, *supra* note 6, at ch. 7.

the applicant that some challenges are likely to be found to be unethical either because they are fraudulent or involve frivolous claims.

I offer the following as a discussion draft of the instructions for such a statement.

> Write a statement of your philosophy of lawyering not to exceed ten double-spaced pages. In preparing your statement you may draw and quote from philosophies of lawyering articulated by lawyers and scholars, but you are not bound to follow any particular philosophy of lawyering. There is no single correct philosophy of lawyering and within a very broad range you are free to adopt a philosophy of lawyering that you consider to be sound. The Committee on Character and Fitness will not reject your application because it or any of its members disagree with your philosophy of lawyering. The Committee reserves the right in extreme cases to call an applicant in for an interview if the Committee concludes that the statement reflects a philosophy of lawyering outside the range of professional discretion, the implementation of which would be likely to lead to disciplinary action against the applicant after admission to the bar.
>
> Your statement must include the following: (1) a statement of the basic principles that are the foundation of your philosophy of lawyering; (2) justification for your use of these principles; and (3) explanation of how you would apply your principles to the following types of problems that you may face in practice:
>
> (a) Choice of type of practice;
> (b) Decision to take or decline cases;
> (c) Scope of counseling a client regarding exercise of the client's legal rights;
> (d) Exercise of professional discretion on behalf of a client (e.g. deciding whether to cross-examine a witness);
> (e) Withdrawal from representation because the lawyer concludes that the client is acting immorally;
> (f) Preventing the client from doing harm to others (e.g. disclosing the client's intention to commit a wrongful act);
> (g) Acting on behalf of a client in ways that will harm others;
> (h) Participation in pro bono, law reform, and other professional activities to improve the law.

To guide applicants, the bar application could give several examples of different philosophies of lawyering.

2. Annual Certification and Revision of a Lawyer's Philosophy of Lawyering

Each year when lawyers pay their annual bar dues, they will be required to certify their continued commitment to their philosophy of lawyering or to make such revisions in their statement as they consider appropriate. The annual review and certification serves two purposes: First, it operates as a mechanism to remind lawyers of their continuing commitment to a philosophy of lawyering. Second, it gives lawyers an opportunity to revise their statements to take into account their experiences and changes in their thinking about what it means to be a lawyer. Should lawyers be allowed to revise their statements whenever they wish, rather than only annually? While a philosophy of lawyering must be dynamic, if a philosophy can be revised at any time, it ceases to become a set of principles and instead becomes an ad hoc accommodation to the current set of pressures that the lawyer may be facing. A right to revise annually seems to be a reasonable compromise between the need for change and commitment to principle.

3. Required Notification to Clients of a Lawyer's Philosophy of Lawyering

Lawyers should be required to notify their clients in some appropriate fashion of their philosophy of lawyering. Notification can be accomplished in many ways. Lawyers can give new clients a copy of their philosophy of lawyering as part of a brochure describing the lawyer and his practice when the client first contacts the lawyer. Lawyers can post their philosophies of lawyering on their web pages. A summary of the lawyer's philosophy can be included or referred to in the lawyer's engagement agreement with a reference to the source of a more complete statement of the lawyer's philosophy.

To implement this requirement of client notification, a new section (f) should be added to Model Rule 1.2. The following is a draft of a proposed section:

> A lawyer shall provide a client with a statement of the lawyer's philosophy of lawyering prior the lawyer's engagement.

Appropriate commentary should be added to explain the scope of the statement and to offer examples of ways in which the statement could be supplied to clients.

4. Disciplinary Actions against Lawyers for Flagrant Violation of the Terms of their Philosophy of Lawyering

Lawyers' statements of their philosophy of lawyering constitute representations by them of the principles that they will use to deal with difficult issues of professional responsibility. A lawyer who flagrantly fails to honor these principles could be found guilty of misconduct under Model Rule 8.4 by engaging in conduct involving deceit or misrepresentation.

In summary, the proposal I have made in this part is designed to require lawyers to develop a philosophy of lawyering, to inform clients of their philosophy, and to create an institutional structure for enforcement of lawyers' philosophies, while recognizing that a variety of legitimate philosophies of lawyering can exist.

C. *Some Criticisms and Responses*

I expect substantial criticism of my proposal. In this section I offer my responses to some of the criticisms that I anticipate being made. First, one might argue that this proposal amounts to touchy-feely nonsense. The practice of law is a tough competitive business and only an academic who doesn't know anything about the practice of law would come up with an idea like this. However, the core of this criticism is a philosophy of lawyering grounded largely in neutral partisanship. If this is what the lawyer believes, the lawyer should be willing to stand behind it by articulating and defending this philosophy of lawyering.

Next, some may argue that if lawyers truly need a philosophy of lawyering, they can develop one on their own without being required to do so by the bar. This position is in essence an argument for the status quo. Any lawyer who believes that the current state of the profession is sound should reject my proposal. The existence of the professionalism movement and substantial scholarly work on the malaise within the profession[104] indicate, however, that the profession is suffering from some fundamental problems.

Even if one accepts that the profession is suffering from fundamental problems, it does not follow that my proposal is the best or even an effective way to deal with those problems. It seems to me, however, that any proposal must focus on both the

104. *See* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); Eugene R. Gaetke, *Renewed Introspection and the Legal Profession*, 87 KY. L.J. 903 (1998-99).

need for lawyers to have a broader philosophical approach to lawyering while at the same time admitting that a wide diversity of lawyering styles exist and can be justified. My proposal responds to both of these factors. In addition, my proposal does not require the creation of any new regulatory bureaucracy, nor does it operate substantively. The core of my proposal is disclosure regulation, allowing clients to scrutinize lawyers' philosophies of lawyering.

Next, it might be claimed that given the factors that tend to favor neutral partisanship, acceptance of this proposal will tend to exacerbate the bias in favor of neutral partisanship. The thrust of this argument is that the only way that philosophies other than neutral partisanship can develop is under-the-table. Lawyers can be concerned about the morality of lawyering or substantive justice, but only if they do so surreptitiously.

I think this argument is factually incorrect and morally reprehensible. The leaders of the bar and the lawyers who are most admired in the profession are not exemplars of neutral partisanship. These lawyers bring good judgment and a strong sense of values to their representation of private clients. Moreover, these lawyers typically exhibit a strong commitment to professional and social issues.[105] There is no reason to believe that young lawyers when they develop their philosophies of lawyering will not turn to the standards of lawyers who are widely admired. Moreover, it is morally reprehensible to argue that alternatives to neutral partisanship can only be developed by lawyers who don't have the courage to state and justify their principles and only by deceiving clients, judges, and other lawyers about the lawyer's values.

Next, one might claim that lawyers won't treat the requirement seriously. Prepared statements will proliferate on places like the internet and lazy lawyers will simply adopt such statements without much thought. I question the accuracy of this criticism. I think that lawyers will take seriously statements that they must file with bar admission officials, make available to their clients, and face potential discipline for violating.

I do anticipate that recommended statements of general philosophies of lawyering or of particular aspects of the lawyer's role will develop. Indeed, a number of professional organizations have already developed such standards.[106] I welcome such

105. *See, e.g.*, ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE (1946).

106. *See, e.g.*, ABA Task Force on Lawyer Business Ethics, *Statement of Principles*, 51 BUS. LAW. 745 (1996); American Academy of Matrimonial Lawyers, *The Bounds of Advocacy*, 9 J. AM. ACAD. MATRIMONIAL LAW. 1 (1992).

models. If a lawyer wishes to adopt a philosophy prepared by such an organization because it represents a philosophy that the lawyer considers sound, a lawyer should be free to do so.

Finally, one might argue that putting power in the hands of admission or disciplinary authorities is dangerous and has the potential for free speech abuse. In a comprehensive study of the history and implementation of the moral character requirement for bar admission, Professor Deborah Rhode questions the wisdom of having this condition for bar admission. Among the criticisms she makes are the following: First, bar admission officials do not have the resources for adequate investigation into moral character, and the inquiries they do conduct are only minimally helpful in determining the moral character of applicants. Second, because of the vagueness of the moral character concept, the admission process is left to the subjective judgment of bar officials. Her study indicates a lack of consensus among these officials as to the types of conduct that warrant investigation or denial of admission. Third, review of character has First Amendment implications, inhibiting freedom of expression by some individuals and deterring others from applying for bar admission. Wide ranging inquiry into the activities of bar applicants also raises privacy issues. Professor Rhode concludes that the bar would be better off abandoning the moral character requirement for bar admission and instead using its limited resources in disciplining lawyers for actual misconduct.[107]

Since my proposal calls for a new bar admission requirement akin to moral character, I take Professor Rhode's criticisms seriously. I recognize that creating a new bar admission requirement poses the risk of abuse by bar officials and creates free speech concerns. I propose to deal with these concerns by strictly limiting the power of character and fitness officials over such statements. Officials would not be allowed to reject applicants because of their philosophical statements. Officials would have the power to return statements to applicants if the statements were incomplete or showed evidence that they were not seriously prepared. The committee could call applicants in for interviews to discuss their statements if the committee believed that the statement reflected a philosophy of lawyering that in the opinion of the committee was beyond the realm of professional discretion. A committee could give an informal warning to an appli-

107. *See* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985). *See also* Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67 (1984).

cant that adherence to such a philosophy could lead to disciplinary action in the future.

It is not crucial to my proposal that statements of philosophies of lawyering be filed with bar admission officials. Disclosure could simply be made to clients rather than to the bar. Despite the risks associated with making statements part of the bar admission process, I think this aspect of the proposal is important for several reasons. First, it sends a message to lawyers that the bar considers statements of philosophies of lawyering to be important. Second, it makes the development of a philosophy part of the professional process rather than simply a matter of the relationship between lawyer and client. This step signifies that applicants have both professional as well as client obligations. Finally, while I recognize the risks of bar scrutiny of these statements, I think the bar should have the opportunity to discuss with an applicant what it means to be a lawyer when a statement reflects views that may be seriously misguided.

CONCLUSION

The organized bar has been searching for some time for a way to deal with what it considers to be a serious erosion of professionalism. At the same time individual lawyers are in need of guidance on how to deal with the wide range of discretionary decisions they face in the practice of law. The proposal I offer attempts to respond to both of these concerns without at the same time directing lawyers to practice in only one way.

Zealous Advocacy: Pushing Against the Borders in Immigration Litigation

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[*] Elizabeth Keyes, Assistant Professor, Director of the Immigrant Rights Clinic, University of Baltimore School of Law. J.D. Georgetown University Law Center, 2004. M.P.A. Princeton University, 1998. B.A. Carleton College, 1994. This Article is inspired by the zealous advocacy I have seen by so many—and yet too few—immigration lawyers, and is dedicated to the memory of one of my earliest bosses who showed us all how it could be done, the late, very great Michael Maggio. I thank David Koelsch and Jayesh Rathod for engaging with me about these ideas and modeling zealous advocacy in their own practice. I also thank Jon Bauer, Susan Carle, Ingrid V. Eagly, David Jaros, Amy Dillard, Kathleen Kim, Jennifer Lee Koh, Natalie Nanasi, Jenny Roberts, Jonathan Weinberg, and participants at the Mid-Atlantic Clinical Theory Workshop, the 2014 AALS Clinical Conference and the 2014 Immigration Law Professor Workshop for helpful and provocative comments on this Article as it evolved. Finally, I thank University of Baltimore law students Caroline Dewey and Miranda Russell for their excellent research assistance. All errors are mine alone.

I. INTRODUCTION

Anyone who ever wanted to become a lawyer while reading TO KILL A MOCKINGBIRD, or who saw law as a tool for responding to injustice, probably drew inspiration from the profession's commitment to zealous advocacy. Zealous advocacy is core to the popular ethos of what good lawyering *is,* and yet for many areas of law, it is only vaguely defined, and is honored too often in the breach. Zeal may be absent because it is not part of the legal culture, especially in the under-resourced, over-burdened court systems affecting some of our most vulnerable populations, very much including the court system that oversees immigration cases. Two central ideas this Article explores are why the legal culture matters, and what role a well-articulated standard and broadly held commitment to zealous advocacy could play in the specific context of immigration court.

Zealousness has at least two manifestations. One is simply a kind of lawyering thoroughness, where lawyers use all tools available to advance their client's interests—and indeed, it is now officially housed in the ethical rules under the principle of diligence. While zeal-as-diligence is not easy, it is also not terribly controversial. The other manifestation of zeal is in pushing boundaries and taking risks for clients, which quickly becomes far more controversial as it calls upon lawyers to tiptoe up to the edges of ethically permissible behavior instead of remaining in a safe, neutral zone. Often cast in negative lawyer-as-hired-gun-terms, this form of zeal is complex, and may still be both client-centered *and* justice-oriented, especially where clients lack

power relative to the system or systems they are confronting.[1] One example may better explain these two aspects of zeal, and show their significance:

Cynthia had lived in the United States for seventeen years, working as a nanny. Along the way she married, and later divorced, a fellow Jamaican with whom she had two daughters. She called the police on him once during a fight, and the police arrested them both. In court, each accepted a deferred sentencing agreement, agreeing to do twenty hours of community service to make the issue go away. Cynthia's older daughter is excelling at school and won a scholarship to a private high school where she plays flute in a traveling orchestra. Her younger daughter suffers from juvenile rheumatoid arthritis, and Cynthia has managed her care over the years. Recently, police pulled Cynthia over for a traffic stop while she was driving in the predominantly white neighborhood where she works, found that she had two IDs with two different names, and placed her under arrest. They notified immigration enforcement officers, leading to her removal hearing because the deferred sentencing agreement constituted a domestic violence conviction that made her deportable.

Now Cynthia is in immigration court. On any given day in immigration courts around the country, dozens, if not hundreds, of immigrants in removal proceedings concede the allegations filed by the Department of Homeland Security on a charging document called the Notice to Appear, in a process that takes only a moment. Many, if not most, of those immigrants will concede that the Government has the legal basis to deport them. And with that, in less than a minute, the Government has met its burden, and the immigrant can be deported unless there is some form of relief he or she can seek.[2]

But Cynthia's lawyer did not concede the basis for deportation, even though the lawyer knew that she did, in fact, lack status—simply because it was still the Government's burden. Now, instead of the Government proving its case within a minute by relying on a concession from the immigrant's attorney, the process stopped and the judge had to hear arguments concerning the sufficiency of the Government's evidence supporting the conviction. An individual without legal immigration status can win her case if the Government cannot, in fact, meet its burden, without ever getting to the question of whether the immigrant is eligible for any kind of relief from removal.[3] *Let us imagine that in this case, though, the Government was able to meet its burden, meaning the Government*

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[1] *See generally* W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004), for an excellent overview of zeal and its critics, among other complicated ethical issues. Kate Cruse also thoughtfully explores the tensions among client-centeredness, zeal and justice in Kate Cruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006).

[2] Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1809 (2013).

[3] The Government can refile charging documents with better evidence in the future if it so chooses.

had now made its case against Cynthia.

The story continues momentarily, but note here how this decision to deny the charge of removability disrupts norms of performance with lawyering that differs sharply from the daily mill of cases churning through the immigration removal system. But this lawyer is simply zealously, if unexpectedly, using all the tools she has at her disposal. This choice is only modestly controversial—many lawyers argue that a duty of candor to the tribunal requires them to concede removability if they know that the Government can ultimately amass evidence to sustain the charge, or if they think it would be frivolous to litigate the charge—but here the lawyer sees this as a weak but not frivolous strategy, and worthy of putting the Government to its burden in case the proof is not present.

Cynthia now tries to avoid deportation by showing she is eligible for the form of relief known as Cancellation of Removal, an application she affirmatively makes to the Government. She is likely eligible because she has been here more than ten years, and her removal would cause "exceptional and extremely unusual hardship"[4] *to her U.S. citizen daughter with arthritis. But there is one wrinkle: the application asks about any arrests, and in response to that question, Cynthia told her lawyer that she was once arrested for theft for taking her ex-husband's car without his permission. A guilty plea for this would make her ineligible for Cancellation. Cynthia said her defender "sorted it all out" for her, but she does not remember what happened at the one court appearance she had, just that the problem seemed to go away.*

The lawyer looked in the criminal courts of Virginia, where Cynthia had lived since coming to the U.S., and found no evidence of an arrest or subsequent charges. Between that and Cynthia's vagueness about what had happened, the lawyer decided she had no duty to dig deeper with Cynthia for details that could help unearth any conviction that might or might not exist. The Government, despite running Cynthia's fingerprints through its fairly comprehensive system, found no evidence of a theft either. Cynthia won her case, got a green card, and stayed in the U.S. to work and to raise and care for her daughters.

This second ethical decision, about how far to dig for the theft conviction, is more controversial. Here, the duty to present a truthful application to the court conflicted with the lawyer's duty of loyalty to her client, and many lawyers would have erred on the side of interrogating the client to be as forthcoming as possible with the tribunal. Indeed, had Cynthia's lawyer asked her a few more questions, she could have found out that the charge was, strangely, adjudicated

[4] This level of hardship is a requirement for one form of relief from deportation, Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents. INA § 240B(b)(1)(D); 8 U.S.C. § 1229b(b)(1)(D) (2013).

in family court alongside the divorce itself—and she could easily have produced the document that would have made Cynthia ineligible for relief. Her diligence would have resulted in her client's deportation, but the lawyer would have secured the court's respect for her honesty and integrity, something that likely matters profoundly to a lawyer who appears before that judge time and time again.

By contrast, the lawyer ran the risk of being hauled up on ethics charges by creeping toward the edge of the murky line between *knowing* about a fact she had a duty to tell the tribunal,[5] *recklessly disregarding* the existence of a relevant fact,[6] or deciding that there was enough ambiguity present that she did *not* "know" about a conviction.[7] This lawyer's choice of interpreting unclear rules in favor of her client is risky to her, but zealousness, as she defined it, demanded she go with that less safe choice.

There is no question that zealous representation has profound consequences in immigration court, where clients may contend with prolonged detention, family separation, and ultimately, for many, deportation with its many attendant losses.[8] Attorneys generally know that zealousness is within their box of tools as they represent clients, and that it is required by the rules of professional conduct in so far as lawyers are to act diligently on their clients' behalves. But zealousness is often tempered by duties to the tribunal, and by attendant role confusion caused by competing duties to clients and the system as a whole. The broader legal context exacerbates these forces, where court systems and the ethical rules increasingly favor more conciliatory

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[5] Model Rule 3.3(a)(1) requires her not to put forth facts she knows to be false. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1)(1983).

[6] The immigration court ethical rules governing the lawyers' conduct go farther than the Model Rules, as discussed in Part 5, *infra*.

[7] Comment 8 to Model Rule 3.3 permits lawyers to resolve doubts in favor of their clients. Comment 8 in its entirety reads:

> 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.

MODEL RULES OF PROF'L CONDUCT.

[8] This Article does not intend to rank practice areas by difficulty, as other practice areas share many of these same challenges and comparable consequences, such as abuse and neglect proceedings. Indeed, as I have shared earlier versions of this Article with lawyers in diverse fields, they have all painfully recognized these issues and identified closely with the challenges described in this Article. Clearly, the forces against zealous advocacy permeate far more than the immigration bar, and are worthy of intensive conversation across legal practice areas.

modes of litigation. Moreover, while some pressures against zealousness are endemic to any system with a relatively small number of repeat players, others result from by skyrocketing immigration court dockets that overwhelm both judges and lawyers for the Government, by widespread, powerful narratives that assume everything from the feebleness of the constitution in immigration court to the presumed removability of the immigrants who appear there. Indeed, in overstretched court systems like this one, it may sometimes seem that zealousness is disfavored entirely. This Article takes the stance, however, that given the stakes in immigration litigation, zealousness is *required* for true attorney effectiveness, no matter how difficult, uncomfortable, or costly it may be, and therefore lawyers in the immigration system urgently need to understand and overcome those barriers to zealous advocacy.

The complexity of these issues, the scope of the consequences, and the importance of a well-defined norm of zealousness all call to mind the world of criminal defense, which has a split personality important to understand. Although all lawyers are bound by rules of professional conduct, criminal defense has a strong history of establishing norms that challenge defenders to rise above the ethical floor often set by those rules, where effectiveness is defined at a minimally effective level. Defenders have created a culture whereby the best defenders stake their reputations on their zeal and on the clarity of their understanding that they stand with their clients against the weight of other forces in the overall legal system. It is true that examples of poor-quality defenders plague the criminal defense bar, and even well-intentioned defenders find themselves unable to live up to their desired level of representation because of impossibly high workloads. Moreover, the law itself defines effectiveness far below the standards of the best defenders, thanks to the extraordinary permissiveness created by *Strickland*[9] and the cases interpreting it, which serve to separate legally-sufficient "effectiveness" from truly effective lawyering. Legally-sufficient effectiveness is a terribly low standard, while truly effective lawyering is a demandingly high one. In a context where legally-sufficient effectiveness might have become the norm, however, defenders have actively sought and defined a much higher standard of practice, which involves oftentimes aggressive interpretations of the rules of ethics in favor of zealous advocacy. Part II of this Article explores the lengthy, sophisticated debate around the justifications (or lack thereof) for such zealousness, looking at factors

[9] Strickland v. Washington, 466 U.S. 668 (1984).

such as resources, procedural advantages, political and psychological advantages, as well as the legitimacy of the immigration court ethical rules themselves.[10]

True effectiveness (as opposed to legally-sufficient effectiveness) is not easy in immigration litigation. Immigration lawyers[11] face a constant and varied set of ethical challenges while working in an exceptionally difficult practice context: administrative law whose complexity is often likened to the tax code; often intransigent bureaucracies; limited judicial review; the demanding solo-practitioner and small-firm business-model that dominates the immigration bar; the presence of trauma; complex cultural and linguistic barriers; and so forth. The uniqueness of immigration practice also makes it likely that immigration lawyers are less likely to be held to high standards than their counterparts in other areas of practice, for many reasons, but especially because those who pay the price for ineffective assistance are often deported and unable to hold counsel accountable.[12]

Complicating matters further, immigration practitioners operate in a unique form of the adversarial system, lacking some of the critical tools and protections—limited though they are—that their closest colleagues, criminal defenders, possess. These limitations certainly arise from the different (oftentimes lesser) constitutional protections

[10] Here, this Article applies a framework developed by ethicist and legal philosopher David Luban to justify including immigration with criminal defense as meriting the choice of "zealous advocacy" and not "litigation fairness" as the baseline for resolving ethical dilemmas. *See* Part II.B, *infra*; *see also* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1998). This Article sidesteps the question of whether different practice areas might adopt different principles, or whether the bar should have a uniform approach to ethics, as this is a subject richly explored and part of ongoing scholarly conversations elsewhere.

[11] I use the term "immigration lawyers," but as will be discussed *infra* in Part Bthere are several categories of non-lawyers who can practice in immigration court, including students, accredited representatives and "reputable individuals." 8 C.F.R. § 1292.1 (2008). Likewise, immigration prosecutors within the Department of Homeland Security certainly practice immigration law, but for ease of identification, I am calling them prosecutors, and their adversaries "immigration lawyers."

[12] This phenomenon is discussed in Part III, *infra*. An empirical study would be well-merited on this point, but it is interesting here to note that immigrants *do* have an incentive to file bar complaints to get their cases reopened under Matter of Lozada, 19 I. & N. Dec. 637 (B.I.A. 1988) (permitting a case to be reopened where an immigrant demonstrates prejudice from a prior attorney's ineffective assistance of counsel). *Lozada*, however, requires that the immigrant still be present in the U.S., requires (most likely) that the immigrant has secured a second lawyer to understand about the options that may be available under *Lozada*, and, most important to this discussion of incentives for effectiveness, does not require that a disciplinary action actually result against the prior attorney.

surrounding immigration proceedings, but they also arise from the posture of immigration cases themselves. Specifically, as Cynthia's story shows, although advocates may see themselves as *defending* their clients against removal, they are affirmatively seeking benefits and have burdens of proof that can, and often do, put their duties to their clients in direct opposition to their duties as officers of the court. These and other ethical issues create ethical dilemmas for immigration litigators, but a broadly-held commitment to zealous advocacy would encourage litigators to explore and act at the edges of ethically permissible behavior to ensure truly effective representation of their clients.

Part III addresses the question of why this kind of powerful standard-setting matters. Again, the world of criminal defense shows how voluntary standards help counteract the erosion of effectiveness that occurs when the legally-sufficient understanding of "effectiveness" is so poor. While not halting the forces of erosion, the standards provide a healthy counter-force. Likewise, the articulation of a heightened standard of effectiveness for immigration attorneys, one that elevates zealous advocacy, could help the practice of immigration in numerous ways. Not only would it bolster, support and encourage the work being done by the many excellent, zealous immigration advocates currently practicing, but it would provide a measure against which the dominant-narrative "bad immigration lawyers" can be judged.

Part IV begins the examination of ways that such a commitment to zealous advocacy might help make difficult choices amid the challenges of immigration litigation. Those challenges may be grouped into ones where zealousness can make a difference, and those where the very structure of immigration law and the ethical rules may make truly client-centered zealous advocacy impossible. These dilemmas will help show the ways that immigration law itself challenges practitioners from adhering to often conflicting ethical duties, let alone achieving a higher standard of effectiveness. This Article calls upon the immigration bar to make zealous advocacy a broadly-shared and well-articulated norm of practice. For the seemingly impossible situations, where lawyers simply cannot meet their competing duties to the clients and to the court, law reform efforts may be needed as well—with some as simple as fine-tuning the governing ethical rules. The untenable contrasts and conflicts set forth in this Article require a shift in the laws and structures so that lawyers in immigration court have the possibility of playing their multiple roles responsibly, something precluded by the current laws and structures.

II. JUSTIFYING ZEALOUSNESS

It is broadly understood that the various ethical duties imposed upon lawyers are frequently in tension with each other. At their core, many of these tensions exist between those duties owed to the client and those owed to the court or legal system generally. Over the centuries, there has been an ongoing struggle between two approaches to this central tension. One approach holds zealous duty to the *client* as the primary duty, one that is only secondarily tempered by duties to the court or legal system generally (hereinafter called the "zealous advocate" approach).[13] The other is an approach where the duties to the court and legal system are more important. This second approach aligns the lawyer and the court as sharing the ultimate objectives of truth and justice (hereinafter referred to as the "litigation fairness" approach).[14]

The decline of the zealous advocate model, as noted in Part 1, manifests in many ways, but most notably in the revision of rules of conduct to minimize or omit references to zeal. As two lawyers note: "The demise and disappearance of 'zeal' from our ethical rules is more than a matter of semantics. In fact, it is evidence of a fundamental paradigm shift that is and has been occurring in our legal system."[15] One powerful intentionally-articulated counterpoint is in the practice of criminal defense, where zealous advocacy retains its power. This Article now briefly sketches out this debate, describing "litigation fairness" and the justifications for it, and contrasting it with the zealous advocacy approach, before assessing the extent to which either model is appropriate in the immigration court context. This Article cannot possibly do justice to the nuances of the various models or to the sophisticated debates among them, but aims to provide just enough context to be instructive to those who are not immersed in ethics literature to understand that there *is* a robust alternative framework urging lawyers to be less uniquely focused on client-centered advocacy.

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[13] Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 CASE W. RES. L. REV. 381 (2012). William Simon underscores the longevity of these themes, but notes that they are not either/or propositions: "There has never been a consensus about where to draw the line between these two aspects of the lawyer's role, and the two have always been in tension within the professional culture." William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1133 (1988).

[14] Andrews, *supra* note 13. .

[15] Lawrence J. Vilardo & Vincent E. Doyle III, *Where Did the Zeal Go?* 38 A.B.A LITIG. 53, 56 (2011), *available at* http://www.americanbar.org/publications/litigation_journal/2011_12/fall/where_did_zeal_go.html.

A. Competing Approaches to Professional Conduct

1. Alternatives to Zealous Advocacy

Various approaches to professional conduct recognize the ways in which ethical duties sometimes conflict, and choose "first-order" moral values, such as truth and justice, as the guiding principle to resolve any conflicts, instead of placing zealous advocacy to the client first.[16] Although the variations on this are diverse, for the sake of simplicity I will focus on one described as "litigation fairness."[17] As one scholar has written, "[t]he lawyer still has a duty to zealously advocate for the client's interest and position, but the duty of zeal should not be allowed to be a justification for lawyer behavior that imposes significant costs on the legal system and society in general."[18] Fairness to the court encompasses such characteristics as reasonable behavior, truth (as to both law and fact), and merit (again, as to both law and fact).[19] Premised upon a vision that two adversaries have comparable levels of power, litigation fairness suggests that a lawyer may not need to unleash every weapon in a brutal struggle for the client's interests.[20]

Carol Rice Andrews has explored this concept in depth, considered its long history, and has suggested that a distinct but encompassing duty that encapsulates what it means to be fair to the court is the concept of "just cause."[21] "Just cause" means assuring that an action is "reasonable, honest, objectively meritorious, and properly motivated."[22] A French ecclesiastical oath from the thirteenth century cautions against knowingly taking cases that are "not just," and while

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[16] Wendel, *supra* note 1.

[17] "Litigation fairness" is but one name and approach for multiple critiques of zealous advocacy. A particularly important approach that shares some characteristics of this model is that of William Simon who offers deep critiques of what he calls the "dominant model" of zealous advocacy, discussed further below, but nicely summarized in Wendel, *supra* note 1. *Compare* Andrews, *supra* note 13, *with* William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1085–87 (1988).

[18] John S. Dzienkowski, *Ethical Decisionmaking and the Design of the Rules of Ethics*, 42 HOFSTRA L. REV. 55, 75 (2013).

[19] "Over the centuries, the concept of litigation fairness has included different duties and standards of conduct, including reasonable behavior, truth, just cause, proper motive, and objective merit." Andrews, *supra* note 13, at 383.

[20] *See* Richard Marcus, *Cooperation and Litigation: Thoughts on the American Experience*, 61 U. KAN. L. REV. 821 (2013).

[21] Andrews, *supra* note 13, at 387. Andrews examines this concern for the "justness" of a legal action in an interesting examination of historical records, from the Justinian oath, through the French ecclesiastical oaths from the 13th century,"[e]very single advocate shall swear that he will faithfully perform his duties; that he will not support cases that are unjust or militate against his conscience." *Id.*

[22] *Id.*

demanding duties to the client, sets forth many more duties to the court itself.[23] As Andrews notes summarizing developments in both the English and French contexts: "Truth and reasonable behavior were paramount duties from the very beginning of the profession in both cultures. . . . Client concerns were often unstated, and when stated, the client duties, including zealous advocacy, were expressly subordinate to the lawyer's duties to the court."[24] As the various legal oaths moved closer to the modern age, a similar emphasis continued. The 1816 oath from Geneva formed the basis for the Field Code and U.S. professional responsibility duties later on. This oath concerned itself primarily with the justness of the litigation and the lawyer's duties to the court, although as noted below, conceives of criminal defense as meriting something different.[25]

Such a focus on the "just cause" of the action is clearly consistent with zealous advocacy where the cause is, in the lawyer's reasonable view, "just"—of particular note here is that the lawyer's view must be a reasonable one, and this mitigates against the fear that zeal is the last refuge of unscrupulous lawyers. However, the litigation fairness approach also recognizes that zealous advocacy is likely to be the duty "most at odds with the lawyer's duties to the court."[26] When imposed, these duties to the court "have been paramount over any conflicting client duties."[27]

This primacy of duties to the court marks a change from the earliest presentation of legal ethics in the Justinian Oath from the sixth century, where duties to the court were seen as tempering the *primary* duty of zealous advocacy.[28] The Oath reads, in part, that

> [T]hey will undertake with all their power and strength, to carry out for their clients what they consider to be just and true, doing everything which it is possible for them to do. However, they, with their knowledge and skill, shall not prosecute a lawsuit with a bad conscience when they know that the case entrusted to them is dishonest or utterly hopeless or composed of false allegations.[29]

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[23] *Id.* at 396–97 (quoting 23 SACRORUM CONCILIORUM: NOVA ET AMPLISSIMA COLLECTIO, as translated in JOSIAH HENRY BENTON, THE LAWYER'S OFFICIAL OATH AND OFFICE 9 (1909).

[24] *Id.* at 401.

[25] *Id.* at 400.

[26] *Id.* at 386.

[27] *Id.* at 383.

[28] *Id.*

[29] Andrews, *supra* note 14, at 389 (quoting the Justinian code).

The Justinian Oath thus strikes a balance in favor of the client while recognizing the importance of lawyerly integrity, without which the system would be degraded by zeal. The different balance struck by litigation fairness has less trust that zealousness (with integrity) would be to the benefit of the overall system.

Litigation fairness does not necessarily proscribe all zealous advocacy, and certainly not in all instances. For example, requiring reasonable behavior is, with very few exceptions, not inconsistent with zealous advocacy. Nor is a zealous advocate likely to be overly conscribed by a duty to avoid offensiveness in treatment of judges and adversaries. Likewise, zealous advocates may reasonably be convinced of the justness of their cause, and not simply be shilling for lying clients, meeting that notion of "proper motivation" that Andrews characterizes alongside just cause as part of duties to the court.[30]

There are many times, however, where putting the needs of the system before the needs of the client makes the two models incompatible. This is especially true in immigration court where the overburdened, under-resourced system would benefit greatly in terms of efficiency and caseload management if lawyers filed fewer motions, allowed the Government to meet its burden easily, consented to abbreviated client testimony to finish hearings more quickly, and so forth. Zealous advocacy in such a setting *does* impose significant burdens on the tribunal itself, and all players in the system are surely aware of those burdens because years-long docket backlogs and under-staffing of the immigration courts are widely noted phenomena,[31] to the dismay of the Government and advocates alike. Thus, immigration lawyers who choose to zealously advocate make a choice at odds with the needs of the system itself—an instance of litigation fairness clashing squarely with zealous advocacy.

The litigation fairness model has been ascendant in American legal culture, and within the ethical literature. Important voices such as William Simon have developed sophisticated arguments for the notion that all players in the adversarial system should define themselves as working toward justice in the system, instead of putting *client* interests first and foremost—although Simon recognizes that once a worthy client is chosen, a lawyer may advocate fully to achieve

[30] Andrews, *supra* note 13 at 386.

[31] *See, e.g.*, Zoe Tilleman, *Immigration Courts Backlog Grows as Obama Prepares Executive Action*, NAT'L L. J. (Nov. 20, 2014), http://www.nationallawjournal.com/id=1202677017577/Immigration-Courts-Backlog-Grows-as-Obama-Prepares-Executive-Action#ixzz3RHYsDPNc.

justice.[32] In this view, lawyers can discern what justice looks like from case to case, and matter to matter, and should commit to working toward that result.

The litigation-fairness model also shows up in recent reforms to the Model Rules, state rules and contested understandings of the roles of lawyers in problem-solving courts. Notice first the changes in the Model Rules themselves. As Professor Anita Bernstein has written, the ABA's 1980 Model Code of Professional Responsibility "omitted zeal from its enforceable rules, replacing the verb phrase 'shall represent' with 'should represent'—its Canon 7 read 'A Lawyer Should Represent a Client Zealously Within the Bounds of the Law' —thereby signaling mere guidance rather than a basis for discipline."[33] States have followed suit. Arizona struck the phrase "zealous advocacy" from its rules of professional conduct in 2003: "Last December, the adverb 'zealously' was removed and replaced with words demanding that lawyers 'conduct themselves honorably.' As the state bar put it, the change was made because 'lawyers had misused' zealous advocacy 'to justify unprofessional, intemperate, and uncivil conduct while engaging in the practice of law.'"[34] In 2004, the Colorado Bar Association President wrote to his membership that: "Diligence, competence, confidentially, with no conflicts of interest: elegant simplicity. The rules are comprehensive, describing a lawyer's duties not only to clients, but also to others. In short, the word 'zealous' is not a word needed to describe a lawyer's ethical duties."[35] In 2009, New York amended its rules, removing all references to zeal.[36] In problem-solving courts, as has been explored elsewhere in the literature, lawyers may be seen to have greater duties to the community and to abstract notions of justice than to the client,[37] although some assert that the

[32] Simon, *supra* note 17.

[33] Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV 1165, 1167 (2006) (citation omitted).

[34] Lincoln Caplan, *The Good Advocate*, LEGAL AFFAIRS (May/June 2004), http://www.legalaffairs.org/issues/May-June-2004/editorial_mayjun04.msp.

[35] Steve C. Briggs, *The Myth and Mischief of Zealous Advocacy*, THE COLO. LAW. (2004), *available at* http://coloradomentoring.org/wp-content/uploads/2013/10/Briggs-S-The-Myth-and-Mischief-of-Zealous-Advocacy-34-The-Colorado-Lawyer-33-2005.pdf.

[36] Vilardo & Doyle, *supra* note 15, at 56.

[37] For an interesting conversation about this debate, see John Feinblatt & Derek Denckla, *What Does It Mean to be a Good Lawyer? Prosecutors, Defenders and Problem-Solving Courts*, 84 JUDICATURE 206 (2001). *See also* Tamar Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75 (2007).

conflict in duties is overstated.[38]

The diminution of zeal in the rules seems to reflect a conflation of zeal with incivility, rudeness and utterly unethical behavior—none of which is actually a problem of zeal. Professor Bernstein defines zeal as "commitment to one side (rather than to a neutral search for truth), and passion."[39] She identifies the many flaws misattributed to zeal.[40] One example of such misattribution, using her definition of zeal, comes from a chapter devoted to "Excessive Zeal" in Richard Abel's excellent LAWYERS IN THE DOCK, a rich set of case studies on unethical practices in a variety of settings.[41] Abel highlights vivid examples of behaviors explicitly in violation of the Model Rules, including rude, personal attacks by lawyers, and falsification of evidence by lawyers. All of the examples noted are problematic, but problematic on their own terms as rule violations, not as examples of zeal itself.[42] One can be a passionate advocate committed to one side in a dispute without engaging in fraudulent, criminal, or hostile behavior. As Professor Bernstein writes, "Lawyers who err deserve blame; zeal does not."[43]

In the immigration context, one appeal of litigation fairness is how it sweeps the rug from under the feet of lawyers who will falsify evidence or file anything for the sake of delaying a client's case, who rely on an *unreasonable* zealousness (not the "reasonable" aspect of a just cause) to shill for clients. Clearly these lawyers are unethical by any standard, but they try to hide their actions under the cloak of zealousness, and a different emphasis on duties to the court system would take that cloak from them.[44] More significantly, a litigation fairness approach lives up to the neglected spirit of *Matter of S-M-J-*,[45] a pivotal case in asylum jurisprudence that is the closest immigration law has come to articulating a collaborative approach in the immigration court system. Notably, however, *S-M-J-* urged that the collaborative

[38] Julie Goldman, *The Need for Mental Health Courts for Lawyers to Fulfill Their Duties Under ABA Model Rule 1.14*, 26 GEO. J. LEGAL ETHICS 683, 689–90 (2013); Ben Kempinen, *Problem-Solving Courts and the Defense Function: The Wisconsin Experience*, 62 HASTINGS L.J. 1349 (2011).

[39] Bernstein, *supra* note 33, at 1171.

[40] *Id.* at 1175–78.

[41] RICHARD ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS (2008), Chapters 7 and 8.

[42] *Id.*

[43] *Id.* at 1169.

[44] Aristotle himself provides a simple response to this argument, noting that "[a] man can confer the greatest of benefits by a right use of [things that are most useful], and inflict the greatest of injuries by using them wrongly." ARISTOTLE, RHETORIC (W. Rhys Roberts trans.), bk 1, ch. 1, sec. 13, at 3.

[45] 21 I. & N. Dec. 722 (B.I.A. 1997).

spirit between judge, Government counsel and the immigrant/ immigrant's attorney be to the benefit of the *immigrant*, not the system itself, in recognition of the tremendous consequences at stake.[46] Such collaboration is sometimes present in *pro se* cases where judges or Government counsel will point out the immigrant's potential eligibility for some form of relief, and urge the immigrant to find counsel who can help him or her apply for relief. Once counsel enters an appearance for the immigrant, however, that notion of collaboration typically evaporates and the proceedings are often highly contested, with even judges playing an active role in adversarial questioning of the immigrant.[47] With such adversariality comes the occasion for zealous advocacy.

2. Zealous Advocacy

Zealous advocacy draws from a longstanding tradition in legal ethics. In 1908, the ABA discussed "the lawyer's obligation to give 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of [the lawyer's] utmost learning and ability.'"[48] This was the "rhetorical apogee" of zealous advocacy, which has been more recently subsumed under the rule exhorting attorney diligence,[49] with a separate mention in the preamble to the Model Rules.[50] Nonetheless, it continues on as a popular ideal.

In modern-day practice, the leading voices for zealous advocacy have been criminal defenders, with abundant scholarship providing justifications for that position.[51] The criminal justice system provides a rich body of accumulated wisdom regarding zealous advocacy in the context of appointed counsel.[52] The ethical norms of criminal

[46] *Id.* at 727.

[47] Maria Baldini-Potermin, *Preparation of Testimony of Noncitizen and Other Lay Witnesses*, IMMIGRATION TRIAL HANDBOOK § 6:17 (2014).

[48] MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 79 (2d ed. 2002) (quoting ABA CANONS OF PROFESSIONAL ETHICS 15 (1908)).

[49] MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1983) ("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.").

[50] "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROF'L CONDUCT Preamble, at ¶ 2 (2013).

[51] FREEDMAN and SMITH, *supra* note 48; SMITH, *infra* note 55

[52] The NAACP Legal Defense Fund (LDF) has written extensively on this issue in the South. The LDF noted that "[o]n the eve of Gideon's 40th anniversary, these paper guarantees, however, are functionally meaningless in Mississippi, a state which provides almost no regulation, oversight, or funding for indigent defense." NAACP LDF, ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS (Feb. 2003),

defenders suggest that among the sometimes competing roles that lawyers play as advocates and officers of the court, the role as advocate is particularly important. Indeed, the first of thirty-eight guidelines issued by the National Legal Aid and Defendant Association ("NLADA") states that: "The *paramount* obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process. Attorneys *also* have an obligation to abide by ethical norms and act in accordance with the rules of the court."[53] David Luban shows how the power differential between the defendant and the opposing party—the State—demands heightened attention to the client, an argument set forth in more detail in the next section. This Article will show that the same, and more, can be said of immigration proceedings.

While the reality in criminal courts across the country is far from the ideal envisioned by *Gideon*,[54] as described in *Part III.A, infra,* the zealous defender remains a dominant paradigm. Freedman and Smith, criminal defense lawyers and scholars, have written extensively on the primacy of zealous advocacy in a defender's practice, and Smith provides an eloquent summary of the philosophy:

> [A] lawyering paradigm in which zealous advocacy and the maintenance of client confidence and trust are paramount. Simply put, zeal and confidentiality trump most other rules, principles, or values. When there is tension between these "fundamental principles" and other ethical rules, criminal defense lawyers must uphold the principles, even in the face of public or professional outcry. Although a defender must act within the bounds of the law, he or she should engage in advocacy that is as close to the line as possible, and, indeed, should test the line, if it is in the client's interest in doing so.[55]

Freedman and Smith have been among the most significant proponents of the importance of zealous advocacy for the practice of criminal defense, although they draw upon the longer tradition of zealous advocacy throughout the broader legal profession.[56] Their

available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf.

[53] NATIONAL LEGAL AID DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES, *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#oneone (last visited Feb. 28, 2015) (emphasis added) [hereinafter NLADA Standards].

[54] Gideon v. Wainwright, 372 U.S. 335 (1963).

[55] Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 89–91 (2003).

[56] Lord Brougham famously described this principle in 1838 as follows:

> An advocate, by the sacred duty which he owes his client, knows, in the

arguments are grounded in the particular needs of criminal defense, given that in the criminal justice system, individuals are seeking protection from the full weight of the State—and given the stakes involved, where life and liberty are on the line.[57] For them, "the central concern of a system of lawyers' ethics is to strengthen and protect the role of the lawyer in enhancing individual dignity and autonomy through advocacy."[58] This view of zealous advocacy does more than defend the constitutional rights of the accused in any given case; it also promotes the broader societal goods of dignity and autonomy.

With such strong historical antecedents, Smith and Freedman have not developed a new principle so much as justified the ongoing relevance and primacy of an old principle. As any practitioner quickly realizes, rules of ethics often conflict with one another (even *within* one jurisdiction, let alone across jurisdictions), and the Freedman view is that in situations of conflict, the defender must resolve the conflict in favor of zealous advocacy for the client.[59] Clinical legal scholars across many disciplines have also recognized zeal as a component of client-centered lawyering, the "predominant model for teaching lawyering skills" in American law schools (although problematically in tension with other values of client-centered lawyering).[60]

3. Debate Over a Unitary Standard or a Context-Specific Standard of Practice

Even among proponents of zealousness, extensive debate exists concerning the question of whether zealous advocacy is justified uniquely for criminal defense, justified for some broader subset of legal practice areas, or justified as a standard for all practice areas. While ultimately beyond the scope of this Article, this question is worth exploring briefly because this Article at a minimum assumes either that zealous advocacy is the right unitary standard or, at least, the necessary standard within the immigration-context.

> discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm—the suffering—the torment—the destruction—which he may bring upon any other.

1 SPEECHES OF HENRY LORD BROUGHAM 105 (Edinburgh: A. & C. Black, 1838).

[57] Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133 (2008).

[58] Smith, *supra* note 55, at 88.

[59] Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133 (2008).

[60] Cruse, *supra* note 1, at 370.

At one end of the debate are Simon, discussed above, and Fred Zacharias, who advance the view that criminal defense is *not* particularly exceptional, and therefore should be governed by the same ethical norms as the rest of the legal profession—and not by norms of zealous advocacy. Zacharias, whose scholarship focuses on prosecutorial ethics, has argued that the difference between civil litigants and criminal defendants is overblown, first because civil cases can have enormous impact on litigants, and second because incarceration is often brief and not terribly disruptive to the incarcerated.[61] For these reasons, there is not enough of a difference between civil and criminal cases, in his view, to justify a different ethical standard.[62]

Moving toward a justification for zealous advocacy in certain contexts is David Luban, a renowned philosopher and legal ethicist who has also taught in an immigration clinic and written of immigration's difficult ethical challenges.[63] Where Simon and Zacharias put forward a unitary theory of ethics that would not justify criminal defense exceptionalism,[64] Luban provides a justification for treating criminal defense differently.[65] Luban's framework applies usefully for evaluating the world of immigration, and will therefore be discussed in greater detail below. He particularly examines the question of who has the advantages in a criminal prosecution by looking at resources, procedural advantages, political and

[61] Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 177–78 (1996). Smith critiques this article:

> He goes so far as to assert that being arrested or incarcerated is no big deal to most "modern" defendants who "may meet incarcerated friends" at the local jail, thus, equating jail for the underclass to Starbucks for the coffee klatsch. Zacharias concludes that, at the very least, "the assertion that criminal defendants are unique is a vast overgeneralization."

Smith, *supra* note 55, at 106–07.

[62] Zacharias, *supra* note 61.

[63] David Luban, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995).

[64] Simon does not believe the power of the State against the individual is a significant enough factor to justify criminal defense exceptionalism, at least partly because he is most concerned with lawyers hired by wealthy elites (think: OJ Simpson defense team) who may have almost limitless resources at their disposal. In Simon's view, such lawyers greatly overpower the "small number of harassed, overworked bureaucrats" who comprise the prosecution. William Simon, *The Ethics of Criminal Defense,* 91 MICH. L. REV. 1703, 1707 (1993). Smith and Freedman have responded vigorously to his arguments, questioning, *inter alia*, whether his theory derives from the correct understanding of how criminal justice operates, and suggesting that his more collaborative approach to ethics ignores the reality of the power imbalances present in trial courts across the nation. SMITH & FREEDMAN, *supra* note 48.

[65] David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993).

psychological advantages, and bargaining power, and concludes that for the overwhelming majority of criminal prosecutions (and not including the high-price defense that preoccupies Simon), the state has far more power, which justifies a "rebuttable presumption" of zealous advocacy: the defender should assume that zealous advocacy is appropriate, unless something in the specific situation argues otherwise.[66] He writes:

> [T]here are substantial objections to a double standard in legal ethics, including the obvious objection that practitioners may disagree about which standard applies to them. In that case, my conclusion is that, if the standard is to be single, it should be the single standard of permitting aggressive defense in every case, rather than Simon's single standard of presuming that aggressive defense is improper except when the threats of overpunishment, racism, or assembly line justice are imminent. After all, since these are the most typical cases, the exception threatens in any event to swallow up the presumption.[67]

A possible line between civil and criminal theories of ethics runs throughout legal history and ethics scholarship.[68] Zealous advocacy is often treated as so innate to criminal defense that it needs no particular justification, and is just a distraction to the more complicated questions of zealousness in non-criminal law practice.[69]

Abbe Smith has pushed back against the silo-ing of zeal to the world of criminal defense, arguing that zealous advocacy is the necessary, defining mode of lawyering across the profession—and not exceptional to criminal defense.[70] Smith acknowledges how criminal defense is unique, but notes that there is simply no line that can be meaningfully drawn between it and the rest of the legal profession:

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[66] *Id.* at 1757–58.

[67] *Id.* at 1766.

[68] "Many of the core ideals are the same in both contexts, but a lawyer's duties may vary depending on whether the litigation is civil or criminal. In my discussion of the historical standards, I occasionally note the different context of criminal cases where that difference helped define the duty on the civil side." Andrews, *supra* note 14, at 385. The 1814 Swiss oath that otherwise falls squarely under the "litigation fairness" model, emphasizing both duties to the court and the justness of the cause, itself carved out an exception for criminal defense: "To not counsel or maintain any cause that I do not feel is just or equitable, as long as it does not refer to a criminal defense." Andrews, *supra* note 14, at 400.

[69] *See, e.g.*, John S. Dzienkowski, *Ethical Decision-Making and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 75 (2013) ("Of course, in criminal cases, the duty of zeal has an especially important place

[70] Smith, *supra* note 55.

> Although thoughtful scholars have proposed ethical schemes with two or more tiers, I believe this is a bad idea and ultimately a dangerous one. Not only is it impossible to draw a principled line between criminal and civil practice, but it is impossible to draw tenable categorical lines at all. There are also a host of practical difficulties in developing an ethical scheme that reflects all of the contexts of legal practice. The danger is to the adversary system itself, and the constitutional principles underlying it. The push to curb zealous representation in civil cases will inevitably jeopardize zealous representation in criminal cases and the rights of the accused. As we have seen, the critique of "adversarial excess" invariably spills over into the criminal system.[71]

The broader and deeper question of whether zealous advocacy should be the unitary standard for every form of law practice is beyond the scope of this Article. In the following section, this Article does reject the notion that zealous advocacy is *never* justified. By bringing the ethical standards of immigration practitioners in line with those of criminal defenders, this work could support Smith—because it shows how difficult it truly is to find a meaningful line between criminal and non-criminal work.[72] It could also support Luban because he justifies zealous advocacy in certain criminal *and* quasi-criminal contexts,[73] and the analysis below situates immigration practice squarely within the kind of "quasi-criminal" context he suggests.

B. Justifying Zealous Advocacy for Immigration Practice

Because part of the justification for zealous advocacy is the unevenness of the adversaries in multiple ways, the immigration system, too, needs to be evaluated as to that question. Indeed, it compares in some regards quite easily to the criminal system, but also exceeds its lopsidedness in other regards.[74] In an immigration proceeding, immigrants face the full power of the Government just as defendants in criminal trials do, but without even the minimal protections available in the criminal setting. "A deportation proceeding is a purely civil action to determine eligibility to remain in this country . . . . Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not

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[71] *Id.* at 137.

[72] Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 89–91 (2003).

[73] DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 31 (2007).

[74] Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009); Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282 (2013).

apply in a deportation hearing."[75] As in the criminal justice system, the stakes in immigration proceedings are extraordinarily high: the possible outcomes usually affect an individual's ability to live with his or her family, to work, and to feel safe. What is being litigated through the immigration laws, in the words of one commentator, strikes "not at the trappings of social, economic, or political advantage, but at the trappings of identity: home, family, community, and self, resulting in 'loss of both property and life; or all that makes life worth living.'"[76] Also as in the criminal system, much of the population in removal proceedings is incarcerated in detention facilities that are only nominally "civil" detention facilities.[77]

These similarities to the criminal system, explored in more depth below, make it a useful exercise to examine how the justifications for zealous advocacy in the criminal context may justify zealous advocacy in immigration as well. In his article, *Are Criminal Defenders Different?*, Luban examines the question of who has the advantages in a criminal prosecution by looking at four factors: resources, procedural advantages, legitimacy, and bargaining power. He concludes that for the overwhelming majority of criminal prosecutions, the State's power far exceeds that of the defense. For this reason, in most cases zealous advocacy will be appropriate and should be the default position of the defender.[78] Applying Luban's four factors in the immigration context, this Article finds a similarly robust justification for zealousness, making zealous advocacy the appropriate default principle in immigration proceedings as well. Indeed, as Professor Susan Carle has pointed out, the "extreme case" where Luban sees a need for moving toward the ethical edges is actually not the extreme for lawyers who routinely

[75] INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

[76] Susan Pilcher, *Justice Without a Blindfold*, 50 ARK. L. REV. 269, 270 (1997) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

[77] The harshness of immigration detention, though nominally civil in nature, is well known. *See generally* DR. DORA SCHRIRO, DHS IMMIGRATION AND CUSTOMS ENFORCEMENT: IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf (noting how immigration detention facilities resemble criminal facilities, and how ICE officials are not experts in the delivery of services needed to run such facilities). For typical accounts of such facilities, see Edwidge Danticat, *Detained Immigrants Deserve Humane Treatment*, WASH. POST (Mar. 14, 2013), http://www.washingtonpost.com/opinions/edwidge-danticat-wasting-money-lives-through-the-detention-of-immigrants/2013/03/14/3d3e08c4-8b70-11e2-b63f-f53fb9f2fcb4_story.html; Azadeh N. Shahshahni, *The Reality of Life Inside Immigration Detention*, ACLU BLOG (Nov. 20, 2012), https://www.aclu.org/blog/immigrants-rights-racial-justice/reality-life-inside-immigration-detention.

[78] Luban, *supra* note 67.

practice in such areas.[79]

1. Resources

The relative power of the state and the immigrant in immigration removal cases largely shares the power dynamic found in criminal proceedings. The Migration Policy Institute determined that the United States Government spends more on immigration enforcement than all other law enforcement activities combined.[80] Much of this spending is concentrated in border enforcement, including speedy, mass-trials brought by federal prosecutors for recent border-crossers, and the spending has not benefited the kind of litigation at the heart of this Article—litigation in immigration courts in the country's interior.[81]

Although the Office of Principal Legal Advisor within the Bureau of Immigration and Customs Enforcement (ICE), which houses the ICE prosecutors, has not benefited from these budget increases, ICE still possesses relative advantages in most of the cases in immigration court. First, ICE has access to the individual's entire immigration and criminal history, much of which may not end up being shared with the applicant. ICE has notes from Customs and Border Patrol, which could include interviews done at the border, or from USCIS, which would include asylum interviews notes if the immigrant filed for asylum affirmatively.[82] Under a recent court order, ICE must now provide these notes *if* the applicant submits a Freedom of Information Act (FOIA) request. ICE has no affirmative duty to turn over the notes to counsel or to the applicant, and one scholar suggests this will leave

[79] Susan Carle, *Structure and Integrity*, 93 CORNELL L. REV. 1311, 1319–20 (2008) (asserting that Luban as starting to use a dividing line centered around clients with power and clients without power).

[80] Doris Meissner, et. al., Donald M. Kerwin, Muzaffar Christi, and & Claire Bergeron, *Immigration Enforcement in the United States*, MIGRATION POLICY INST. (Jan. 2013), http://www.migrationpolicy.org/pubs/enforcementpillars.pdf.

[81] The President's Fiscal Year 2015 Budget: Department of Homeland Security, NATIONAL IMMIGRATION FORUM (Mar. 11, 2014), http://immigrationforum.org/blog/the-presidents-fiscal-year-2015-budget-department-of-homeland-security/ (showing that the Office of Principal Legal Advisor prosecuting cases in court had a budget of roughly $204.5 million in 2014, out of an enforcement budget of approximately $5.6 billion) (last visited Feb. 17, 2015). Note that for FY2016, ICE is seeking a budget increase to fund approximately 300 more attorney positions. Dibya Sarkar, *The President's 2016 Budget Request: Immigration and Customs Enforcement*, FIERCE HOMELAND SECURITY (Feb. 5, 2015), http://www.fiercehomelandsecurity.com/story/presidents-2016-budget-request-immigration-and-customs-enforcement/2015-02-05.

[82] Maria Baldini-Potermin, IMMIGRATION TRIAL HANDBOOK, § 3:12. FOIA requests to the EOIR and DHS.

many out from receiving these crucial notes as a result.[83] Second, ICE prosecutors typically hear all their scheduling matters in one consolidated session in front of one judge, while an individual attorney may have matters on multiple days of the week, requiring hours to be spent in court simply awaiting a ten minute status hearing.[84] Third, ICE has the capability of investigating documents, courtesy of the Homeland Security Investigations Forensic Document Laboratory ("FDL").[85] The FDL has "[m]ore than 60 specially trained staff members [who] have access to a library and databases of identity and travel documents from across the world and the latest technology to identify inconsistencies."[86] By contrast, an immigrant can attest to the validity of a passport or birth certificate or political membership card introduced into evidence, but cannot usually independently provide proof of authentication. Although that may be sufficient to meet their burden of authentication,[87] it hardly carries the same level of weight as documentation submitted to the FDL.

In the specific realm of asylum litigation, the balance of investigatory resources is more sharply tilted toward the Government, for the simple reason that as a matter of safety, asylum-seekers often fear obtaining evidence from the persecuting country,[88] and may fear

[83] E-mail from Professor Phil Schrag, one of the authors of the influential REFUGEE ROULETTE, to the CAIR Coalition (Nov. 22, 2013) (on file with author):

> By its literal terms, the consent agreement only applies to officers handling FOIA requests. That will help referred asylum applicants who have representatives many months before their hearings. But it won't help the many others—with no representatives, with incompetent representatives who don't file FOIA requests, or who retain representatives within a few months before their court hearings—because they will never get the notes in time.

[84] Although not a procedural advantage, the extent of this face time also raises a "repeat player" issue that may provide ICE with a distinct advantage over the immigrant's attorney. Some immigration attorneys are frequently enough at court to be considered repeat players but none has the extensive time logged in front of particular judges that ICE counsel would. This may, of course, work to the disadvantage of an ICE attorney if that attorney has established a bad reputation with a particular judge.

[85] *Homeland Security Investigations Forensic Laboratory*, IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/hsi-fl/ (last visited Feb. 28, 2015).

[86] *TOP STORY: ICE's Forensic Document Lab Serves as Authentication Authority*, IMMIGRATION AND CUSTOMS ENFORCEMENT (Aug. 15, 2011), https://www.ice.gov/news/releases/1108/110815washingtondc.htm.

[87] Documents may be considered authentic where they are inherently reliable. Matter of Barcenas, 19 I. & N. Dec. 609 (B.I.A. 1988).

[88] One attorney known to the author used to seek authentication until a client's sister was killed in Burundi in the attempt to authenticate a document. The difficulties of seeking such authentication were examined—and found plausible—by the Fourth Circuit in a case about discretion in asylum proceedings. Zuh v. Mukasey, 547 F.3d

any action—like authentication, or contacting witnesses—that might alert the persecuting government to the fact that the individual is seeking asylum. The availability of the Homeland Security Investigations Forensic Document Laboratory is an extra advantage in this delicate setting. More profoundly, as will be discussed below under procedural advantages, the evidentiary imbalance is aggravated by the burden on the applicant to provide all corroborating evidence that would be reasonable to obtain, while the Government can win its case without producing any evidence whatsoever—simply by finding discrepancies in the asylum-seeker's statements.[89] The demands on the Government are simply smaller than the demands on the applicant, which means that far more resources must go into preparing an asylum-seeker's case than would go into opposing it.[90]

2. Procedural advantages

When considering procedures, it is clear that here the advantages available to the Government greatly outweigh—and perhaps completely obliterate—those available to immigration lawyers, in numerous ways. This section examines how constitutional infirmities in immigration law advantage the Government, and how the posture of immigration cases (where the immigrant is seeking a benefit from the State) disadvantages the immigrant.

a. Constitutional infirmities in immigration law

One set of constitutional infirmities in immigration law arises from the plenary power doctrine, which permits the political branches of government to create and administer immigration policy largely free of constitutional scrutiny.[91] While the criminal system has a host of constitutional protections (even if many are weakly implemented),

504, 508–09 (2008).

[89] *See* Part II.B.2(b), *infra*.

[90] Private immigration attorneys practicing in the area of removal defense earn approximately $63,000 as a median salary (compared to $100,000 for their colleagues who do business immigration, and work approximately 50 hours per week (the median weekly hours)). *AILA Marketplace Study*, at 44, AMERICAN IMMIGRATION LAWYERS ASSOCIATION (Dec. 2011), *available at* http://www.aila.org/content/fileviewer.aspx?docid=36823&linkid=245426. Fifty-two percent say they have all the work they can handle and another 21 percent have more than they can handle. *Id.* at 36. By comparison, a position posted in 2014 for an ICE attorneys opening listed a salary of $106,263–$157,100. *See* USAJOBS, Job Announcement, https://www.usajobs.gov/GetJob/PrintPreview/385875000# (last visited Mar. 30, 2015) (job announcement on file with author).

[91] *See generally* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

immigration courts are required only to be "fundamentally fair" under the Fifth Amendment.[92]

The fundamental fairness standard, governed by the *Mathews v. Eldridge*[93] balancing test, allows immigrants to have interpreters,[94] and to present evidence—such as hearsay evidence—that would not be admissible in federal proceedings.[95] The standard, however, also permits numerous practices that work against the immigrants, and does not apply in a large number of areas that could be considered part of fairness, such as having an attorney at all. Consider just four of these practices. First, under the "fundamental fairness" standard, an individual need not be physically present for their hearing.[96] Detained immigrants need to be present only by video for their removal hearings, because transporting them from detention facilities would, it is argued, be cost-prohibitive for the Government.[97] Second, in immigration proceedings, a mentally incompetent individual's case can go forward so long as the proceeding is simply "fair," although courts have recognized that this likely means the appointment of counsel.[98] By contrast, in the criminal setting, cases cannot go forward at all where the defendant is not mentally competent.[99] Third, the

[92] Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH & LEE L. REV. 469, 515–16 (2007).

[93] 424 U.S. 319 (1976).

[94] Niarchos v. INS, 393 F.2d 509, 511 (7th Cir. 1968) ("We think that the absence of an interpreter at the 1962 hearing is contrary to the aim of our law to provide fundamental fairness in administrative proceedings."). Notions of fairness clearly shift over time, as the current standard providing for interpreters is based upon fundamental fairness, as was a seminal case reaching the opposite result in 1891. Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (finding that lack of an interpreter for a Japanese woman did not violate due process).

[95] Matter of Grijalva, 19 I. & N. Dec. 713 (B.I.A. 1988) (hearsay evidence permitted unless its use would be fundamentally unfair).

[96] 8 U.S.C. § 1229a(b)(3) (2006) ("If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.").

[97] This practice could be litigated, as the balancing test has strong compelling factors on the immigrant's side as well. However, as a practical matter, an interlocutory appeal on such a pre-trial issue would be made unlikely by the fact of the immigrant's detention, as a delay of even two or three months and continued detention while the matter was pending before the BIA, would considerably deter most immigrants from filing the appeal.

[98] Matter of M-A-M-, 25 I. & N. Dec. 474 (B.I.A. 2011).

[99] Caleb Foote, *A Comment on Pre-Trial Detention of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960) ("The competency rule did not evolve from philosophical notions of punishability, but rather has deep roots in the common law as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.") *Id.* at 834.

right to be represented at the immigrant's own expense is available only as a statutory matter, not from a constitutional right.[100] Although decades of immigration decisions recognized that the immigrants can expect their counsel to be effective (under the Fifth Amendment Due Process Clause),[101] that right applies only if they *have* counsel, and there is no right to counsel under the Sixth Amendment for immigration proceedings.[102] Furthermore, the recent *Compean* decision, later vacated by the Attorney General, found that there was no Fifth Amendment right to counsel, and therefore no right to *effective* counsel.[103] Although vacated, the issue is not settled—the Attorney General asked EOIR to develop a rule on the subject when he vacated *Compean*, and EOIR has not yet done so.[104]

Whether or not immigrants with counsel are entitled to *effective* counsel, what is yet more significant is that immigrants largely have no constitutional right to counsel in the first place. As long established, removal proceedings are not punishment, no matter how serious a consequence deportation may be. As the Court noted in *Padilla*, "We have long recognized that deportation is a particularly severe 'penalty';

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[100] INA § 240(b)(4)(A); 8 U.S.C. § 1229a(b)(4)(A) (2013).

[101] For example, in Matter of Assaad, 23 I. & N. Dec. 553, 558 (B.I.A. 2003) (citations omitted), the court stated:

> [S]ince *Matter of Lozada* was decided 15 years ago, the circuit courts have consistently continued to recognize that . . . [an alien] has a Fifth Amendment due process right to a fair immigration hearing and may be denied that right if counsel prevents the respondent from meaningfully presenting his or her case.

Id. *Matter of Lozada* requires that individuals file a complaint with the attorney's bar and if able to demonstrate prejudice, they may have their cases reopened or reviewed. It is unclear how much of a deterrent this system is to immigration practitioners.

[102] Trench v. INS, 783 F.2d 181, 183 (10th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986). *See generally* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1775–80 (2010).

[103] Matter of Compean, 24 I & N. Dec. 710 (B.I.A. 2009). The Ninth Circuit has found that fundamental fairness does matter, looking at "whether the proceeding is so fundamentally unfair that the alien is prevented from reasonably presenting her case," and requiring the individual to demonstrate prejudice, a high bar to meet. Torres-Chavez v. Holder, 567 F.3d 1096, 1100 (9th Cir. 2009) (citing Lara-Torres v. Ashcroft, 383 F.3d 968, 974 (9th Cir. 2004), *amended sub nom.* Lara-Torres v. Gonzales, 404 F.3d 1105 (9th Cir. 2005)). Steven Legomsky has thoughtfully explored how this leaves adjudicators unconstrained in assessing effectiveness, and potentially subject to severe new limitations by Congress, and crafted an approach to require greater constitutional protections for immigrants post-*Padilla*. Stephen H. Legomsky, *Transporting Padilla to Deportation Proceedings: A Due Process Right to the Effectiveness of Counsel*, 31 ST. LOUIS U. PUB. L. REV. 43, 47 (2011).

[104] *Attorney General Vacates Compean Order, Initiates New Rulemaking to Govern Immigration Removal Proceedings*, DEP'T OF JUSTICE (June 3, 2009), http://www.justice.gov/opa/pr/attorney-general-vacates-compean-order-initiates-new-rulemaking-govern-immigration-removal.

but it is not, in a strict sense, a criminal sanction."[105] In these non-criminal proceedings, immigrants are not generally entitled to appointed counsel.[106] This sets in motion, as Professor Noferi has termed it, "cascading constitutional deprivations" for the immigrant.[107]

Another right available to criminal defendants that is not available to immigrants is that of *Brady* disclosures.[108] *Brady* entitles defendants to see the evidence against them, including potentially exculpatory evidence.[109] In immigration court, pre-trial discovery is nominally available as a regulatory matter, but in practice does not exist.[110] ICE prosecutors have routinely refused requests to see the immigrant's "A file," or immigration file; the Ninth Circuit held in 2013 that the immigrant had a right to the file,[111] but other circuits have not yet followed suit. A recent lawsuit has improved the availability of notes from asylum interviews, but such notes must be requested through FOIA and not automatically turned over by the Government. Since the credibility of the immigrant in court is always important, and in asylum cases particularly critical, this inability to see the file and discover potential discrepancies before trial matters profoundly. Where discrepancies are probable (traumatized individuals testifying about events that may have occurred years in the past)[112] and determinative (an adverse credibility finding jeopardizes asylum cases), immigrants are at a significant procedural disadvantage not being able to examine their file before a hearing.

Another constitutional infirmity is the reach of *I.N.S. v. Lopez-Mendoza*,[113] the case that limited the "fruit of the poisonous tree" doctrine in immigration proceedings. In *Lopez-Mendoza*, the Court

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[105] Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

[106] As noted above, this is being incrementally addressed through appointment of counsel for specific sub-groups of immigrants.

[107] Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 81 (2012).

[108] The landmark Brady v. Maryland case found a due process violation where the prosecution did not turn over potentially exculpatory evidence to defense. 373 U.S. 83 (1963).

[109] *Id.*

[110] Geoffrey Heeren, *Shaking the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569 (2014).

[111] Dent v. Holder, 627 F.3d 365, 373–74 (9th Cir. 2010) (citation omitted) (noting that the immigrant has a right to a "full and fair hearing in a deportation proceeding" under the Fifth Amendment, and holding that denying him access to his immigration file ("alien file") constituted a violation of this constitutional right).

[112] Ilunga v. Holder, No. 13-2064, 2015 WL 332110 (4th Cir. Jan. 27, 2015).

[113] 468 U.S. 1032 (1984).

held that evidence obtained in violation of the Fourth Amendment could nonetheless be admissible in immigration court, absent "particularly egregious" Fourth Amendment violations, because immigration proceedings are "purely" civil actions where criminal protections need not apply.[114] Immigration practitioners still sometimes seek to suppress illegally obtained evidence, and occasionally succeed, but judges are hesitant to engage in Fourth Amendment litigation in their administrative tribunals, and practitioners face pressure from both their adversary (ICE) and the judge him or herself to refrain from raising these issues.

Likewise, secret evidence has been permitted in immigration court for decades. In *Knauff v. Shaughnessy*, a case which arose in the context of national security concerns during the Second World War, the Government permitted the exclusion of Ellen Knauff on the basis of secret evidence.[115] INA §240(b)(4)(B) also permits the Government to rely upon secret evidence in the removal context.[116] Secret evidence clearly inhibits immigrants' ability to defend themselves because they will typically only receive a summary of the evidence, making it difficult to contest its accuracy, challenge its sources, and so forth.[117]

b. Posture of immigration cases

A critical source of difference between the criminal and immigration court settings arises from the different posture of immigration cases. In criminal cases, the defendant is seeking protection from the State. In immigration cases, the immigrant is seeking protection from the State's desire to remove him or her, and the State initially has the burden to prove removability.[118] This is a burden that the State is seldom required to prove. Even when contested, which happens seldom, the standard of proof for the State is lower than in the criminal context, which may help explain the number of U.S. citizens who end up being deported despite their protestations that they are, indeed, citizens.[119]

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[114] *Id.* at 1050.

[115] U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[116] INA § 240(b)(4)(B); 8 C.F.R. § 1240.11(c)(3)(iv) (2013). *See also* INA § 504(e)(1)(A) (creating Alien Terrorist Removal Courts where secret evidence may be used). *But see* Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287, 301–02 (noting that this provision has never yet been invoked).

[117] Niels W. Frenzen, *National Security and Procedural Fairness: Secret Evidence and the Immigration Laws*, 76 INTERPRETER RELEASE 45 (1999).

[118] INA § 240(c)(3).

[119] William Finnegan, *The Deportation Machine*, NEW YORKER (Apr. 29, 2013); Ted

Once the State meets this initial burden, usually with the immigrant conceding removability at a master calendar hearing, the burden shifts to the immigrant to establish a right to remain and this generally means that the immigrant must request a *benefit* from the State, instead of seeking enforcement of a right.[120] This basic tenet of immigration law creates countless procedural disadvantages and ethical dilemmas for the immigration practitioner, some of which are examined in more detail in Part B, *infra*. At root, because the immigrant is affirmatively seeking a benefit, almost anything the Government may require to show eligibility for that benefit must be given—if the requirement is too onerous, the individual can simply choose not to apply for the benefit.[121]

Finally, simply in terms of the task set for each side, the procedural posture means that the task is vastly more difficult and resource-intensive for the immigrant's attorney than for the Government. First, the attorney must establish every element of eligibility by a preponderance of the evidence, which means the Government need simply disprove one element.[122] Second, in asylum cases in particular, the attorney must provide corroborating evidence of the asylum claim where reasonable to expect that such evidence is available, despite the relative unlikelihood of someone fleeing persecution with corroborating documents.[123] By contrast, the Government can win its case merely by finding inconsistencies in the applicant's testimony, usually via cross-examination and sometimes by introducing notes from initial asylum interviews conducted months, if not years, before the final hearing.[124] For reasons well explored

Robbins, *In the Rush to Deport, Expelling U.S. Citizens*, NAT'L PUB. RADIO (Oct. 24, 2011). *See also* DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 14–15 (2012).

[120] INA § 240(c)(2).

[121] Similar issues abound in welfare law, such as requirements that candidates undergo drug testing before receiving welfare benefits, although some of these laws are being struck down as unconstitutional. *See, e.g.*, Lebron v. Wilkins, 990 F. Supp. 2d 1280 (M.D. Fla. 2013), *aff'd sub nom.* Lebron v. Sec'y of Florida Dep't of Children & Families, No. 14-10322, 2014 WL 6782734 (11th Cir. Dec. 3, 2014).

[122] INA § 240(c)(4).

[123] "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents." UNHCR, UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 REFUGEE CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 196, *available at* http://archive.hrea.org/learn/tutorials/refugees/Handbook/partii.htm (last visited Feb. 28. 2015).

[124] The Fourth Circuit recently acknowledged this unfairness powerfully in Ilunga v. Holder, No. 13-2064, 2015 WL 332110 (4th Cir. Jan. 27, 2015), but advocates still must contend with the REAL ID's definition of credibility, which includes consistency.

elsewhere, even asylum-seekers with truthful, unembellished claims may be inconsistent, creating another challenge for their lawyers to overcome.

3. Legitimacy

This aspect of Luban's justification for zealous advocacy in the criminal context is the most weakly applied to the immigration context, but has resonance here, too. Writing about jury impressions of the State's criminal case, he notes the narrative and normative power that the State has in pursuing a case against a defendant, as juries will think "where there's smoke, there's fire."[125] The Government's reliance on police officers as witnesses, too, taps into powerful perceptions about law enforcement reliability, and who constitute the "good guys" in a particular case. The jurors' faith that a case brought by the State is credible because the State itself is "democratic and legitimate" also strengthens the State's hand at trial, in his view.

Immigration hearings are bench trials, so if this factor of legitimacy resonates in the immigration context, it is through the susceptibility of judges to those narrative dynamics.[126] Those dynamics may, indeed, be powerful, as I have explored in other scholarship.[127] The dynamics emerge through such phenomena such as the availability heuristic (the mental shortcut filling in dispositive information when the fact-finder has a litany of available stories, often from popular media, that help make sense of the case in front of him or her) or cognitive dissonance (the difficulty of reconciling new information with previously understood information or, even more powerfully, previously made decisions).[128] But while legitimacy aspect may be a factor, it is likely less of a factor here than in the criminal jury-trial context, where most judges are also keenly aware of their duty to rule impartially—a factor that may help diminish the biases and heuristics noted above, at least as compared to juries.

See REAL ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 231; 8 U.S.C.A. § 1252 (West 2015).

[125] Luban, *supra* note 65 at 1741.

[126] *See generally* Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012).

[127] *Id.*

[128] *Id.*

4. Bargaining power

Luban posits that the weak bargaining power of criminal defendants can justify zealous advocacy, because such advocacy may be the only true bargaining chip that a criminal defender has.[129] The same can be said for immigration attorneys. Many immigrants are in removal proceedings because of some prior contact with the criminal justice system.[130] The conflation of the immigration and criminal systems, and the consequences to immigrants' removability, have been well studied in both criminal and immigration scholarship.[131] An immigrant's bargaining power within immigration has often been eliminated at that stage of proceedings, where he or she accepted a guilty plea that rendered him or her deportable, yielding to complex pressures that have been well documented elsewhere.[132]

Within the immigration system itself, bargaining power is extremely limited. Other scholars have noted, correctly, that this stems from the binary nature of removal proceedings, where the outcomes are either removal or admission.[133] What little opportunity exists for negotiation focuses on two specific avenues: seeking prosecutorial discretion to administratively close or terminate a case (or stay removal if ordered removed) or by requesting voluntary departure in lieu of a removal order.[134] As described here, the immigrant has extraordinarily

[129] Luban, *supra* note 65 at 1747 ("In the criminal defense context, by contrast, it seems intuitively correct to me that the prospect of aggressive defense can indeed function to take away the prosecutor's built-in bargaining advantage . . . and it seems plain that prosecutors have little incentive to bargain fairly unless defenders reestablish the balance of bargaining power.")

[130] *See* Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013).

[131] Jason A. Cade and Jenny Roberts have explored this intersection from the criminal justice perspective. *See* Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011). Many have explored this intersection on the immigration side, since the early work of Juliet Stumpf and Jennifer Chacón. *See* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1831 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

[132] Cade, *supra* note 131; Roberts, *supra* note 131.

[133] *See, e.g.*, Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009) (calling for proportionate immigration sanctions in lieu of the one currently available sanction, deportation); Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 393 (2008) ("[T]here is little bargaining in modern deportation proceedings, relative to the bargaining that occurs in the criminal justice system, because deportation is a largely binary rather than graduated sanction.").

[134] A third, specific to the asylum context, concerns offers by the government to stipulate to withholding of removal (a higher evidentiary burden, but a lesser form of

little bargaining power in requests for prosecutorial discretion, and the more effective requests for voluntary departure actually yield little by way of benefit to the immigrant—thus, they are bargains easily given by the Government and not reflective of a diminished governmental bargaining power.

One of the broadest means available to securing relief from removal is the favorable exercise of prosecutorial discretion, but as the name implies, it is relief that is solely determined by the prosecutor himself. Although having a long history in the immigration context,[135] prosecutorial discretion came to prominence among immigration practitioners with the release of two memos by ICE Director John Morton in the summer of 2011.[136] These two memos were followed by an announcement that the new agency vision would be implemented in conjunction with the Department of Justice through an individualized review of existing cases to permit closure or other discretionary actions for those deemed to be low priorities.[137] Then-Secretary of Homeland Security Janet Napolitano explained the administration's policy in a speech given on October 5, 2011, emphasizing that the Administration's stated focus had been clearing immigration courts' dockets so that priority could be given to the "identification and removal of public safety and national security threats."[138]

Despite the attention given to it, however, and despite the breadth permitted by the Morton Memos, actual favorable exercises of discretion have been extremely limited. There is little cost to the

relief) in lieu of litigating and risking an adverse decision from the judge. The difficulties associated with this particular bargaining position merit far more detailed consideration than this Article can afford.

[135] *See generally* Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action and the DREAM Act*, 91 TEX. L. REV. 59 (2013).

[136] The first memo concerned civil immigration priorities generally. MEMORANDUM FROM JOHN MORTON ON EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS (June 17, 2011), www.ice.gov/doclib/secure-communities/pdf/ prosecutorial-discretion-memo.pdf. The second concerned discretion for particular victims, witnesses and plaintiffs. MEMORANDUM FROM JOHN MORTON ON PROSECUTORIAL DISCRETION REGARDING CERTAIN VICTIMS, WITNESSES AND PLAINTIFFS (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/ domestic-violence.pdf.

[137] Letter from Janet Napolitano to Senator Dick Durbin (Aug. 18, 2011), *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Prosecutorial%20Discretion_Napolitano%20Durbin%20letter%208-18-11.pdf (last visited Mar. 30, 2015).

[138] DHS, Press Release, *Secretary Napolitano's Remarks on Smart Effective Border Security and Immigration Enforcement*, DEP'T OF HOMELAND SECURITY (Oct. 5, 2011), http://www.dhs.gov/ynews/speeches/20111005-napolitano-remarks-border-strategy-and-immigration-enforcement.shtm.

Government for denying a prosecutorial discretion request, especially where the prosecutor could point to any negative equity. Although there are supposed to be systemic advantages to granting the requests where the applicant meets enough of the prosecutorial discretion factors, there is little advantage to the prosecutor in any particular case. The prosecutor bears the risk of being the name associated with a decision not to remove someone who later proved dangerous, either in terms of national security or crimes—and while that risk may be small, the impact would be strongly negative if it did happen. With the outcomes in the hands of the prosecutors, and incentives skewed toward denying requests, it is unsurprising that the rate of favorable prosecutorial discretion decisions remains low. The latest data, from December 2014, showed that only 6.6 percent of cases before the immigration courts were closed through an exercise of prosecutorial discretion.[139] An earlier report indicated that 95 percent of those granted prosecutorial discretion were represented by attorneys, so even with advocates, the vast majority of immigrants were unable to bargain for the desired result of administrative closure or termination of their cases.[140]

The second form of negotiation that happens in immigration court, voluntary departure, is the reverse of prosecutorial discretion in terms of incentives and availability. Voluntary departure is designated by statute to permit certain immigrants to avoid the ten-year bar associated with an immigration court removal order and "voluntarily depart" the country at their own expense.[141] Voluntary departure meets multiple government objectives: removing the unlawful immigrant, avoiding litigation, and saving the money it would take to litigate and enforce an order, as well as to actually transport the immigrant to the home country.[142] Absent any of the statutory bars to voluntary departure, such as certain criminal convictions,[143] ICE prosecutors routinely agree to requests for voluntary departure.

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[139] TRAC Immigration, *Immigration Court Cases Closed Based on Prosecutorial Discretion*, http://trac.syr.edu/immigration/prosdiscretion/compbacklog_latest.html (last visited Feb. 28, 2015).

[140] TRAC Immigration, *ICE Prosecutorial Discretion Program* (June 28, 2012), http://trac.syr.edu/immigration/reports/287/ (last visited Mar. 30, 2015).

[141] INA § 240B (2013).

[142] Ballenilla-Gonzalez v. INS, 546 F.2d 515, 521 (2d Cir. 1976) ("The purpose of authorizing voluntary departure in lieu of deportation is to effect the alien's prompt departure without further trouble to the Service. Both the aliens and the Service benefit thereby.").

[143] Aggravated felonies disqualify immigrants from seeking voluntary departure. INA § 240B(a)(1).

Although this might seem to be an area where the immigrant has great bargaining power, the fact is that the benefit to the immigrant is usually negligible—if there is any benefit at all. Immigrants who have accrued a year or more of unlawful presence in the United States are subject to a ten-year bar whether they leave the country with an immigration court removal order, through voluntary departure, or simply by self-deportation.[144] Many of those in immigration removal proceedings have this ten-year bar already, in one of two ways. Either they were picked up after having been in the country a year or more, or for more recent arrivals, their continued accrual of unlawful presence while awaiting their hearing pushes them past the all-important year mark. The Government therefore loses nothing, gains the same ten-year bar on the individual returning, and avoids litigation. Moreover, the immigrant leaves at his or her own expense—a specific cost, although one that is perhaps compensated for by the dignitary value of not being deported. To the extent the immigrant is bargaining, it is for something of considerable *benefit* to the Government, hardly a robust example of bargaining power.

Moreover, detention casts a shadow over any bargaining processes. Detained immigrants comprised 36 percent of immigration court cases, or roughly 100,000 people, completed in FY2012.[145] Of these 100,000 cases, some were detained because they were subject to the mandatory detention provision of the INA, which covers almost all drug offenses, as well as many theft convictions, violent crimes, and others.[146] Others are detained simply because the government sees them as a flight risk and/or a danger to public safety, or because they are unable to pay bond, if bond was set.[147] In either situation, very difficult detention conditions[148] create a strong incentive to agree to any option that will end the detention quickly and provide a strong

[144] INA 212 (a)(9)(B)(i)(II).

[145] FY 2012 STATISTICAL YEARBOOK FY 2012, at O1, DEP'T OF JUSTICE (Feb. 2013, revised Mar. 2013), http://www.justice.gov/eoir/statspub/fy12syb.pdf [hereinafter EOIR STATISTICAL YEARBOOK].

[146] INA § 236(c).

[147] Discretionary detention is authorized by INA § 236(a), and its parameters are fleshed out in Matter of Patel, 15 I&N Dec. 666 (B.I.A. 1976).

[148] *See, e.g.*, Robert Morgenthau, *Immigrants Jailed Just to Hit a Number*, N.Y. DAILY NEWS (Jan 19, 2014), *available at* http://www.nydailynews.com/opinion/immigrants-jailed-hit-number-article-1.1583488; Ian Urbina and Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 24, 2013), http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html?pagewanted=all&_r=0; Nina Bernstein, *Officials Hid Truths of Immigrant Deaths in Jail*, N.Y. TIMES (Jan. 9, 2010), *available at* http://www.nytimes.com/ 2010/01/10/us/10detain.html?ref=incustodydeaths.

disincentive to exercising rights of appeal, which can stretch a period of detention out for months longer. Moreover, some immigrants are unlikely to be ultimately removed because they are from a country where, for example, there is ongoing strife, and these individuals become eligible for post-order release (usually with intensive monitoring and/or an ankle bracelet) 180 days after an administratively final order.[149] An appeal would delay their possibility of release on that basis as well, as it would delay the existence of an administratively final order. Finally, detainees have great difficulty securing representation for possible appeals, often because of the increased cost of access to detention facilities by lawyers (distance and bureaucratic obstacles, as well as higher costs for hiring experts who might be needed in the case).[150]

These dramatic limitations on the existence of immigrants' bargaining power justify zealous advocacy. As Luban writes in the criminal context, "[t]he credible threat of an aggressive defense that will not necessarily lead to acquittal—remember that only 1% of state felony prosecutions end in acquittal—may provide a bargaining chip sufficient to persuade an otherwise recalcitrant prosecutor to bargain in good faith."[151] In immigration, knowing that a case will be fiercely litigated may be sufficient to have the Government attorney take a closer look at whether, indeed, this case could benefit from prosecutorial discretion instead of litigation. While Government attorneys have not fully availed of prosecutorial discretion in line with the Morton memos,[152] the prospect of vigorous litigation, instead of the likelihood of accepting voluntary departure or facing a weak opponent, may be enough to add some vitality to the prosecutorial discretion option.

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[149] 8 C.F.R. § 241.4 (2013).

[150] *See generally* Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 548 (2009); HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY § VII (Dec. 2, 2009), http://www.hrw.org/en/node/86760/section/8 (describing the phenomenon of ICE transfers of detainees to remote locations, and the incumbent strains placed on their attorneys, particularly pro bono attorneys).

[151] Luban, *supra* note 67, at 1745 (citation omitted).

[152] As of this writing, there is no data on the superseding Johnson memos.

5. Moral (Il)legitimacy of the Rules Governing Immigration Lawyers

To all of these factors enumerated by David Luban in the criminal context, I add a fifth that is unique to immigration law. Lawyers practicing in immigration court are governed not just by the rules of the bar(s) where they are admitted, but also by the rules of immigration court itself, which are set by the Executive Office of Immigration Review ("EOIR"), the agency within Department of Justice that administers the immigration courts themselves.[153] These rules apply *only* to the immigrant's representative, not to the Government attorneys for whom separate rules and regulations exist.[154]

This is not merely a question of authorship, but of interest. Rules of professional conduct have long been written by lawyers' associations to govern themselves: a means of regulating themselves so as to avoid regulation (and possibly interference) by the Government.[155] Although lawyers presumably have strong self-interest in rules that favor their ability to meet their clients' needs in any way possible, rules which were too heavily focused on duties to the client with no countervailing duties to the court would likely invite criticism and, eventually, governmental rule-setting. As such, the rules consider a number of interests, and attempt to balance those interests, with the result being tensions and ambiguities, but ones that lawyers have for generations been largely able to navigate.

By contrast, the rules authored by the immigration court system itself favor the court's interests in excess of what is in state and model rules of professional conduct. Several of the rules are analogous to common rules of professional conduct, but not all. As clinical law professor and immigration scholar Lauren Gilbert has shown, the EOIR rules have a significant difference when it comes to the lawyer's ability to protect client confidences (explored in Part B). AILA ethicist Reid Trautz underscores this problem: EOIR rules "have no

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[153] 8 C.F.R. § 1003.102 (2013).

[154] EOIR, FACT SHEET: PROFESSIONAL CONDUCT FOR IMMIGRATION PRACTITIONERS – RULES AND PROCEDURES (Aug. 19, 2004), *available at* http://www.justice.gov/eoir/press/00/profcondfaks.htm.

[155] Critiques of this, too, abound. As Patrick J. Schiltz has written:

> I don't have anything against the formal rules. Often, they are all that stands between an unethical lawyer and a vulnerable client. You should learn them and follow them. But you should also understand that the formal rules represent nothing more than "the lowest common denominator of conduct that a highly self-interested group will tolerate."

Patrick J. Schiltz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52 VAND. L. REV. 871 (1999) (quoting Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 730 (1994)).

counterpart to Rule 1.6—Maintaining Confidentiality. None. The federal rules are primarily to benefit the agencies, not clients. The agencies want disclosure. They value and require candor, so they do not address client confidentiality."[156] James Garvin echoes this, noting that while the EOIR rules were formulated, among other reasons, with an imperative of "safeguarding a vulnerable client population," the rules—unlike those for states—"do not deal nearly so much with conduct offensive to individuals as they do with conduct offensive to the Government."[157] For these and other reasons, immigration attorneys fiercely critiqued the rules when they were proposed.[158] Thus, the EOIR rules of conduct provide another compelling reason to embrace zealous advocacy: where attorney choices are sharply circumscribed by rules less legitimate than those adopted by state bar associations, lawyers should be seeking to push those rules to their limits to defend the interests of their clients.

III. WHY ADOPT A GUIDING PRINCIPLE AT ALL?

Although immigrants are not entitled to counsel at the Government's expense, when they do secure counsel—and in the slowly increasing numbers of cases where appointed counsel *is* provided—they are, at least for now, entitled to have that counsel be effective. There is very little guidance, however, as to what constitutes effective counsel in the immigration context, and in any case, as discussed above, legally-sufficient effectiveness may differ enormously from truly effective lawyering. In the absence of guidance, ethical standards may tend toward the lowest norm permitted under the applicable rules of professional conduct particularly since many lawyers will never be held accountable for poor-quality lawyering.[159] In the absence of a well-articulated principle for resolving tensions, multiple pressures (described in Part Bmake it far more likely that tensions will resolve in favor of the tribunal and not in favor of any one particular client. Articulating the principle of zealous advocacy as an obligation of professional responsibility and lawyerly effectiveness matters precisely *because* of all these factors, trends and impulses that work against it.

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[156] Reid F. Trautz, *When a Client Lies: Balancing Confidentiality and Candor* (Dec. 18, 2012), *available at* http://agora.aila.org/product/detail/1220 (emphasis added) (last visited Feb. 28, 2015).

[157] James G. Garvin, *Multi-Jurisdictional Disciplinary Enforcement*, in AILA, ETHICS IN A BRAVE NEW WORLD: PROFESSIONAL RESPONSIBILITY, PERSONAL ACCOUNTABILITY, AND RISK MANAGEMENT FOR IMMIGRATION PRACTITIONERS, AILA (2004) 84.

[158] *Id.*, at 83.

[159] Discussed *supra* in Part 5.

A. The Power of Standard Setting: Lessons from Criminal Defense

Experiences in the criminal context help us see the need for articulating standards of effectiveness that include zealousness. In the decades since *Gideon v. Wainwright*[160] established the right indigent criminal defendants have to a lawyer, the experience of appointed counsel in the criminal setting has shown us that not all defenders are equal. An unfortunate percentage of appointed defenders turn in miserably deficient performances.[161] Criticisms abound concerning the nation's failure to live up to the promise of *Gideon*: poor state funding[162] has led to overwhelmingly large dockets for defenders,[163] exacerbated by the expanded reach of the criminal justice system in an era of massive incarceration.[164] Compounding these factors is the laughably limited protection afforded to defendants who believe they have been inadequately represented and who must satisfy the onerous ineffective assistance of counsel requirements under *Strickland v. Washington*.[165] One prominent criminal defense attorney, Steven Bright, has lamented that the *Strickland* standard "demeans the Sixth Amendment" promise of counsel.[166] *Strickland*, famously, allows representation by "anyone with a 'warm body and a law degree' to satisfy the Sixth Amendment."[167]

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[160] 372 U.S. 335 (1963).

[161] *See generally* Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104 (2009). *See also* Public Defender, Eleventh Judicial Circuit of Fla. v. State, 115 So.3d 261 (Fl. 2013) (holding that enormous workloads violated the defendants' Sixth Amendment right to counsel); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 682–83 (2007) (describing "pervasive" deficiencies in defense). "The result [of enormous caseloads] is rampant ineffectiveness of trial counsel even among conscientious public defenders, to say nothing of lawyers who sleep through trial or abuse alcohol and drugs while representing their clients." *Id.* at 83.

[162] Thomas Giovanni and Roopal Patel, *Gideon at 50: Three Reforms to Revive the Right to Counsel*, BRENNAN CENTER FOR JUSTICE (2013), *available at* http://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf.

[163] *Id.*

[164] Abbe Smith has described "the increasingly muted sound of Gideon's Trumpet as the criminal justice system has grown beyond all imagination." Abbe Smith, *Gideon Was a Prisoner: On Criminal Defense in a Time of Mass Incarceration*, 70 WASH. & LEE L. REV. 1363, 1364 (2013) (citation omitted); *see also* Paul Butler, *Gideon's Muted Trumpet*, N.Y. TIMES, Mar. 18, 2013, at A21.

[165] 466 U.S. 668 (1984).

[166] Steven Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1883 (1994).

[167] Abbe Smith, *Gideon Was a Prisoner: On Criminal Defense in a Time of Mass Incarceration*, 70 WASH. & LEE. L. REV. 1363, 1385 (2013) (quoting David Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 819 (1976). And beyond these

Understandably, just as the effectiveness of the criminal defense bar ranges widely, so does the level of zealous advocacy. Often, criminal defendants receive subpar, decidedly *un*-zealous representation from appointed counsel. As Bright has written, "Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters. This fact is confirmed in case after case."[168] This problem has been documented and critiqued widely.[169] As lawyers have tried to put meaning into the *Strickland* standard, seeking findings that counsel was ineffective at the trial level, a pattern of poor representation has become part of the story of criminal defense.

If *Strickland* represents one force moving toward substandard representation, then well-developed principles of zealous advocacy constitute a force pushing back against *Strickland*. Thanks to the exceptional leadership of many defender services and the National Legal Aid and Defender Association ("NLADA"), robust standards of competent representation have been developed and the best defenders provide exceptional service to their clients at defender services from Washington, D.C. to Seattle to the Bronx. NLADA's role articulating and defining the standard for ethical practice of criminal defense was recognized by the Supreme Court in *Padilla*. In the Court's examination of effectiveness of counsel, the Court emphasized the "weight of prevailing professional norms," citing NLADA and others.[170]

Among these prevailing norms, zealousness reigns supreme. According to NLADA, the very first standard that a defender must meet is this: "The *paramount* obligation of criminal defense counsel is to provide *zealous* and quality representation to their clients at all stages of the criminal process. Attorneys *also* have an obligation to abide by ethical norms and act in accordance with the rules of the court."[171] The primacy of zealous advocacy here is clear, tempered by other ethical

existing criticisms, some have said that *Strickland* is diluted still farther by the *Padilla* decision, imposing a lesser duty of effectiveness on criminal defenders representing noncitizens. *See generally* César Cuauhtémoc García Hernández, *Strickland-Lite: Padilla's Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844 (2013) (criticizing the Court's failure to fully remedy the problem of inaccurate advice for noncitizen criminal defendants).

[168] Bright, *supra* note 166, at 1836. *But see* Butler, *supra* note 164.

[169] EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST•CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES, INNOCENCE PROJECT 3 (2010) (noting that 81 percent of ineffective assistance of counsel claims were rejected in cases where the defendant was ultimately exonerated through DNA); Bright, *supra* note 166.

[170] Padilla v. Kentucky, 559 U.S. 356, 367 (2010).

[171] NLADA Standards, *supra* note 53 (emphasis added).

norms and court-rules. The specificity of the subsequent standards provides a fuller sense of what zealous advocacy entails: undertaking every possible motion and action to secure the best outcome for the client. For example, contrary to the conciliatory legal culture that exists in many fora, Guideline 5.1 sets the default mode in favor of filing pretrial motions; such motions should be filed "whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant." The same guideline states that "[c]ounsel should withdraw or decide not to file a motion *only* after careful consideration."[172]

The articulation of these standards matters. Literature on organizational culture shows that the repeated articulation of values and norms influences the conduct of cases.[173] As scholar Darryl Brown has written, particularly considering the criminal practice setting, "In localized, close-knit practice settings, lawyers and judges often adopt strong social norms. . . . On crucial issues, attorney judgment is affected by norms that coerce or persuade attorneys to choose options they would not otherwise choose, for reasons other than the client's best interest."[174] He goes on to powerfully describe the ways that local norms constrain attorneys from filing certain kinds of motions, seeking jury trials, and so forth, because the consequences of violating the norms are so costly.[175] Other scholars have defined legal culture as the "bundle of shared, local perceptions and expectations in the operation of a legal system."[176] This "bundle" may or may not comport with actual laws and regulations, as Brown writes, but they become a set of "'rules of thumb' that seem to arise spontaneously and supplant the exercise of discretion in the mass processing of cases."[177] They may be seen as heuristics, mental short-cuts that help attorneys navigate law that "is too complex for attorneys to internalize and apply on a daily basis."[178]

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[172] *Id.* at 5.1(c) (emphasis added).

[173] *See, e.g.*, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Group on Best Practices*, 31 CARDOZO L. REV. 1961, 1995–99 (2010) (discussing systemic and cultural aspects of prosecutorial offices, and how they impact conduct).

[174] Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 803 (2000).

[175] *Id.* at 806–13.

[176] Theresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 803 (1994). *See generally* Mary Helen McNeal, *Slow Down, People Breathing: Lawyering, Culture, and Place*, 18 CLINICAL L. REV. 183, 205–20 (2011) (discussing the multiple factors that create and sustain local lawyering cultures).

[177] Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1518 (1996).

[178] McNeal, *supra* note 176, at 212.

Legal culture is also powerful in terms of ethics. After studying the legal culture of Baltimore attorneys, one scholar noted that "no coherent account of professionalism, legal ethics, or the contemporary legal profession is possible without understanding the workings of practice organizations."[179] And unfortunately, culture is not always in a positive relationship with ethics. Noted ethics scholar Deborah Rhode has assessed the impact there has been as the legal profession as shifted from "informal regulatory controls" to "reliance on official codes."[180] She writes that:

> [A]spirational norms have largely given way to minimal rules. The result does not necessarily reflect what most commentators (or even lawyers) would consider right or moral. And the danger in diluting the ethical content of ethical codes is that they will nonetheless pass for ethics. New entrants are socialized to the lowest common denominator of conduct that a highly self-interested group will tolerate.[181]

If organizational culture and norms affect the practice of law, as they surely do, then the content of professional norms matters greatly to the practice of zealous advocacy. The ethos promoted by a commitment to zealous advocacy creates a cultural counterweight to prevailing norms of conciliation. Negotiation, mediation, and other forms of alternative dispute resolution dominate civil justice (and within civil *litigation* in particular, some estimate that as many as 99 percent of cases resolve without going to trial).[182] In the criminal justice sphere, the vast majority of cases are negotiated, or pleaded, out instead of fully litigated.[183] This overall tendency toward non-litigation is compounded by the dynamics of lawyers who are harried and overworked, and who are, perhaps most problematically, subject to the "repeat player" dilemma. This dilemma, well known to practitioners, arises when lawyers appear before the same set of judges, against the same adversaries, over and over, where relationships and reputation—not wanting to rock the boat—may inveigh powerfully against zealousness.[184] Against such a context, the principled articulation of

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[179] *Id.* at 217 (quoting MICHAEL KELLY, THE LIVES OF LAWYERS 18 (1996))

[180] Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 730 (1994).

[181] *Id.*

[182] Hilarie Bass, *The End of the Justice System as We Knew It?*, 36 LITIGATION 1, 1 (2010).

[183] Padilla v. Kentucky, 559 U.S. 356, 372–73 (2010) (citing statistics from the Department of Justice Bureau of Justice Statistics). *See generally* Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650 (2013) (discussing why a right to effective counsel in plea-bargaining should be recognized).

[184] *See, e.g.*, Mary Helen McNeal, Slow Down, People Breathing: Lawyering, Culture and Place, 18 CLINICAL L. REV. 183, 216–17 (2011) (discussing the "repeat player"

and commitment to zealous advocacy as a guiding principle makes it possible to *be* zealous and for those repeat players to understand that the zealousness is the defender doing her or his job.

NLADA and leading defender services provide the counterpoint in an era when there are "too few resources, too many clients, and fee systems that discourage zealous advocacy."[185] At their best, these organizations deliver client-centered lawyering that—whether the client wins, loses or something in-between—helps create procedural justice. Procedural justice sees value in zealous representation where it leaves a client trusting (relatively) the fairness of the process, regardless of the actual result. Moreover, the articulation of the standard may provide necessary support and encouragement to those advocating fiercely for their clients. As Abbe Smith has written:

> The ethic of zeal is especially important here because it is comfortingly simple. How else might would-be defenders be assured that they will be able to do the work and sleep at night, and even feel good about it? The paradigm of devotion and zeal serves as both the motivation for doing the work and the excuse for doing it well.[186]

Robust assertion of ethical standards and precise definitions of the elements of zealous advocacy, as embodied by the NLADA Standards, is particularly important given the phenomenon of "ethical fading." Ethical fading is "the cognitive tendency of individuals to conflate acting ethically with acting in a self-interested way."[187] Perceiving our desired actions as unethical leads to cognitive dissonance ("as a good person, how could my actions be unethical?") and a corresponding desire to find a way to relieve the dissonance. As described by one of the founding scholars on the subject, "[b]ecause the occurrence of cognitive dissonance is unpleasant, people are motivated to reduce it; this is roughly analogous to the processes involved in the induction and reduction of such drives as hunger or thirst—except that, here, the driving force arises from cognitive discomfort rather than physiological needs."[188]

phenomenon in criminal, bankruptcy and family law).

[185] Smith, *supra* note 55, at 92 (citation omitted).

[186] *Id.* at 118.

[187] Paul R. Tremblay & Judith A. McMorrow, *Lawyers and the New Institutionalism*, 9 U. ST. THOMAS L.J. 568, 579 (2011).

[188] Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Policy Lying,* 32 U.C. DAVIS L. REV. 389, 424 (1999) (quoting ELLIOT ARONSON, THE SOCIAL ANIMAL 178 (7th ed., 1995)).

A strong organizational culture affects the practice of ethical fading by providing a "'default' orientation toward which the 'fading' tends."[189] This is partly because "social organization and, in particular, community norms are almost always more important influences on individual conduct than formal rules." Although more emphasis has been placed on the negative effects of ethical fading, it is possible that organizational culture promoting strong ethical norms would have a comparably powerful effect in a positive direction.[190]

While the standards have been developed with specificity for certain aspects of criminal practice, Jenny Roberts has shown how standards are limited or absent in the particular context of misdemeanor court.[191] She demonstrates how the absence of such powerfully articulated norms permits ineffective assistance of counsel in that arena.[192] The rest of this Article explores the absence of strongly articulated norms in immigration, too, and examines the implications of that absence.

B. The Immigration Bar in the Absence of Heightened Standards

1. Structure of the Immigration Bar and Disciplinary Mechanisms

Like other administrative law bars, the immigration bar practices in a complicated world, often hidden from the view of mainstream legal practitioners. There are two basic streams of immigration matters: affirmative applications submitted seeking benefits from the Department of Homeland Security, and administrative exclusion and removal hearings conducted by the Executive Office for Immigration Review ("EOIR"), situated in the Department of Justice. This Article focuses on the EOIR removal hearings, although many of the same issues apply in DHS applications. EOIR removal hearings address one of two principal legal matters, although procedurally, each looks

[189] Tremblay & McMorrow, *supra* note 187, at 579.

[190] "The new institutionalism, however, does not suggest that the norm creation will inevitably erode ethical decision-making." Tremblay & McMorrow, *supra* note 187, at 579 (quoting Brown, *supra* note 174, at 813).

[191] Professor Roberts cites a lack of case law applying Strickland to the lower criminal courts. Roberts, *supra* note 131, at 315–22. She also notes the extremely limited applicability of professional standards like those from the ABA or the National Association of Criminal Defense Lawyers. "[T]he [ABA Criminal Justice] Standards do not address the ways in which defense counsel might effectively represent misdemeanor clients, given the particular needs and challenges of misdemeanor representation, when the right to counsel applies. There is a similar lack of guidance in other standards . . ." *Id.* at 329.

[192] *Id.*

almost exactly the same. One kind of hearing determines whether someone who has not yet been formally admitted *can* be admitted, or instead must be removed; this hearing happens whether or not the individual has physically entered the U.S. prior to the removal process beginning and the key question is admissibility. The other kind of hearing determines whether someone who has already been formally admitted can be removed, and the key question is deportability.[193]

Those authorized to appear before EOIR courts include both attorneys and a wide range of permissible non-attorney representatives. Federal regulations permit not just licensed attorneys, but also supervised law students and law graduates, representatives accredited by the Board of Immigration Appeals (a component of EOIR), foreign lawyers, and other "reputable individuals."[194]

Those appearing in immigration tribunals are subject to at least two different sets of ethics rules. First, as federal administrative tribunals operated by the Department of Justice, practitioners are subject to the professional conduct rules that EOIR has promulgated specifically for the immigration courts,[195] which encompass many, but not all, of the same principles as the ABA Model Rules of Professional Conduct, and they may be sanctioned for violating those rules.[196] James Gavin, an immigration lawyer who has been active in AILA's ethics work, has categorized these rules, noting that only five of the thirteen

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[193] The difference between these two types of cases is critical. For example, in *"Conditional Admission" and Other Mysteries: Setting the Record Straight on the "Admission" Status of Refugees and Asylees,* 17 N.Y.U. J. LEGIS. & PUB. POL'Y 37 (2014), Laura Tjan-Murray states:

> A noncitizen's "admission" status is fundamental to his or her procedural options and constitutional standing. First, it determines whether the noncitizen is subject to the grounds of inadmissibility or deportability in removal proceedings. Generally speaking, the latter are far more favorable to noncitizens. A noncitizen's admission status also may control whether she is eligible for bond or subject to mandatory detention over the course of proceedings, including during any government appeal of a victory by the noncitizen at trial. Even more sobering, whether a noncitizen is deemed "admitted" may be decisive as to whether she possesses any constitutional right to be released from detention following a removal order—or may be incarcerated indefinitely. Finally, whether and when a noncitizen has been "admitted" can determine whether she is eligible for a defense to removal or is removable at all.

[194] 8 C.F.R. § 1292.1(a) (2008). Although there are no publicly available statistics on the breakdown of kinds of appearances, this last category of "reputable individuals" appears to be very rare; I have not yet encountered such an appearance in immigration court, while other categories are reasonably common.

[195] 8 C.F.R. § 1003.102 (2003).

[196] 8 C.F.R. § 1003.103 (2003) (Immediate suspension and summary disciplinary proceedings).

have analogs in the Model Rules, while others like the prohibition against "contumelious and otherwise obnoxious conduct" and "repeated lateness for hearings" do not.[197] Second, those practitioners who are licensed attorneys are subject to the rules of the state bar(s) to which they have been admitted. As discussed in Part IV, *infra,* those state rules may conflict with EOIR rules, especially where the EOIR rules lean more toward duties to the tribunal and not to the client.[198]

Immigration lawyers are subject to the same disciplinary mechanisms as any of their non-immigration peers, including censure, suspension, and disbarment. These mechanisms can be used both by states and by the Department of Justice.[199] The extent to which they *are* used is a separate, important question. EOIR publishes a list of suspended and expelled practitioners; as of February 2015, that list contained 622 names, of which 198 were disbarred, 88 suspended indefinitely, and almost all of the rest suspended between 30 days and 10 years.[200] What cannot be gleaned from EOIR data is the number of complaints brought against attorneys—whether directly to EOIR or through state bars—that went nowhere, and why. What also cannot be discovered is how many complaints were not brought in the first place. Particularly when victims of ineffective assistance are deported, they may be unable to pursue a complaint from outside the country.[201] Even those not deported may be insufficiently familiar with the U.S. legal system to be aware of their right to file such complaints—often complaints are filed if and when they acquire new counsel who can diagnose the prior ineffectiveness. On the other hand, one factor

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[197] James G. Garvin, *Multi-Jurisdictional Disciplinary Enforcement, in* AILA, ETHICS IN A BRAVE NEW WORLD: PROFESSIONAL RESPONSIBILITY, PERSONAL ACCOUNTABILITY, AND RISK MANAGEMENT FOR IMMIGRATION PRACTITIONERS, 84 (2004).

[198] *See, e.g.*, Lauren Gilbert, *Facing Justice: Ethical Choices in Representing Immigrant Clients*, 20 GEO. J. LEGAL ETHICS 219 (2007); REID TRAUTZ, WHEN GOOD LAWYERS GO BAD: STRATEGIES TO REDUCE YOUR RISKS (AILA 2007).

[199] Executive Office of Immigration Review, *List of Currently Disciplined Practitioners*, DEP'T OF JUSTICE, *available at* http://www.justice.gov/eoir/discipline.htm (last visited Feb. 28, 2015) [hereinafter EOIR DISCIPLINE LIST]. State bar associations also post information on attorneys disciplined for various violations of professional conduct in the immigration setting, although the data are not published by field of practice and are therefore difficult to aggregate. *See., e.g.*, Maryland Attorney Grievance Commission, *Maryland Attorneys Disciplinary Actions FY 2015*, MDCOURTS.GOV, http://www.courts.state.md.us/attygrievance/sanctions15.html (last visited Feb. 28, 2015).

[200] EOIR DISCIPLINE LIST, *supra* note 199.

[201] The complaint form itself presumes a location within the United States. EOIR, *Immigration Practitioner Complaint Form*, *available at* http://www.justice.gov/eoir/eoirforms/eoir44.pdf (last visited Feb. 28, 2015). Even if someone filed the complaint from another country, the process often involves interviews with witnesses, and that could prove difficult for complainants outside the country. *Id.*

pushes for more complaints to be filed: those who do remain in the United States, and have sophisticated legal knowledge or effective new counsel, have an incentive to file complaints as a basis for reopening their cases. *Matter of Lozada* permits immigrants to reopen their cases on the basis of prior ineffective assistance of counsel, but must file a bar complaint to qualify for reopening.[202]

2. Reputation of the Immigration Bar

Whether due to the mix of individuals able to appear, the complexity of the law itself, or some other difficulty, the immigration bar (broadly defined) has a poor reputation. Nightmare stories of ineffective, incompetent and fraudulent attorneys abound, such as the case study of a New York attorney, Joseph Muto, who routinely missed hearings and was ultimately disbarred in New York for acting as a front for non-lawyers manufacturing fraudulent cases[203] (although his punishment before EOIR itself was only a seven year suspension).[204] Another case is that of the Father Bob Vitaligione, an accredited representative who was beloved for providing representation to thousands of needy individuals, until the extent of his incompetence was revealed.[205] In both cases, the practitioners seemed to be stepping in to help meet immense legal needs, perhaps demonstrating the view that any lawyer—even an overworked one—was better than no lawyer. But in both cases, their missteps, mistakes and, in the case of Muto, fraud, did more damage to their clients than might have happened with no lawyer at all.[206]

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[202] Matter of Lozada, 19 I. & N. Dec. 637, 639 (B.I.A. 1988), *overruled by* Matter of Compean, 24 I. & N. Dec. 710, 711 (B.I.A. 2009), *vacated*, 25 I. & N. Dec. 1, 1 (B.I.A. 2009). The *Lozada* approach has been criticized from many angles. The Attorney General in *Compean* noted that "[b]y making the actual filing of a bar complaint a prerequisite for obtaining (or even seeking) relief, it appears that *Lozada* may inadvertently have contributed to the filing of many unfounded or even frivolous complaints." *Compean*, 24 I. & N. Dec. at 737. One scholar proposed doing away with the bar complaint requirement, noting that the goals of validity and notice are met by other aspects of the Lozada procedure. Aliza B. Kaplan, *A New Approach to Ineffective Assistance of Counsel in Removal Proceedings*, 62 RUTGERS L. REV. 345, 367–68 (2010).

[203] Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. REV. 1449 (2006).

[204] EOIR DISCIPLINE LIST, *supra* note 199.

[205] Sam Dolnick, *Removal of Priest's Cases Exposes Deep Hole in Immigration Courts*, N.Y. TIMES (July 7, 2011), http://www.nytimes.com/2011/07/08/nyregion/priests-former-caseload-exposes-holes-in-immigration-courts.html?pagewanted=all&_r=0.

[206] Indeed, regulations require that both the Immigration Judge and ICE attempt to identify what relief might be available for *pro se* individuals, and judges often urge individuals for whom some relief might be available to try even harder to find an attorney for their case. At least the "regulations require" claim should have a citation. Such a *pro se* individual is far better off than if represented at the outset by someone

Due to well-known stories like those above and many others, as prominent immigration attorney Michael Maggio noted, "the collective ethical reputation of the immigration bar, which has never been great, is worse now than ever."[207] Maggio, whose own zealous advocacy was a trademark of his career,[208] thoughtfully lays out the multiple dimensions of the ethics challenges facing the immigration bar, noting how some of the least experienced immigration practitioners are among the most likely to be working on the most complex cases for the most vulnerable clients. More seasoned lawyers, he notes, tend to derive business from the world of labor certifications, which require craftsmanship and great skill, but are not as treacherous as removal proceedings, asylum cases and so forth.[209]

The American Immigration Lawyers Association has done enormous work trying to address the challenge noted by Michael Maggio. In addition to employing someone full time to educate members on ethics issues, the website for AILA members features practice and professionalism prominently on its homepage, and links to ethics publications and state-by-state compendia of rules providing guidance to immigration lawyers.[210] It also has a message board where members can seek guidance on ethical obligations and dilemmas, but these mostly focus on matters beyond removal proceedings (such as the dual representation problems in employment-based and family-based applications).[211] Given the non-adversarial context of these inquiries, it is perhaps unsurprising that the thoughtful analysis found in these resources tends to be fairly conservative in its approach—focusing carefully on lawyer liability exposure, and not on zealous

like Muto or Vitaligione who misses hearings, fails to screen for relief, and concedes removability or seeks voluntary departure when other, better courses of action were available.

[207] Michael Maggio, *Matter of Ethics*, *in* BRAVE NEW WORLD *supra*, note 157.

[208] Patricia Sullivan, *Immigration Lawyer Michael A. Maggio*, WASH. POST (Feb. 12, 2008), http://articles.washingtonpost.com/2008-02-12/news/36922813_1_fight-deportation-immigration-lawyer-ins-agents; *Firm Carries on Michael Maggio's Pro Bono Legacy*, AILA , http://ailahub.aila.org/i/49654/2 (last visited Feb. 28, 2015).

[209] Maggio, *supra* note 207.

[210] AMERICAN IMMIGRATION LAWYERS ASSOCIATION, www.aila.org (last visited Feb. 28, 2015). A post in the message board available to members solicits ethics articles that AILA is interested in publishing, and suggests that "possible topics include advertising immigration legal services across state lines, application of ethics rules on global practice, 'unbundling' legal services, and oversight of independent paralegals." (Post, Sept. 20, 2013). While these are undoubtedly important topics, they do not cover anything close to the topic of zealous advocacy in immigration removal.

[211] *See, e.g.*, Jill Marie Bussey & Jane W. Chen, *A Primer on the Ethical Considerations in Family-Based Practice*, AILA (2010); Trautz, *supra* note 198; Hilary Sheard, *Ethical Issues in Immigration Proceedings*, 9 GEO. IMMIGR. L.J. 719 (1995).

advocacy for clients. Furthermore, AILA—while exceptionally influential for immigration practitioners—is a membership organization, and not all immigration lawyers pay the dues needed to access these resources.[212]

In the removal context, one resource does lay out detailed steps that lawyers can take to prepare and defend their cases effectively: The Immigration Trial Handbook.[213] This resource has a wealth of information relevant to different stages of trial preparation, and provides a path for advocates to be extremely effective, and at times zealous.[214] It carries less authority for articulating standards of zealousness for the profession, however, than something like the NLADA standards developed for criminal defenders.[215] It is a private publication not developed as part of an effort to reach consensus about professional standards of effectiveness. As such, it falls well short of even the voluntary NLADA standards. Clearly, many lawyers *do* routinely practice zealously in immigration removal; the concern of this article is that they are unsupported and too often alone, not able to relay on a legal culture shared throughout the immigration bar. The flip side of this tarnished coin is that those lawyers who do *not* practice zealously have no commonly accepted standards in this practice area showing them precisely the degree to which they are falling short.

3. Efforts to Extend *Gideon*

Into this confounding world where lawyers and many kinds of non-lawyers can practice, and where unique and multiple ethical rules govern those who practice, come the questions of right to counsel, and the importance of that counsel being effective. The former question has been studied in some depth, but only recently has attention turned

[212] It is not possible to state how many immigration lawyers are *not* AILA members, especially because attorneys practicing in immigration court may consider themselves general practitioners working in multiple fields. But the dues likely price some percentage of lawyers out of membership, even where they are interested. For 2014, they range from $125 for non-profit attorneys to $455 for regular members with 7+ years of practice. *2014 AILA Dues Structure*, AILA.ORG, http://www.aila.org/membership/join (last visited Feb. 28, 2015). For an excellent study of the impact of AILA on immigration lawyer practices and actions, *see* Leslie Levin, *Specialty Bars as a Site of Professionalism : The Immigration Bar Example*, 8 U. ST. THOMAS L.J. 194 (2011).

[213] MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK (2013) [hereinafter IMMIGRATION TRIAL HANDBOOK].

[214] *Id.* at § 7:12. For example, it says that "counsel can and should object to [the] admission" of Form-213 when it contains information the client disputes.

[215] *Blue Ribbon Advisory Committee on Indigent Defense Services* (1996), NLADA.ORG, *available at* http://www.nlada.org/Defender/Defender_Standards/Blue_Ribbon.

to the latter question.[216]

The right to appointed counsel matters in a world where so many are unrepresented. During FY 2012, only 56 percent of immigrants had representation in removal proceedings.[217] The increasing use of detention, particularly in isolated locations, also decreases the ability of immigrants to secure representation.[218] Pro bono legal services for detainees are exceptionally limited, largely because of time and travel costs associated with access to far-flung facilities, such that a single two-hour interview with one client might consume 8–10 hours of an attorney's day.[219] At the same time and travel costs make private representation more expensive than many detainees can afford.[220] Even facilities close to major metropolitan areas have very low rates of representation for detainees, with one New York study showing only 40 percent have counsel by the time their hearing is completed (compared to 73 percent for those who are not detained).[221] Farther afield, that rate tumbles to 21 percent.[222] And "farther afield" is increasingly the norm in immigration detention. With roughly 36 percent of the immigration courts' cases comprised of detained cases,[223] these high rates of being unrepresented represent a significant problem.

Since 1989, there have been programs around the country trying to improve access to justice by providing pro bono representation and/or legal representation to detainees in different ways.[224] The Florence

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[216] *Compare* Beth Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393 (2000) *with* Hamutal Bernstein and Andrew I. Schoenholtz, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55 (2008).

[217] EOIR STATISTICAL YEARBOOK, *supra* note 145, at G1.

[218] Stacy Caplow has done statistical analysis of the rise of detained cases within the immigration court system. Stacy Caplow, *After the Flood: The Legacy of the Surge of Federal Immigration Appeals*, 7 NW J. L. & SOC. POL'Y 1, 25–26 (2012). Criticisms of ICE's detention quota abound. *See e.g.*, Morgenthau, *supra* note 148.

[219] Consider, for example, an attorney in Washington, D.C. representing a detainee in Farmville, Virginia, 170 miles away. Driving time each way is roughly three hours without traffic, and there can be significant delays between arriving at the detention facility and actually seeing the detainee client.

[220] Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 548–59 (2009).

[221] *The New York Immigrant Representation Study: Preliminary Findings*, N.Y. TIMES (May 3, 2011), *available at* http://graphics8.nytimes.com/packages/pdf/nyregion/050411immigrant.pdf.

[222] *Id.*

[223] EOIR STATISTICAL YEARBOOK, *supra* note 145, at O1.

[224] Ingrid V. Eagly has examined the ways that current legal service provision (via non-profits, pro bono representation, and law school clinics) could provide a

Immigrant and Refugee Rights Project has been representing immigrants and providing legal information to thousands of unrepresented immigrants at detention facilities in Arizona since 1989, and in that same year the American Bar Association, AILA and the State Bar of Texas set up ProBar to improve access to justice for immigrants in South Texas.[225] Since that time, legal orientation programs (LOPs) have increased massively in scale, under the monitoring of the Department of Justice's Office of Legal Access Programs.[226] Since 2008, the American Bar Association, in collaboration with several other entities, founded the Immigration Justice Project of San Diego to respond to the crisis in lack of representation. The project uses a network of pro bono attorneys to "promote due process and access to justice at all levels of the immigration and appellate court system."[227] The project specifically notes that the pro bono assistance is to be of "high-quality," although it does not define that term.[228]

Recognizing that such programs are, at best, a patchwork solution, there have been increasing—and increasingly effective—calls from the bar, policy advocates and legal scholars to recognize a right to *appointed* counsel in specific contexts. The quest to extend *Gideon* to the immigration context began decades ago and has been studied and justified in academic and policy literature.[229] These authors seek

foundation for expanding Gideon to immigration practice. Eagly, *supra* note 74.

[225] *Our History*, THE FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, http://www.firrp.org/who/history/ (last visited Feb. 28, 2015); *What Is ProBAR*, PROBAR DETENTION PROJECT, http://www.americanbar.org/content/dam/aba/administrative/immigration/probar/probaradultsbrochure7-12.authcheckdam.pdf (last visited Mar. 30, 2015).

[226] *Office of Legal Access Programs*, DEP'T OF JUSTICE, http://www.justice.gov/eoir/probono/probono.htm (last visited Feb. 28, 2015).

[227] *Immigration Justice Project (IJP) of San Diego: About Us*, ABA.ORG, http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/immigration_justice_project_ijp_of_san_diego/about_us.html (last visited Feb. 28. 2015).

[228] *Id.* Professor Andrew Schoenholtz and Hamutal Bernstein also note the importance of competence: "The crucial role of competent representation is one of the motivating factors behind the ABA Immigration Justice Project, which seeks not only to provide representation but also to train and prepare counsel in order to provide competent services." Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 59 (2008).

[229] *See, e.g.*, Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 ABA HUMAN RIGHTS MAGAZINE, no. 4, (2013), http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/extending_the_promise_of_gideon.html; Donald Kerwin, *Revisiting the Need for Appointed Counsel* no. 4 (Apr. 2005), http://www.migrationpolicy.org/research/revisiting-need-appointed-counsel; Beth I.

the extension of *Gideon* appointed counsel to immigration proceedings generally, for reasons very similar to the ones set forth in Part I, *supra*, comparing the immigration and criminal systems' stakes, complexity and power-imbalances.[230] Others have begun the process of defining specific contexts within immigration law that might justify the appointment of counsel.[231]

The phenomenon of appointed counsel in the immigration context is becoming more widespread for two reasons: development of case law providing counsel as a matter of due process, and expansion of appointed counsel through statutes or Government programs. First, the *M-A-M-* case recognized deficiencies in the due process available to mentally incompetent immigrants in the immigration court system.[232] The court in *M-A-M-* considered the Fifth Amendment due process rights of immigrants in removal proceedings, applying the standard of "fundamental fairness" to the question of whether a mentally incompetent individual had a right to appointed counsel in this particular civil context.[233] *Turner v. Rogers*[234] which examined the right to counsel in a child support enforcement case where the father was incarcerated, likewise offered a framework for evaluating Fifth Amendment due process right to counsel. While the Court found no right in that particular case, its framework, as scholar Ingrid Eagly has shown, could justify appointed counsel in the immigration context.[235]

Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B. C. THIRD WORLD L. J. 393 (2000).

[230] *Id.*

[231] Kevin Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013) (appointment of counsel for lawful permanent residents in removal proceedings); Noferi, *supra* note 107 (appointment of counsel for hearings to determine whether mandatory detention applies); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1359–60 (2011) (right to counsel for immigrants in removal proceedings because of a criminal conviction, post-*Padilla*).

[232] Matter of M-A-M-, 25 I. & N. Dec. 474 (B.I.A. 2011). This marked a leap forward from the statutory standard simply requiring the mentally incompetent individual's rights to be protected, without stating *how* such rights were to be protected:

> If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien . . . . The Act's invocation of safeguards presumes that proceedings can go forward, even where the alien is incompetent, provided the proceeding is conducted fairly.

Id. at 477 (internal citations omitted).

[233] Matter of M-A-M-, 25 I & N Dec. 474 (B.I.A. 2011).

[234] 131 S. Ct. 2507 (2011).

[235] Eagly, *supra* note 74, at 2302–03 (noting that if the framework requires "weighing case complexity, representation status of the parties, and available procedural safeguards" it could justify appointed counsel in the immigration context).

Second, appointed counsel is increasing as a legislative matter, and may continue to increase through immigration and other reforms. The Senate immigration bill, passed in June 2013, permitted appointed counsel for any proceeding at the discretion of the immigration judge, but *required* appointment of counsel for minors and mentally incompetent individuals.[236] Then, without waiting for federal reform, New York City created the first publicly funded "defender system" for immigrants in removal proceedings, in July 2013.[237] The $500,000 allocation creates a pilot project that would provide representation to 135 individuals.[238] If expanded, the project would coordinate a network of lawyers drawn from both private firms and non-profit immigration legal service providers.[239] As Ingrid Eagly has noted, "[r]egardless of how courts ultimately resolve the constitutional question, all levels of Government retain the ability to take legislative action to expand access to appointed counsel."[240]

C. New Focus on Effectiveness of Counsel

Clearly, appointed counsel is increasing, and likely to increase further, either through litigation or legislation. Appointment of counsel is, however, merely a starting point in considering access to justice. Increasingly, scholars are also looking at the effectiveness of the counsel that immigrants do have. As Professor Andrew Schoenholtz and Hamutal Bernstein write:

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[236] S.B. 744, § 3502(c) (2013) reads:

> Notwithstanding subsection (b) [providing discretionary authority to appoint counsel], the Attorney General shall appoint counsel, at the expense of the Government, if necessary, to represent an alien in a removal proceeding who has been determined by the Secretary to be an unaccompanied alien child, is incompetent to represent himself or herself due to a serious mental disability that would be included in section 3(2) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102(2)), or is considered particularly vulnerable when compared to other aliens in removal proceedings, such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings.

[237] Kirk Semple, *City to Help Immigrants Seeking Deportation Reprieves*, N.Y. TIMES (July 27, 2013), http://www.nytimes.com/2013/07/18/nyregion/city-to-help-immigrants-seeking-deportation-reprieves.html?ref=nyregion&_r=0.

[238] *Id.*

[239] PETER L. MARKOWITZ, PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN (2009), http://immigrantdefenseproject.org/wp-content/uploads/2011/03/Protocol.pdf.

[240] Eagly, *supra* note 74, at 2303.

> The problem is not only lack of representation but also poor quality of representation. Low-quality representation is too often the case at the Immigration Court level. Some applicants manage to secure representation, but their representative (1) may not have the appropriate legal expertise, (2) may be overloaded with too many cases, (3) may not give due attention and care to individuals, or (4) may even be fraudulent.[241]

Chief Immigration Judge Juan Osuna has similarly emphasized that counsel is not enough, and that the representation itself must be *good*: "Good lawyers help immigrants navigate a complex process. . . . [T]he system overall benefits when good lawyers get involved."[242] Judge M. Margaret McKeown and Allegra McLeod have also examined the question of effectiveness, looking at such trademarks of bad lawyering as placing clients unnecessarily into removal proceedings and failing to offer evidence, concluding that the view that *any* lawyer is better than no lawyer is fundamentally in error, a conclusion this Article supports.[243]

Beyond avoiding the importance of avoiding such unarguably bad lawyering (an important and herculean task in and of itself), this Article wants to ensure that our definition of competence is defined not against the lowest common denominator, but *upward* toward an aspirational standard. The way that zealous advocacy can make a practical difference in establishing a better standard for immigration lawyers is the subject of the next section of this article.

IV. THE IMPACT AND LIMITATIONS OF ZEALOUS ADVOCACY AS A GUIDING PRINCIPLE

A. Where Zealousness Might Make a Difference

There are multiple scenarios in immigration court where zealousness would be somewhat counter-cultural and could work to the benefit of clients, particularly those with more limited options or cases with weaker evidence. Certainly, many lawyers already do these things. However, in the fast-paced world of master calendars, where dozens of cases are processed swiftly, and trials that are condensed to just two or

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[241] Schoenholtz & Bernstein, *supra* note 228 at 59–60.

[242] Allegra McLeod & M. Margaret McKeown, *The Counsel Conundrum: Effective Representation in Immigration Proceedings*, *in* ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 286–306 (New York: New York University Press 2009).

[243] *Id.*

three hours, many of these maneuvers are exceedingly rare.

This section concretizes the notion of zealous advocacy in the immigration context. But it is also worth noting at the outset what, in this author's view, zealous advocacy is *not*: It is not uncivil and it is not dishonest. Zealousness may seem to demand an aggressive style or promote a propensity to exaggerate evidence. While different lawyers have different styles, incivility rarely serves any good purpose, and attorney dishonesty hurts not just the integrity of the system, but the interests of the clients known to be represented by someone with a reputation for dishonesty. The scenarios below show multiple contexts in which a lawyer can be zealous while remaining civil and honest.

1. Putting the Government to its Burden

The Government has the initial burden in a removal proceeding, to establish alienage, i.e. that the immigrant is not a U.S. citizen.[244] Once this burden is met, the burden shifts to the immigrant to prove he or she has a right to remain, and/or a defense to removal.[245]

The Government may seek to meet its burden by submitting a Form I-213 ("record of deportable alien") at the initial status hearing for a removal proceeding (the "master calendar"), although such documents are also introduced later, just for impeachment purposes during an individual hearing.[246] The Form I-213 contains information about the immigrant and the circumstances of his or her arrest and, if relevant, criminal history.[247] Immigration agents also include in Form I-213 any statements made by the immigrant upon arrest by DHS, as well as information from investigations made by ICE or other agencies pertaining to the immigrant.[248] The document is signed only by the arresting agent, and by the receiving officer who authorizes prosecution of the case. The court considers Form I-213 "inherently trustworthy," as a default matter, despite the presence of hearsay on the document.[249] The Form often contains information that is prejudicial to the immigrant's case, including the facts that the Government can use to meet its burden of establishing alienage, like

[244] INA § 240(c)(3)(A).

[245] INA § 240(c)(2).

[246] Matter of Ponce-Hernandez, 22 I. & N. Dec. 784, 785 (B.I.A. 1999) ("[A]bsent any evidence that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage or deportability.") (citation omitted).

[247] IMMIGRATION TRIAL HANDBOOK, *supra* note 213, at § 7:12. Matter of Mejia, 16 I. & N. Dec. 6 (B.I.A. 1976).

[248] IMMIGRATION TRIAL HANDBOOK, *supra* note 213.

[249] Matter of Mejia, 16 I. & N. Dec. 6, 8 (B.I.A. 1976).

nationality, and date, place and manner of entry. The form may also include allegations of criminal involvement not supported by records of conviction.[250]

Despite its "inherent reliability," advocates can challenge the admission of the Form. One reason for objection is that rarely has the lawyer been given a chance to examine it more than cursorily before the Government seeks to have it admitted. The lawyer has a statutory right to examine the evidence[251] a right that is diminished when custom and collegiality subtly pressure a decision to go along to get along and not waste the court's time by examining the document closely. Another is a simple objection to its hearsay, which, while likely to be overruled, preserves the objection for appeal if necessary; just because an objection is unlikely to be sustained does not mean the lawyer should resist making it. This is fairly cost-less zealous advocacy: something well within a lawyer's ability to do with minimal disruption of the litigation for either side. It is thus a place where zealous advocacy would prove easy to apply if adopted as a guiding principle.

The Government also meets its burden when the immigrant concedes the allegations made on the Notice to Appear (Form I-286, "NTA").[252] The NTA usually makes several factual allegations, including: nationality, date, and place and manner of entry, and sometimes other allegations about criminal activity, failure to remain in status, or others. Regulations provide for many different reasons why a notice to appear can be canceled,[253] from contesting the allegations, to asserting that the individual is actually a citizen of the U.S., to asserting that the notice was "improvidently issued." There is no data available showing the number of cases where an immigrant objects to admission of the NTA, but any observation of a master calendar shows how unusual it is to see attorneys make objections to the NTA or deny allegations thereon (except, sometimes, to make technical corrections which can be—and are—rapidly resolved with the issuance of a new NTA). When the newly created New York Immigration Defenders corps began litigating cases, their routine denial of NTAs sparked notice from lawyers unaccustomed to seeing

[250] While frequently damaging to the immigrant's case, the Immigration Trial Handbook also notes that Form I-213 may contain information about the arrest that could provide the basis for a Motion to Suppress Evidence. IMMIGRATION TRIAL HANDBOOK, *supra* note 213, at § 7:12.

[251] INA § 240(b)(4)(B); 8 U.S.C. § 1229a(b)(4)(B) (2013).

[252] 8 C.F.R. § 1240.8 (2013).

[253] 8 C.F.R. § 239.1(a) (2013). The Immigration Trial Handbook lists eleven different means of challenging a notice to appear, most of which derive from the immigration regulations. IMMIGRATION TRIAL HANDBOOK, *supra* note 213, at 5:10.

that done.[254]

When the allegations stem from evidence obtained unconstitutionally, lawyers can—and should—deny the allegations and pursue a Motion to Suppress Evidence. The regulations themselves provide for this: When the NTA is "issued under circumstances involving duress, a lack of due process, violations of a noncitizen's rights under the regulations, or *other violation of a constitutional right*," it may be challenged.[255] *Matter of Garcia*[256] provides one excellent example of this, although its contours are currently the subject of federal litigation.[257] The BIA found that Mr. Garcia's statements were made involuntarily when the then-INS handcuffed him and repeatedly refused him access to his attorney, even erasing the attorney's number from Mr. Garcia's arm (where he had written it).[258]

Beyond the regulatory violations, *INS v. Lopez-Mendoza*[259] opened the door to filing suppression motions under the Fourth Amendment when abuses were egregious, and possibly even more widely than that.[260] Concurrent with the rise in immigration enforcement done by local law enforcement agents, such constitutional issues have risen in immigration court as well, but are still a relatively unusual basis for challenging a NTA. This is so partly because *Lopez-Mendoza* is sometimes read as saying that the Fourth Amendment's exclusionary rule does not apply in immigration court,[261] and partly because such

[254] Rich commentary on this phenomenon emerged in a closed Facebook group for private immigration lawyers. (Sept. 11, 2014) (entire thread on file with author).

[255] Absent proof that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability or inadmissibility. Matter of Barcenas, 19 I&N Dec. 609 (B.I.A. 1988); Matter of Mejia, 16 I&N Dec. 6 (B.I.A. 1976).

[256] Matter of Garcia, 17 I.&N. Dec. 319 (B.I.A. 1980).

[257] The BIA held in 2011 that statements made prior to the issuance of an NTA. *Id.*

[258] *Id.* at 320.

[259] 104 S. Ct. 3479 (1984).

[260] The American Immigration Council Legal Action Center (affiliated with the American Immigration Lawyers Association) has shown how much of the reasoning behind *Lopez-Mendoza*'s "egregious violations" standard is based on facts no longer true in the present-day immigration enforcement apparatus. *Practice Advisory: Motions to Suppress in Removal Proceedings: Cracking Down on Fourth Amendment Violations by State and Local Law Enforcement Officers*, AMERICAN IMMIGRATION COUNCIL LEGAL ACTION CENTER (Aug. 15, 2013), http://www.legalactioncenter.org/sites/default/files/motions_to_suppress_in_removal_proceedings-_cracking_down_on_fourth_amendment_violations.pdf.

[261] Deborah Anker, *Asylum Status*, AMERICAN LAW INSTITUTE AMERICAN BAR ASSOCIATION TRAINING, C394 ALI-ABA 355 (Apr. 1989) (citing C. Slovinsky & M. Van Der Hout, *Motions to Suppress After Delgado and Lopez–Mendoza*, 13 IMMIGRATION

litigation is poorly understood.[262] Moreover, as one practice resource notes, "[Filing a motion to suppress under the Fourth Amendment] will not endear you to the Office of Chief Counsel and may adversely affect how DHS trial attorneys think of you and treat you."[263] Here, the disruption to the litigation is significant; such motions can take years to resolve as both sides work their way through appeals. Moreover, the reputational costs to the disruptive litigator can be significant.[264] However, disruption in defense of a constitutional right is at the least ethically defensible, under a guiding principle of zealous advocacy would be *required* to be a truly effective attorney.[265] Understanding the tactic as a key piece of effectiveness might reduce the reputational costs borne by lawyers who, at present, are litigating against cultural norms in immigration court.

2. Fighting Within Any Given Case

Zealousness also may shape how any given case is litigated, and will affect how well an attorney deploys motions, calls witnesses, counsels a client, or pushes to have evidence introduced. Even where there is no basic conflict in duties, the absence of a strongly articulated principle of zealous advocacy matters if the legal culture, as described in Part III(A) *supra*, deters such ethically permissible conduct simply as a matter of custom.

One scenario is not unique to immigration practice but is powerful there: the familiar scenario of the judge who wishes to hurry along proceedings. Imagine an immigration judge who wants to rush through testimony in a particular case because an overcrowded docket in the system generally has left her with too little time to patiently hear all the testimony. Does the lawyer push back and insist? Make an objection for the record? This is not a difficult choice, and a zealous

NEWSLETTER No. 5–6 at 1 (1984).

[262] See generally Maureen Sweeney, *Shadow Immigration Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 227, 277-79 (2014) (describing the lack of an analytical framework for immigration judges to determine motions to suppress, and noting the attendant confusion when such motions are filed).

[263] *Motions to Suppress in Removal Proceedings: A General Overview* 34, AMERICAN IMMIGRATION COUNCIL LEGAL ACTION CENTER http://www.legalactioncenter.org/sites/default/files/motions_to_suppress_in_removal_proceedings-_a_general_overview_1-26-15_fin.pdf (last visited Feb. 28, 2015).

[264] From discussion of an earlier draft of this Article, at the Mid-Atlantic Clinical Theory Workshop, held at University of Baltimore (Feb. 2014) (notes on file with author).

[265] Indeed, the Sixth Circuit just found that an unwarranted concession of removability by an immigrant's prior counsel constituted egregious circumstances, sufficient to allow the individual to reopen proceedings and withdraw the original admissions and concessions. *See* Hanna v. Holder, 740 F.3d 379 (6th Cir. 2014).

advocate would do at least one of those two things. But when zealousness is not the norm, and there are powerful pressures to please the Court, to be a good repeat player in the system, some lawyers will refrain from doing either of these simple litigation maneuvers, privileging the legal system over their client.

More difficult is the question of truthfulness and the lawyer's role in eliciting and presenting the truth. A common example of this arises for those seeking relief by applying for a crime-victim visa (a "U visa") from USCIS, an increasingly prevalent way to gain immigration status.[266] Although not adjudicated in court, courts often permit continuances if an immigrant appears to have a chance of regularizing status through an application to USCIS, and will postpone proceedings while that application is adjudicated. One question asked on the U visa application is "Have you EVER committed a crime or offense for which you have not been arrested?"[267] Some lawyers believe that they must answer "yes" to this question if the client discloses any possible transgressions (and because the lawyer must ensure that the client has answered every question on the form, this is information the lawyer *will* obtain from a client who is reasonably forthcoming). Others argue that the question itself implies that that no judge or jury has found the immigrant guilty of any offense, so it cannot be known with certainty whether there was a crime or offense committed at all. In this view, the lack of certainty permits a "no" answer even in the presence of questionable conduct.[268]

The fact that there are two possible paths demonstrates that this is an ethical gray area, where different actions may both be justified, and where duties come into sharp tension. On the one hand, the path of saying "yes" puts the lawyer in the role of being judge and jury for

[266] The visa came into creation in 2000, but lacked implementing regulations until 2008. Since then, through trainings and education, it has become widely known and widely sought. Ten thousand of such visas are available each year, and USCIS now routinely meets that quota. *USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year*, USCIS (Dec. 11, 2013), http://www.uscis.gov/news/alerts/uscis-approves-10000-u-visas-5th-straight-fiscal-year.

[267] *I-918, Petition for U Nonimmigrant Status*, at 3, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *available at* http://www.uscis.gov/i-918 (last visited Feb. 28, 2015).

[268] Still others say that the information is protected by the Fifth Amendment right to remain silent, but such a right must be invoked and in a civil matter, such as the adjudication of a U visa, invocation of the right permits the decision-maker to make an inference of guilt. *See* Gutierrez v. Holder, 662 F.3d 1083, 1091 (2011). Furthermore, while in a civil proceeding, an individual may invoke the Fifth Amendment, and let the fact-finder draw what conclusions they will from its invocation, there is no mechanism for doing so in immigration applications, short—perhaps—of writing "I invoke the Fifth Amendment" in the margin of the form or in a supplement.

their own client, which is squarely in collision with duties to the client—and yet, to lawyers making this choice, this likely feels like a fairly safe ethical choice, privileging the legal system over the client. It may be unfortunate and frustrating, but not unethical. Why that seems like the straightforward ethical choice is difficult to know. Perhaps answering yes appeals to the lawyer's need to prove that lawyers can be honest, contradicting the profession's (unearned) reputation for pervasive dishonesty. Perhaps answering yes shows respect or even some awe for the legal system, the same system that drew the lawyer into the profession in the first place. Answering yes may let the lawyer align with the legal system in a gatekeeping role that feels important, even if wrongly ascribed in an adversarial context.[269] Regardless, it is a safe choice that is unlikely to bear any negatives consequences for the lawyer.[270]

On the other hand, the defensible path of saying "no" even when possibly the truth is "yes," is a choice made by the zealous advocate, but for the risk-averse among us, this choice comes uncomfortably close to a collision with duties to the legal system. And why is that? Again, legal cultures develop shared norms, and it is difficult for lawyers to go against those norms. Because zealous advocacy is *not* the guiding principle within immigration law, a borderline decision such as this may lead to considerable discomfort with going against the cultural grain. A clearer, well-defined and broadly shared value of zealousness might ease that discomfort and make it easier to tip the balance toward duties to the client.

Another area where lawyers self-censor is in providing evidence to the tribunal. It is broadly understood that the Model Rules prohibit a lawyer from acting simultaneously as witness and advocate in a particular trial.[271] However, this rule, Rule 3.7 (which has no analog in the rules governing immigration court appearances) contains an exception for situations where "disqualification of the lawyer would work substantial hardship on the client."[272] Arguably, this exception applies frequently in the context of asylum litigation, where the attorney is a witness to efforts to corroborate the asylum-seeker's claim. In asylum cases, the legal standard is that applicant's own statement

[269] The gatekeeping role has been suggested in non-litigation contexts like corporate counsel work. *See* W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167 (2005).

[270] The reason the lawyer is unlikely to face consequences from the client whose duty was compromised is addressed in Part III.B.1, *supra*.

[271] ABA MODEL RULES OF PROF'L CONDUCT R. 3.7 (1983).

[272] *Id.*

may be sufficient to win asylum, but *only* when it would not be reasonable to expect corroboration.[273] This legal standard has been criticized as disadvantaging asylum-seekers who cannot produce adequate corroboration, and who cannot know what any particular immigration judge will expect to be "reasonably available."[274] Sometimes the client can offer testimony about attempts to obtain evidence, but often it is the lawyer who has done much of the case investigation, and knows much better than the client how hard or easy a particular document or witness statement was to obtain.[275] In a well-known case study from Georgetown Law's Center for Applied Legal Studies, students went to heroic lengths and deployed extraordinary creativity to find a key witness for their client's case.[276] They succeeded, but had they not ultimately succeeded (and not all efforts yield such excellent results), their efforts are surely evidence relevant to the determination of what evidence was "reasonably available" in the case—and therefore precluding testimony would impose substantial hardship on the client and thus meet the Rule 3.7 exception. Yet this thorough reading of the rule, coupled with a legal culture that assumes lawyers cannot offer testimony, could prevent such evidence from being offered at all. A legal culture that had zealous advocacy embedded as a guiding principle might lead more attorneys to try.

B. When Zealous Advocacy is Impossible

While zealous advocacy can resolve some dilemmas like those described so far in this section, there are other situations in immigration court, particularly as concerns candor to the tribunal, where it is simply not possible. Immigration law is not unique for experiencing tensions in the ethical rules where further guidance is needed. Such tensions have been examined in a variety of contexts.[277] Nonetheless, immigration law, and particularly the practice in immigration court where removal hearings are heard, is rife with such dilemmas, and those dilemmas often turn upon whether the lawyer

[273] REAL ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 231; 8 U.S.C.A. § 1252 (West 2015).

[274] Deborah Anker, Emily Gumper, Jean C. Han & Matthew Muller, *Any Real Change? Credibility and Corroboration After the REAL ID Act*, *in* IMMIGRATION & NATIONALITY LAW HANDBOOK (2008–09).

[275] *See, e.g.*, DAVID NGARURI KENNEY & PHIL SCHRAG, ASYLUM DENIED 136 (2009) (describing the efforts made by student attorneys to find a copy of a key news article in an asylum case).

[276] Agata Szypszak, *Where in the World is Dr. Detchakandi? A Story of Fact Investigation*, 6 CLINICAL L. REV. 517 (2000).

[277] Andrews, *supra* note 14.

chooses to favor duties to the client over duties to the court, or vice versa. Under different sets of ethical rules, lawyers have some grey area within which they can navigate competing duties and make a range of choices. That range of choices is sharply curtailed in immigration court, leaving lawyers in an untenable position.

AILA ethicist Reid Trautz introduces us to this problem:

> Our profession's ethical rules of conduct contain rules that may appear to conflict with each other, making it difficult for even experienced practitioners to properly apply and follow. Among the most difficult of these arises when a client lies: the intersection of our obligations of client confidentiality and candor toward an adjudicative tribunal. *For immigration lawyers, this frequently manifests itself when we learn a client may have been untruthful in an adjudicative hearing.* It is in this zone of difficulty that many lawyers find themselves, seeking a path to extract their clients and themselves from a legal and ethical quagmire.[278]

Note first, that in this example about honesty to the tribunal, that the lawyer has learned the client *may* have been untruthful. Under most rules of practice, such ambiguity about whether the client actually was or was not untruthful permit the lawyer to continue representing the client without any duty to share any doubts with the Court. The normal ethical standard imposing a duty to correct the record is "actual knowledge,"[279] which does not seem to exist in this example. However, in immigration court, the standard for knowledge included "reckless disregard" of the possibly false story.[280] So, indeed, the rules do not just *appear* to conflict, in Trautz's formulation; they do conflict.

Professor Gilbert has laid out these dilemmas and tensions in her scholarship.[281] In a wonderfully detailed case study (and one all too familiar to anyone who has represented clients in immigration court), she describes the multilayered dilemmas facing a particular pro bono attorney. This attorney represented a woman who, among other issues, made questionable, if not illegal, decisions about who to claim as a dependent on her tax returns. This issue put the lawyer in a bind as the immigration judge had demanded to see those tax returns as proof of the woman's good moral character (a requirement for the relief being sought). Gilbert explores the shades of whether the lawyer knew, suspected or recklessly disregarded information about the truth

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[278] Trautz, *supra* note 156.

[279] MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983).

[280] 8 C.F.R. § 1003.102(c) (2013).

[281] Gilbert, *supra* note 198, at 234–36.

or falsity of those returns.[282] Exploring client truthfulness is an issue familiar to all lawyers.[283] But Gilbert explores how this tension is exacerbated by numerous factors: the burden on immigrants to provide such evidence; by the likelihood of even minor issues and discrepancies to undermine a legal case; and by the under-resourced overwhelmed nature of immigration court dockets—"an increasingly draconian legal environment," as Gilbert describes it.[284]

In Gilbert's case study, the lawyer opts for solidarity with his client, and favors zealous advocacy over candor to the tribunal where those two values come into conflict.[285] As she writes,

> Faced with an ethical dilemma that threatened to derail his client's case, Attorney S considered not only the precise ethical issues he was facing, but the context in which the issues arose. Attorney S was representing a client before a decidedly hostile government attorney and a judge with one of the highest denial rates in the country. The stakes for his client were extremely high. Failure to win at this stage of the proceedings on discretionary grounds was likely to result in Bertha's immediate deportation.[286]

Such a decision may have violated the ethical rules in the lawyer's particular jurisdiction, because standards for what constitutes knowledge do vary across jurisdictions. The decision also, though, almost certainly runs afoul of the EOIR rules, which favor candor to the tribunal and do not acknowledge the lawyer's competing (and here, conflicting) duties to the client.[287] Recognizing that the zealous lawyer may be liable for ethical violations, Gilbert worries about the "chilling effect" of the recklessness standard and concludes that"

> While the Model Rules would allow attorneys to exercise discretion and their own moral judgment in deciding whether to offer evidence they believe might be false, the EOIR/DHS Rules appear to require practitioners to evaluate the veracity of their clients' testimony or the authenticity of their documentation and decline to offer such evidence if they suspect it may be false . . . . Subjecting practitioners to disciplinary sanctions for offering probative evidence that the attorneys suspect may be false is likely to have a chilling

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[282] *Id.*

[283] *See generally* Lisa G. Lerman & Philip G. Schrag, *Lawyers' Duties to Courts, Adversaries and Others: Truth and Falsity in Litigation*, *in* ETHICAL PROBLEMS IN THE PRACTICE OF LAW (3d ed. 2012).

[284] Gilbert, *supra* note 198, at 220.

[285] *Id.* at 258.

[286] *Id.* at 258–59.

[287] *Id.*

> effect on advocacy, pose a serious threat to the independence of immigration practitioners, and result in abuse of authority by immigration judges and DHS, upon whom practitioners become dependent for the right to practice.[288]

Gilbert closes her article by assessing that attorneys may be guided more by fear of liability under the EOIR rules, and less by the needs of their clients, an untenable situation.[289]

Other dilemmas emerge in the context of an applicant's criminal activity. Frequently in immigration law, the structure of the process and the nature of the applications for relief from removal require the immigrant to incriminate him or herself in some criminal wrongdoing; forms for common applications like asylum or cancellation of removal ask about criminal offenses committed, and the inquiry is not limited to convictions.[290] Regulations require that the attorney provide *all* the client's criminal records to the Court.[291] This is a reversal of the criminal context, where the Government has the duty to disclose exculpatory information,[292] the defender has no affirmative duty to present any evidence at all, and the accused has the right to remain silent. By contrast, here the immigrant—in removal, but affirmatively seeking something from the Government—has no such shields. For the most part, because applicants' biometric information is used to produce their criminal records,[293] the duty is simply acquiescing to the inevitable with no actual harm done to the clients' interests: the Government already possesses the information. However, not all criminal records are equally readily available, and when the Government does not find a record, but it comes to the attention of the lawyer, the lawyer now faces the stark choice between honoring her duty to the Court, by producing the record, and her duty to her client, whose chance at relief may now be reduced or destroyed by the disclosure. This is the scenario envisioned in the Cynthia case described at the beginning of this Article,[294] when the lawyer dug with her client to discover where the mysterious missing conviction record

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[288] *Id.* 229–30.

[289] *Id.* at 260.

[290] *EOIR Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents*, at 5, DEP'T OF JUSTICE (July 2014), *available at* http://www.justice.gov/eoir/eoirforms/eoir42b.pdf ; *USCIS Application for Asylum and Withholding of Removal*, at 8, UCSIS.GOV (Dec. 29, 2014), *available at* http://www.uscis.gov/sites/default/files/files/form/i-589.pdf.

[291] 8 U.S.C. § 1229a(c)(2)(A) (2013); 8 C.F.R. § 1240.8(d) (2013).

[292] *See* Brady v. Maryland, 373 U.S. 83 (1963).

[293] *Fingerprints*, UCSIS.GOV, http://www.uscis.gov/forms/fingerprints (last visited Feb. 28, 2015).

[294] *See* Introduction, *supra*, and text accompanying notes 2–4.

might be found.

In the moment *before* asking that digging question of the client, zealousness for the client should have stopped the student from inquiring further. She had done her due diligence, and could honestly stand before the court and said "we went to the courthouses to get the records, and this conviction did not come up, and we do not know what it was about." *Now,* however, she knew. And her duty to produce the record came into sharp conflict with her duty to her client—because the theft made her ineligible for Cancellation because it was considered an aggravated felony for immigration purposes. Every actor in the Court that day felt a weight of frustration with this outcome. The law prevented the Judge from granting the relief he thought she merited, and the student-attorneys, exercising their ethical obligations, had given him the information that led to that result.

It is worth stepping back a moment and thinking about the competing purposes of these duties in the first place. The duty to our clients is, of course, designed to promote trust so that the client can confide in the lawyer with the utmost confidence that her or his interests will be protected as a result of divulging the truth. The duty to the court helps ensure a well-functioning legal system, one in which all the players can have confidence because all the actors are behaving according to known, understood, shared rules. And the benefits are not just to the system, but also to the litigants. A growing body of scholarship and empirical work on the idea of "procedural justice" shows that litigants value a fair system even when they ultimately lose their case.[295] Lawyers, too, can derive satisfaction from an ethos of "playing by the rules"; respect for the rules feels virtuous, and can be far more comfortable that working along the edges of the rules and perhaps engaging in (civil) confrontation with opposing parties and the Court along the way.

When such important duties collide, then, there is a significant cost. What the dilemmas above show is that in immigration proceedings, where applicants must present information affirmatively in order to defend against removal, the client is wrong to trust the lawyer, because the lawyer is not always going to be able to protect the

[295] Legal scholars have imported this idea from the realm of social psychology. *See, e.g.*, Deborah A. Goldfarb, *Shaping Perceptions of Justice: A Familial Model of Procedural Justice*, 82 UMKC L. REV. 465, 466 (2014) (citing, *inter alia,* John Thiabaut & Lauren Walker, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975) and Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127 (2011)).

client's confidences so long as duties to the court triumph over duties to the client.[296] And there is a true cost associated with that for the *client*. But the costs do not stop with the client; they also extend to the system as a whole, which is predicated on clients trusting their lawyers. There are myriad reasons *ex ante* why clients might not trust their lawyers—from the reputation of the immigration bar generally to cultural views about lawyers to more individual fears about engaging with authority figures—and in the immigration context, people are sometimes coming from countries where lawyers are not as independent as they are in the United States.[297] Now, to a situation where trust is difficult to establish, we add structural factors that make trust even riskier—and we set up incentives for savvy clients, and perhaps all clients, to be less than fully honest with their attorneys. In such a context, the goals of the legal system itself are ill-served.

C. Ways Through the Impasse

As the above scenarios suggest, commitment to a principle of zealous advocacy could provide a useful and necessary counterbalance to the skewed adversarial world of immigration court. A well-articulated principle could become a touchstone for attorneys going against the current cultural grain, and help build a new legal culture within the world of immigration court. This Article has begun the work of providing the theoretical justification for such a principle, and has demonstrated numerous contexts in which it would make a significant difference to the conduct and outcome of immigration removal cases. The simplest conclusion to draw from this is that leaders of the bar, mentors to new attorneys, and teachers of law students must do more to articulate, elevate, and embody this principle so that cultural change will follow.

A principle of zealous advocacy is not all-powerful, however. Given that there are situations where the rules of professional conduct in immigration court actually *prevent* a lawyer from being a zealous advocate for her client, what are the lawyer's options? Hew to the lowest common denominator, being as zealous as the court-favoring rules permit (which is not particularly zealous)? Advocate for a change in the rules that will permit ethical practice that also allows for

[296] Stephen Ellman portrays this dilemma starkly in his article on the ethics of interviewing. Stephen Ellman, *Truth and Consequences*, 69 Fordham L. Rev. 895 (2000).

[297] *See, e.g.*, *2014 Report of Special Rapporteur on the Country Visit to El Salvador*, at ¶¶ 90–95, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (May 24, 2013), *available at* http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/43/Add.1.

zealousness? Determine that those rules are morally inferior and thus less worthy of respect? Engage in civil disobedience to defy the rules?

The last two options fail for different reasons. Indeed, though similar in act—breaking the rules—the two options differ importantly. Disregarding rules from a private judgment that the rules lack moral authority is not the same as civil disobedience. Civil disobedience requires making the disagreement public, and accepting the legal consequences of violating the rules. This Article in no way endorses the view that rules may simply be ignored—indeed, much of the analysis above shows simply how to work more zealously within these existing rules, flawed as they sometimes are.

This Article also suggests now that the time is not right for civil disobedience. The argument *for* civil disobedience is that lawyers are being asked to resolve irresolvable moral tensions. Arguably, when two sets of professional conduct rules permit two different outcomes, as in this hypothetical, the one more favorable to duties to the client should outweigh the one set by the court itself: as a moral issue, the two are not equal, as one set of rules was developed by lawyers who endure the competing duties, and the other set was developed by a court with a strong self-interest in favoring the duty to the court over duties to the client. Civil disobedience is a way of expressing dissent with that status quo, and lawyers do have a right and an ability to engage in civil disobedience,[298] but civil disobedience is truly justified when the legal system fails to accommodate any other forms of dissent, and where dissent through lawful channels has been stifled and stymied.[299] It is not the case that lawful channels have been exhausted on this issue; indeed, very little action has taken place beyond regulatory comments, to even raise the difficulties explored in this Article. Furthermore, as a practical point, the question of lawyers engaging in civil disobedience has been justified in the context of actions taken outside of the lawyer's client matters (civil disobedience on issues of concern to the public, not to a particular client). A lawyer's stance in protesting a policy by, for example, being part of a sit-in at the Capitol to get arrested, is unlikely to directly affect the lawyer's clients.[300] But any act of civil disobedience in the context of a removal proceeding would likely result in chaos, impossible disruptions to the legal process, and severe

[298] Robert M. Palumbos, *Within Each Lawyer's Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience*, 153 U. PA. L. REV. 1057 (2005).

[299] *Id.*

[300] If newsworthy enough, perhaps a judge or ICE attorney would hear of it and that could affect their attitudes to the lawyer and, by extension, to the lawyer's clients, but the risks of this seem attenuated at best.

prejudice to the client.[301]

Nor is hewing to an ethical "lowest common denominator" a sufficient response. A typical view taken from a different sphere of immigration practice (business immigration) suggests that "[d]espite the complexity of the client's situation, it is *always prudent to remain well within the boundary line of what is ethical. Since this boundary line is often amorphous and can shift, subject to varying interpretations, why should the lawyers take a risk?*"[302] Although written about a different context, this quotation also seemingly describes too much of immigration removal practice. The Article has shown that in removal proceedings, the answer to "why take a risk" is the very nature of the proceedings, the stakes involved, and the disparities of power between the sides.

In removal proceedings, hewing to safe, familiar standards (ones that do not elevate zealous advocacy as the guiding principle) is likely to set up the client to lose in any collision between duties to the court and duties to the client. So many factors work against immigrants in the removal system that their representatives must approach the boundary lines wherever possible, and seek to push those boundaries where there are decent arguments to do so. And as the previous sections have shown, it is possible to be far more zealous within the confines of those boundary lines than might seem possible from the vantage point of a risk-averse legal culture.

Zealous advocacy can often be as ethical as a more conservative approach, even when it *feels* like it is a risk. And when an ethical strategy or approach works to the advantage of the client, the client's interests must be foremost on their representatives' minds, thus forcing an effective lawyer to reject a safer option chosen *merely* because it is safe.

The first significant way through the impasses sketched above, therefore, is a simple one—to elevate the principle of zealous advocacy such that it feels like a routine, expected choice and not a risky one. Changing the legal culture to embrace principles of zealous advocacy will encourage the risk-averse to see their zone of permissible, ethical conduct more broadly and to approach the boundary lines more fearlessly.

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[301] How, for example, could a lawyer forthrightly disavow a duty to the court without indirectly revealing that the client has something negative the lawyer is refusing to disclose?

[302] Cyrus D. Mehta, Howard S. Myers & Kathleen Campbell Walker, *How to Walk the Ethical Line: Being Less Stressed Out* 51 (2011), *available at* http://www.ailawebcle.org/resources/Resources%20for%2012-13-11%20Seminar.pdf.

The second way through the impasse is to identify the areas where zealous advocacy—and therefore effective lawyering—is impossible, and begin challenging the structures that give rise to these impossibilities, including the rules of conduct for immigration practitioners themselves. This Article has attempted to identify some of those areas, but has just begun a task worthy of fuller development. But even just drawing from two of the impossible situations described above, we could imagine immigration attorneys deploying regulatory processes, advocacy or impact litigation to alter the underlying problems giving rise to the ethical dilemmas. For example, attorneys could seek to renegotiate the terms of EOIR's rules governing professional conduct of immigration practitioners, so that the recklessness test is abated, or could file a lawsuit challenging the overbroad formulation of the question on the U visa application seeking information about offenses ever committed, as *ultra vires*.[303] Lobbying, negotiating, defining rules, and challenging rules are all tasks that lawyers are well-equipped to engage in, and advocacy by lawyers in these and other areas could prove effective for removing the source of some of the dilemmas this article has described.

V. CONCLUSION

As immigration laws and enforcement of those laws have become more severe, and as appointed counsel increases in the world of immigration, the time is right to think thoroughly and creatively about how immigration lawyers can be more effective, individually and collectively, as the "immigration bar." While the efforts to reduce the worst practices and remove the worst offenders are critical, these efforts are insufficient in the face of the enormous challenges and burdens immigrants face in the removal system. A higher standard is needed, and zealous advocacy is a critical piece of that high standard. With zealous advocacy as the baseline, as a core, guiding principle for immigration lawyers, lawyers will be empowered to take stronger stances in defense of their clients—demanding every advantage ethically permitted to advance the interested of their clients, without crossing over into unethical behavior. As Abbe Smith exhorted in the criminal context, "Although a defender must act within the bounds of the law, he or she should engage in advocacy that is as close to the line

[303] The question does not elicit legally relevant information for screening an individual for admissibility under the Immigration and Nationality Act; the other more narrowly tailored questions on the form do implement the admissibility screening contained in the INA, but this question does not, and eliminating it would remove the dilemma for practitioners.

as possible, and, indeed, should test the line, if it is in the client's interest in doing so."[304] The same is true for those engaging in the defense of immigrants facing removal. This Article has shown how often this can be done without subverting existing rules, and calls upon immigration practitioners to identify and challenge the barriers to zealous advocacy that still remain. The nature of the task—defending clients against removal to other countries, separation from their families and lives they have built here—demands that we challenge the borders of expected behavior in immigration court, by pushing against prevailing norms, and raising the bar of what constitutes truly effective lawyering.

[304] Smith, *supra* note 55, at 89–91.

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Yes, No, or Maybe: The Importance of Developing a Philosophy of Lawyering in an Era of Immigration Upheaval

By K. Craig Dobson

A few years ago, a friend asked me to represent her on a DUI charge. I had never handled a criminal case, and I really didn't know where to begin. I asked some experienced colleagues for help, and they emphatically recommended a book by Bubba Head, one of the best DUI attorneys in the state of Georgia and possibly the United States. I bought the book and read it, and then asked follow-up questions of my colleagues. I asked one lawyer about the procedure that he used to test the equipment at the police station that measures blood alcohol content. The colleague laughed and said that nobody really did everything that Bubba recommended in his book. In what seemed to be his way of justifying the fact that he had never tested the electrical systems, etc. at the police station, he said that this would likely just make some people mad, namely the judge and the prosecutor, and ultimately hurt not only this client, but also my reputation and thus future clients. And further, local lawyers could not charge the fees that Bubba was rumored to have charged so it was not economical to put in this level of time and effort. Though the book was universally recommended by colleagues, they apparently did not intend for me to follow Bubba's advice *that* closely.

This raises a number of issues that are also applicable in the immigration context, particularly in immigration court. In this era of immigration upheaval, lawyers need to know how far they *can* go and how far they *should* go in representing their

clients. In this writing, I will argue that the answer lies not only in the applicable ethics rules and laws, but also resides within each individual lawyer.

The ethics rules require that we diligently and competently represent our clients, relegating the "zealousness" language to the comments and the preamble.[1] (The preamble to the federal rules does, however, state that nothing in those rules is intended to relieve the lawyer of her duty to zealously represent her client.[2]) Without the express requirement of zealousness, perhaps the first question we should ask is whether an immigration lawyer *should* represent her client with zeal. Professor Elizabeth Keyes, in her salient article, *Zealous Advocacy: Pushing the Borders in Immigration Litigation*,[3] answers the question with a resounding "yes" when it comes to clients in immigration court proceedings. She argues that the odds are stacked against the immigrant, and zealous representation is one of the few things we can do to make sure that justice is done. But other lawyers may disagree with this "client-centered" approach, espousing a different "philosophy of lawyering," or more specifically, "philosophy of practice."[4] Professor Nathan Crystal, in his groundbreaking work, *Developing a Philosophy of Lawyering*,[5] delineates several different philosophies of practice that a lawyer may adopt. Professor Keyes' philosophy of practice would clearly fall within the category of what I believe Professor Crystal would call "client-centered."[6] While it is doubtful that most lawyers practice in a "client-centered" way[7], I firmly believe that that is the aim for most of us in the profession. I would also guess that most lawyers feel that this is in fact the *only* way there is to practice—as a "client-centered," "hired gun." With this as the only acceptable goal, lawyers can become overwrought with guilt and dissatisfaction for falling short. But in fact, the ethics rules give us a lot of latitude. By developing a philosophy of lawyering, lawyers can—within the scope of applicable laws and ethics rules—define for themselves a way of practicing law that is consistent with their long-term vision for their lives and their values. This will lead to increased contentment among lawyers within the profession, with the ensuing benefits passed along to clients. And clients will benefit as well by receiving clear articulations of lawyers' philosophy of practice so that they can make informed decisions about which lawyer to hire. In fact, Professor Crystal argues that such disclosure should be required.[8] The goal of this writing is to briefly introduce lawyers to the concept of a philosophy of practice, to illustrate by way of example how various philosophies might play out in immigration practice, and to demonstrate the benefit to both lawyers and clients of such an organized approach to discretionary decisions within the practice of law.

Professor Crystal delineates philosophy of practice into four main categories: a self-interested philosophy of lawyering, a morality-based philosophy of lawyering, a philosophy of lawyering centered around institutional values, and a philosophy of lawyering that is client-centered.[9] The range of various philosophies of practice is broad and the subject of a great deal of legal scholarship.[10] Additionally, one's philosophy of practice need not fit neatly into one of the categories, but may instead be

1 See generally ABA Model Rules of Professional Conduct. The word "zealous" does not appear in the text of the rules.

2 "Nothing in this regulation should be read to denigrate the practitioner's duty to represent zealously his or her client within the bounds of the law." 8 CFR 1003.102.

3 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3. Available at: http://scholarship.shu.edu/shlr/vol45/iss2/3.

4 The concept of "philosophy of lawyering" is broad and encompasses a lawyer's work/life balance, involvement in the development of the profession, and the practice of law itself. See generally Nathan M. Crystal, *Using the Concept of a "Philosophy of Lawyering" in Teaching Professional Responsibility* (2007) 51 St. Louis U.L.J. 1235 (2007). This article focuses on the latter, what Professor Crystal calls "philosophy of practice," defining it as "that part of a lawyer's overall 'philosophy of lawyering' that focuses on a lawyer's philosophy in making discretionary decisions in the practice dimension." *Id* at 1241.

5 Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75 (2000).

6 Nathan M. Crystal, Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility (2007) 51 St. Louis U.L.J. 1235 at 1245.

7 Professor Crystal notes that "[s]ome empirical studies (although limited in number and scope) of the behavior of criminal defense lawyers, lawyers in small communities, lawyers in nonlitigation activities, and lawyers in large law firms cast doubt on the claim that neutral partisanship accurately describes the conduct of most lawyers. Indeed, some of these studies suggest that the problem with the way lawyers conceive of their role is the opposite of neutral partisanship; lawyers are not sufficiently zealous in representing their clients because they are concerned about protecting their reputations, preserving relationships with other lawyers, judges, or officials, or advancing their own interests." Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 88 (2000).

8 Professor Crystal states that "[c]lients…are entitled to more than word of mouth or the luck of the draw. Clients are entitled to receive from their lawyers a clear expression of the lawyer's philosophy of representation." Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 94 (2000).

9 Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1245 (Chart 3).

10 See Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1251.

a complex combination of various aspects of each.[11] This brief hypothetical will help illustrate how a philosophy of practice may influence a lawyer's decisions in real life.

Hypothetical

In order to show contrast among various philosophies of practice, including the client-centered approach advocated by Professor Keyes, I will use a question she addresses in her article: "Have you EVER committed a crime or offense for which you have not been arrested?".[12] Assume that, while completing Form I-918 for a client who is in removal proceedings, he reveals to a lawyer that he has committed several crimes. He admits to stealing a watch on his 18th birthday and he tells the lawyer that he frequently jaywalks. He further states that his lawyer must, of course, keep these facts a secret. The I-918 petition for U status is the only defense the client has in removal proceedings. With this brief example, I will begin by analyzing how a self-interested philosophy of practice might look in the immigration context.

A Self-Interested Philosophy of Lawyering

After careful consideration, lawyers might decide that they will generally exercise any discretion they may have in favor of themselves.[13] To avoid potential ethical entanglements, the lawyer follows a self-interested approach to discretionary decision-making. He tells the client that he cannot proceed without disclosing these offenses on the I-918. He further tells the client that he must conduct research to determine whether stealing the watch was in fact a crime involving moral turpitude and whether it is subject to the petty offense exception under INA § 212(a)(2)(A)(ii)(II). The self-interested lawyer charges a high, but reasonable, hourly rate and tells that client that this will cause the legal fee to increase substantially. If the petty offense exception applies, then the client will then have to disclose the shoplifting offense on his I-918 and the lawyer will draft a brief to USCIS explaining how the petty offense exception applies, again adding to the already substantial legal fee. The self-interested lawyer might then explain that other lawyers disagree with the duty to disclose prior offenses and that the client is free to seek the opinions of other lawyers.[14]

While such an approach may seem absurd and extremely prejudicial to the client at first, a closer look may reveal that this actually benefits the client in the long run. If the petty offense exception does apply, then the client could disclose the shoplifting (and perhaps include some general statement that says he jaywalks on a regular basis and cannot recall every offense). If the petty offense exception does not apply, then a waiver could be filed. Perhaps there is a small chance that someone witnessed him shoplifting or that he bragged to his friends about doing so. If the client is successful with his petition, he would never again have to worry about his failure to disclose. If one of these people contacted USCIS to report the shoplifting or perhaps turned the client in to local authorities, this would not give rise to his losing his status and once again facing proceedings.[15]

11 See Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1245.

12 See Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2, Article 3 at 532 quoting I-918, Petition for U Nonimmigrant Status, at 3, U.S. Citizenship and Immigration Services, available at http://www.uscis.gov/i-918 (last visited Feb. 28, 2015).

13 See Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1244, 1245.

14 ABA Model Rule 1.3 requires the lawyer to act with "reasonable diligence and promptness," and Comment 1 says the "lawyer must…act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." But the comment further states that a "lawyer is not bound, however, to press for every advantage that might be realized for a client."

15 The disclosure per se may lead to criminal charges being initiated. As this is a serious consequence under criminal law, it may be wise to insist that the client consult with criminal defense counsel if this is beyond the scope of the lawyer's engagement.

If the client insisted on not revealing the shoplifting on his application, the immigration lawyer might seek leave to withdraw from the case, citing a breakdown in the lawyer/client relationship. In the event that the judge were to deny the motion, the lawyer would have no choice but to continue with the representation pursuant to ABA Model Rule 1.16 and applicable federal rules. As the I-918 is filed with USCIS, it might be possible for the lawyer to limit the scope of his representation and insist that the client hire separate counsel for the U petition, but this would nonetheless require substantial cooperation of the client.

The self-interested lawyer would be unlikely to propose checking the "no" box on Form I-918 as this may increase the risk of violating ABA Rule 4.1 or 3.3.[16] Furthermore, an "overzealous" prosecutor might even seek criminal charges against a lawyer pursuing this option, making this an even more unlikely choice for the lawyer who has adopted this philosophy of practice.[17]

A Morality-Based Philosophy of Lawyering

Under a morality-based philosophy of lawyering, "lawyers are morally accountable for the actions that they take on behalf of their clients and must be prepared to defend the morality of what they do."[18] Under this philosophy, lawyers cannot claim that they are merely a "hired gun" and that they are not morally responsible for their actions so long as they comply with laws and ethics rules. Of course, one problem with a morality-based philosophy of lawyering is that moral values are subjective.[19] This problem also makes it more difficult to demonstrate how this rule might apply. Honesty would be a moral value that presumably all lawyers would consider important, but their interpretation of the technical aspects of the I-918 question under discussion may vary. In our example involving the I-918, one lawyer may interpret their duty of honesty, based upon religious or moral values, to require him to either withdraw from the case or convince the client to proceed checking the "yes" box. Another might value honesty as much as the first, but interpret this differently within the context of his overall obligation to serve his client and the technical interpretation of the question. Assume that his client is from Honduras. The lawyer might consider his obligation to interpret any gray area in favor of his client, given the risk that his client might otherwise face returning to Honduras—a small country where he would face grave danger—in the future. The lawyer may be concerned that his client stole an expensive watch and committed a crime that is not covered under the petty offense exception, is punishable by at least a year in jail, and therefore is subject to a waiver for which there is no guarantee of approval. The lawyer might consider the Judeo-Christian value of welcoming the stranger to compel him to interpret the gray area in favor of helping his client remain here and avoid the suffering he would face in Honduras. As justification for his action, he might interpret the question on the I-918 as overly broad, unfair, and decide that honesty does not require checking the "yes" box. (A detailed discussion to follow under the "client-centered" section.)

16 The lack of clarity as to whether Rule 3.3 or 4.1 applies in this situation provides another good example for analysis of philosophy of practice. Beyond the clarity provided by the plain meaning of the definition of tribunal in the ABA Model Rules, the NYSBA makes a strong argument in Opinion 1011 that service centers and field offices are not tribunals. However, the opinion cites several court opinions that have reached contrary conclusions. The opinion points out that, in each case cited, either the lawyer did not dispute the issue or the court provided no explanation as to why it reached its conclusion. Even Hazard & Hodes state, "without citing authority, 'Rule 3.3(d) applies to such matters as applications before the Patent Office and other ex parte presentations')." NYSBA Opinion 1011 (quoting Hazard & Hodes, *The Law of Lawyering* § 29.3, at 29-7 (2007 Supp.). It is likely that the client-centered lawyer would consider Rule 4.1 to apply when there is a lack of clarity as to whether a previous statement need be corrected. The self-interested lawyer would be more likely to err on the side of considering service centers "tribunals" for purposes of Rule 3.3.

17 Cyrus Mehta, *Crime Without Punishment: Have You Ever Committed A Crime For Which You Have Not Been Arrested?*, at http://blog.cyrusmehta.com/CyrusMehta/wp-content/uploads/wp-post-to-pdf-enhanced-cache/2/crime-without-punishment-have-you-ever-committed-a-crime-for-which-you-have-not-been-arrested.pdf.

18 Nathan M. Crystal, *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1235 at 1242.

19 Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 90 (2000).

An Institutional Values-Based Philosophy of Lawyering

Those concerned about the subjective nature of a "philosophy of morality" might instead choose a "philosophy of institutional value." There are many complex theories espoused by ethics scholars, and a detailed analysis of each is beyond the scope of this writing.[20] For illustrative purposes, I will use Professor Crystal's more general definition of a "philosophy of institutional values" as "approaches based on social or professional values or norms rather than principles of morality."[21] In this case, a lawyer might argue that, after long and deliberate consideration, the law has been drafted to take crimes involving moral turpitude seriously. Federal regulations give form instructions great weight, and this would presumably extend to answering every question on the forms.[22] Though regulations are not passed by elected officials, they are promulgated after notice to and comment by the public. He might then decide that it makes sense that the lawyer's own moral views are subjugated to those of the state.[23] He might decide that the question should be answered in the affirmative in our example because the shoplifting offense is clearly the kind of thing the drafters were looking for.[24] In Professor Keyes' words, "[p]erhaps answering yes shows respect or even some awe for the legal system, the same system that drew the lawyer into the profession in the first place."[25]

A lawyer who follows an institutional values-based philosophy would likely have faith in "the system," believing that the laws and courts are essentially fair and just. A lawyer who finds our current laws and court system to be deeply flawed and in need of dramatic change would be less likely to choose such a philosophy. On the other hand, a lawyer might express his views that the system needs change (and even work toward making the change happen) while at the same time believing that in gray areas his personal code of ethics must give way to institutional values until such change occurs. To give an analogous political example to illustrate the point more clearly, it is widely known that John McCain has sometimes voted to confirm certain Presidential nominees who he would not have chosen personally and who might work against some of the laws and policies he believes to be important. Citing the maxim that "Elections have consequences," he might vote to confirm such a candidate so long as he or she is competent.

A Client-Centered Philosophy of Practice

Using a client-centered philosophy of practice, the lawyer would "take any action that will advance the client's interest so long as the action does not clearly violate a rule of ethics or other law (the principle of professionalism)."[26] Professor Keyes argues forcefully that such a philosophy be adopted by all immigration court lawyers, given the gravity of the matters before the tribunal and the unfairness under current regulations and laws.[27] With regard to answering in the affirmative on the broad question posed on the I-918, she argues that "the defensible path of saying 'no' even when possibly the truth is 'yes,' is

20 For an overview of some important philosophies of institutional values, see Nathan M. Crystal, " *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1235 at 1242-1244.

21 Professor Crystal notes that "philosophies of morality and institutional values are not inconsistent because institutional values often embody moral principles." Nathan M. Crystal, *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1242, 1243.

22 See 8 CFR 103.2(a).

23 Perhaps this line of thinking most closely aligns with Professor Brad Wendell's philosophy of lawyering briefly outlined by Professor Crystal. Nathan M. Crystal, *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1243, 1244.

24 The drafters of the form are apparently fishing for an admission under INA § 212(a)(2)(A)(i), though certain responses may lead an officer to believe the client is a "drug abuser or addict" under INA §212(a)(1)(A) or give them "reason to believe" that the client "is or has been an illicit trafficker in any controlled substance…" under INA §212(a)(2)(C)(i).

25 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 533.

26 Nathan M. Crystal, Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility (2007) 51 *St. Louis U.L.J.* 1241.

27 See generally Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 532, FN 268.

a choice made by the zealous advocate."[28] But she admits that "for the risk-averse among us, this choice comes dangerously close to a collision with duties to the legal system."[29] As immigration lawyer and ethicist Cyrus Mehta points out in his article on the subject in the negative could lead to problems with "an overzealous prosecutor or bar investigator," but he also provides an in-depth illustration of just how complicated and unclear the matter really is.[30] The Board of Immigration Appeals (BIA) has held that "a valid admission of a crime for immigration purposes requires that the alien be given an adequate definition of the crime, including all essential elements, and that it be explained in understandable terms."[31] The argument that some make is unless the client has been presented with the law under these terms, he or she cannot possibly answer the question in the affirmative. This might then lead one to the conclusion that in practice only a criminal defense lawyer might be required to check "yes," as only they would know all the essential elements of the crime. But there might exist the rare circumstance in which an individual might have officially made a previous admission before a government official, thereby satisfying these requirements and necessitating an affirmative answer. And a lawyer might further argue that if this question were to be interpreted as a broad "catch all," then virtually everyone would have to check the "yes" box. The lawyer could argue that the government must be aware that most lawyers and foreign nationals who prepare these forms do not interpret the forms in this broad manner. Otherwise, nearly everyone—almost certainly those who drive automobiles—would be answering "yes" to the question and explaining that they have broken traffic laws (often misdemeanors under state law) countless times and have possibly committed other crimes that they were not even aware of. Perhaps the most compelling argument of all in the context is that "guilt" with respect to a particular crime is a legal term. Checking the "yes" box when a client has not been convicted according to INA Section 101(a)(48)(A) essentially involves the client's own lawyer assuming the role of both judge and jury with respect to the conduct in question.[32] Furthermore, checking the "yes" box could lead to fundamentally unfair results for those who were never charged with a crime. Assume the client checks the "yes" box, though his conduct was never called into question by authorities. This might then lead to further inquiry by immigration officials and an official admission under INA 212(a)(2), ultimately resulting in a finding that he is "inadmissible" under immigration law. Another client who has done the same thing is charged with shoplifting, which ultimately results in "pre-trial intervention" (PTI). The client makes no formal admission, completes a program under state law that allows him to avoid jail time, and avoids a final disposition that qualifies as a conviction under INA 212(a)(2). He checks the "no" box to the "Have you ever committed a crime or offense…" question and provides a copy of the certified original disposition showing successful completion of PTI in response to another question on the form, asking whether he has ever been arrested or charged with a crime. No further questions are asked of this client, and he is not found inadmissible. This provides strong support for the lawyer who checks the "no" box in our hypothetical situation, but serious risks remain, which is why this option would likely only be selected by the client-centered lawyer.

The self-interested lawyer works to minimize his personal risk and prioritizes himself when representing his client. The morality-based lawyer prioritizes her personal ethical system. The lawyer who adopts an institutional values approach prioritizes the broader ethical system of the whole over that of the individual. But the truly client-centered lawyer prioritizes the client above all else.

28 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 533.
29 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 533.
30 Cyrus Mehta, *Crime Without Punishment: Have You Ever Committed A Crime For Which You Have Not Been Arrested?*, at http://blog.cyrusmehta.com/CyrusMehta/wp-content/uploads/wp-post-to-pdf-enhanced-cache/2/crime-without-punishment-have-you-ever-committed-a-crime-for-which-you-have-not-been-arrested.pdf (last accessed July 5, 2017).
31 Matter of K, 7 I&N Dec. 594 (BIA 1957).
32 See Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 532.

Developing Your Own Philosophy of Practice

Every lawyer should formally draft her or his own philosophy of practice.[33] You have a philosophy of lawyering whether you are aware of it or not.[34] If you are not aware of it, then your clients probably do not know what it is either. Develop a written philosophy and hone it through time. This allows you to clarify your thoughts and can be an invaluable guide when making difficult decisions. Professor Crystal makes several suggestions as to how lawyers might provide their philosophy of lawyering to clients. I strongly support lawyers providing a philosophy of practice (or better yet, their more comprehensive philosophy of lawyering) to their clients because this allows the client to make an informed decision about who to hire, but I stop short of suggesting this as a requirement. A lawyer's website would be the ideal place to post this and reference to it in the engagement letter would be a good idea.[35] While it would seem likely that a client would only choose a lawyer with a client-centered practice, there are plenty of examples in which a client might prefer a different kind of lawyer. An evangelical Christian might choose a lawyer who makes her discretionary decisions based upon the guiding principles of her religion. A lawyer who espouses a philosophy of practice based in institutional values might, out of respect for the rule of law, develop a deep understanding of her field of practice and thus provide outstanding legal representation to her clients. And a client might choose to hire a lawyer despite her having a more of a self-interested philosophy of practice, provided she has stellar track record of success.

Lawyers also benefit from having a philosophy of practice. It is this lawyer's opinion that many lawyers are unhappy with their work because they are not living in a manner that is consistent with their vision and values. Developing a written philosophy of lawyering can help the lawyer along the path to greater career satisfaction. Those who work as employees may decide to quit their job and work someplace else or start their own firms. Others might decide to change the way they practice. And as immigration lawyers face increasingly more difficult ethical decisions, a formal, written philosophy of practice can serve as the bedrock upon which these decisions are made. The hypothetical in this article provides one such example.

Immigration lawyers should not only know the immigration laws, but also the criminal statutes that could possibly affect their clients and them.[36] And to effectively represent our clients, we must know the ethics rules inside and out. Put another way, every lawyer should be an expert in the Rules of Professional Conduct, including the comments thereto. Lawyers must be keenly aware of the rules that do not allow for discretion,[37] and they must exercise clear and sound judgment as to the boundaries of discretion.[38] Now more than ever, lawyers need a set policy to guide them in discretionary matters, and clients deserve to know how their lawyers will handle these issues before hiring the lawyer. Developing a formal philosophy of practice is a way to achieve this.

33 See Nathan Crystal's articles on the subject.
34 "Because discretion is so pervasive in the practice of law, lawyers develop, either thoughtfully or haphazardly, a general approach for making these decisions." *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 75 (2000).
35 See *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 97 (2000).
36 Cyrus D. Mehta and Alan Goldfarb, *Up Against a Wall: Post-Election Ethical Challenges for Immigration Lawyers*, Jan. 11, 2017, (AILA Doc. No. 17011200).
37 For example, a lawyer may not charge a contingency fee in a criminal case or certain family law matters. See Rule 1.5(d).
38 See, for example, the reasonableness requirements of ABA Model Rule 1.7.

CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

CRIME WITHOUT PUNISHMENT: HAVE YOU EVER COMMITTED A CRIME FOR WHICH YOU HAVE NOT BEEN ARRESTED?

Posted on July 30, 2012 by Cyrus Mehta

Advising a client on how to answer Kafkaesque questions on immigration forms regarding potential past criminality can pose a dilemma for the ethically-minded immigration attorney and the processes raises a multitude of complex issues cutting across various areas of law.

For example, the Form N-400, Application for Naturalization, asks broadly *"Have you ever committed a crime or offense for which you have not been arrested?"* One would be hard pressed to find a person who has never committed an offense for which she has not been arrested. Multitudes of New Yorkers must have committed the offense of jay walking with full sight of a police officer who never bothered citing the offender. Some states criminalize "fornication" (sexual intercourse between unmarried persons) despite this type of law's dubious constitutionality. New York criminalizes adultery no matter how long ago a person separated from the spouse. Does an immigration attorney have to plumb a client's sexual past to answer the question on the N-400 application? Must the lawyer then also report the client's other past potential offenses such as speeding?

The question on the I-485 application asks more narrowly if one has knowingly "committed any crime of moral turpitude or drug-related offense" which did not result in arrest. Given the heavy litigation in this area, only a lawyer with experience could recognize a CIMT. Under the categorical approach, which requires consideration of the minimal conduct implicated by a penal law, even if one has engaged in "theft," a temporary taking of another's belongings (rather than a permanent one) may not be morally turpitudinous. *See e.g.* *Wala v. Mukasey,* 511 F.3d 102 (2d Cir. 2007). Regarding a "drug-related offense," if your

client smoked pot at a concert during college, how do you assess whether the act was a crime within that jurisdiction back then? In a complex penal law system, requiring the prosecutor to determine the applicable law and demonstrating each element of guilt beyond a reasonable doubt, without a lab test can the client know beyond a reasonable doubt that the substance was pot and not say oregano?

ABA Model Rule 3.3(a)(1) states that " lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of a material fact or law previously made to the tribunal by the lawyer..." Criminal penalties may attach to a lawyer who knowingly falsely prepares an application for a client. See 18 USC 1001, 18 USC 1546 or 18 USC 371. Whether a lawyer can be accused of unethical or criminal conduct without *knowing* that a crime occurred is unclear; an overzealous prosecutor or bar investigator might pursue it.

The question of knowingly committing a crime for which one has never been arrested derives from INA § 212(a)(2), which makes inadmissible one who *admits* having committed certain crimes. Thus, a non-citizen, including an LPR, need not have a criminal conviction to be found inadmissible; he or she can be equally snared for having admitted to the commission of a crime. Yet, the Board of Immigration Appeals ("BIA") has established stringent requirements for a validly obtained admission: (1) the admitted conduct must constitute the essential elements of a crime in the jurisdiction in which it occurred; (2) the applicant must have been provided with the definition and essential elements of the crime in understandable terms prior to making the admission; and (3) the admission must have been made voluntarily. *See Matter of K-*, 7 I&N Dec. 594 (BIA 1957). It would be very difficult for an applicant to satisfy the requirements of an admission while completing the form.

The requirements established by the BIA to corral the unwieldy question suggests that it defies a straightforward answer. Even in what seems an obvious admission of crime – your client arrives to sign the form and reports having just killed someone, might she have committed an act of self-defense if she was in a city with a Stand Your Ground law?

Practice News, (June 2012), available from AILA Publications, http://agora.aila.org.

The author thanks his associate, Myriam Jaidi, for assistance on this article.

NYSBA NY Rules of Professional Conduct (2021)

Effective April 1, 2009, as amended through June 24, 2020, with commentary as amended through October 30, 2021.

NEW YORK STATE BAR ASSOCIATION

NYSBA NY Rules of Professional Conduct (2021)

NEW YORK STATE BAR ASSOCIATION

The New York Rules of Professional Conduct, which became effective on April 1, 2009, have been adopted by the Appellate Division of the New York State Supreme Court and are published as Part 1200 of the Joint Rules of the Appellate Division (22 N.Y.C.R.R. Part 1200). The Appellate Division has not adopted the Preamble, Scope and Comments, which are published solely by the New York State Bar Association to provide guidance for attorneys in complying with the Rules.

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PREAMBLE:
A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.

[2] The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation.

[3] A lawyer's responsibilities in fulfilling these many roles and obligations are usually harmonious. In the course of law practice, however, conflicts may arise among the lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Nevertheless, within the framework of the Rules, many difficult issues of professional discretion can arise. The lawyer must resolve such issues through the exercise of sensitive professional and moral judgment, guided by the basic principles underlying the Rules.

[4] The legal profession is largely self-governing. An independent legal profession is an important force in preserving government under law, because abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice law. To the extent that lawyers meet these professional obligations, the occasion for government regulation is obviated.

[5] The relative autonomy of the legal profession carries with it special responsibilities of self-governance. Every lawyer is responsible for observance of the Rules of Professional Conduct and also should aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves. Compliance with the Rules depends primarily upon the lawyer's understanding of the Rules and desire to comply with the professional norms they embody for the benefit of clients and the legal system, and, secondarily, upon reinforcement by peer and public opinion. So long as its practitioners are guided by these principles, the law will continue to be a noble profession.

SCOPE

[6] 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 Rules define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules. The Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

[7] 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.

[8] The Rules provide a framework for the ethical practice of 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.

[9] 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.

[10] 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 whether to agree to a settlement or 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 in 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.

[11] 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 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.

[12] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule

does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, because the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[13] 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) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

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

(c) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

(d) "Confidential information" is defined in Rule 1.6.

(e) "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(g) "Domestic relations matter" denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(h) "Firm" or "law firm" includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

(i) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

(j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

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

(l) "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

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

(n) "Person" includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(o) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(p) "Qualified legal assistance organization" means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(q) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

(r) "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.

(s) "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.

(t) "Screened" or "screening" 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 or the firm is obligated to protect under these Rules or other law.

(u) "Sexual relations" denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(v) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(w) "Tribunal" denotes a court, an arbitrator in an 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 legal judgment directly affecting a party's interests in a particular matter.

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, email or other electronic communication or any other form of recorded communication or recorded representation. 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] Some Rules require that a person's oral consent be "confirmed in writing." *E.g.*, Rules 1.5(g)(2) (client's consent to division of fees with lawyer in another firm must be confirmed in writing), 1.7(b)(4) (client's informed consent to conflict of interest must be confirmed in writing) and 1.9(a) (former client's informed consent to conflict of interest must be confirmed in writing). The definition of "confirmed in writing" provides three distinct methods of confirming a person's consent: (i) a writing from the person to the lawyer, (ii) a writing from the lawyer to the person, or (iii) consent by the person on the record in any proceeding before a tribunal. The confirming writing need not recite the information that the lawyer communicated to the person in order to obtain the person's consent. For the definition of "informed consent" See Rule 1.0(j). If it is not feasible for the lawyer to obtain or transmit a written confirmation at the time the client gives oral consent, then the lawyer must obtain or transmit the confirming writing within a reasonable time thereafter. If a lawyer has obtained a client's informed oral consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Computer-Accessed Communication

[1A] Rule 1.0(c), which defines the phrase "computer-accessed communication," embraces electronic and wireless communications of every kind and includes, without limitation, communication by devices such as cell phones, smartphones, and all other handheld or portable devices that can send or receive communications by and electronic or wireless means, including cellular service, the Internet, wireless networks, or any other technology.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (h) will depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. For example, a group of lawyers could be regarded as a firm for purposes of determining whether a conflict of interest exists but not for application of the advertising rules.

[3] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. 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. Whether lawyers in a government agency or department constitute a firm may depend upon the issue involved or be governed by other law.

[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 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 or 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, so long as the necessary scienter is present and the conduct in question could be reasonably expected to induce detrimental reliance.

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. *E.g.*, Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent. Other considerations may apply in representing impaired clients. *See* Rule 1.14.

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

Screened or Screening

[8] The definition of "screened" or "screening" applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rule 1.11, 1.12 or 1.18. See those Rules for the particular requirements of establishing effective screening.

[9] The purpose of screening is to ensure 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 promptly 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. In any event, procedures should be adequate to protect confidential information.

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

RULE 1.1

COMPETENCE

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

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

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 associate with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all

legal problems. Perhaps the most fundamental legal skill consists of determining what kinds 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] [Reserved.]

[4] A lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation

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

Retaining or Contracting with Lawyers Outside the Firm

[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 should ordinarily obtain informed consent from the client and should reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). 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 needs of the client; the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside 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.

[6A] Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routing calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

[7] When lawyer 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 about the scope of their respective roles and the allocation of responsibility among them. *See* Rule 1.2(a). When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations (*e.g.*, under local court rules, the CPLR, or the Federal Rules of Civil Procedure) that are a matter of law beyond the scope of these Rules.

[7A] Whether a lawyer who contracts with a lawyer outside the firm needs to obtain informed consent from the client about the roles and responsibilities of the retaining and outside lawyers will depend on the circumstances. On one hand, if a lawyer retains an outside lawyer or law firm to work under the lawyer's close direction and supervision, and the retaining lawyer closely reviews the outside lawyer's work, the retaining lawyer usually will not need to consult with the client about the outside lawyer's role and level of responsibility. On the other hand, if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client. In any event, whenever a retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a).

[8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

RULE 1.2

SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to the provisions herein, 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 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, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

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. The lawyer shall consult with the client with respect to the means by which the client's objectives are to be pursued. See Rule 1.4(a)(2).

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

[6A] In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that if the lawyer or the client determines during the representation that additional services outside the limited scope specified in the engagement are necessary or advisable to represent the client adequately, then the client may need to retain separate counsel, which could result in delay, additional expense, and complications.

[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 were 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* Rules 1.1, 1.8 and 5.6.

Illegal and Fraudulent Transactions

[9] Paragraph (d) prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the 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 illegal 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. When the representation will result in violation of the Rules of Professional Conduct or other law, the lawyer must advise the client of any relevant limitation on the lawyer's conduct and remonstrate with the client. *See* Rules 1.4(a)(5) and 1.16(b)(1). Persuading a client to take necessary preventive or corrective action that will bring the client's conduct within the bounds of the law is a challenging but appropriate endeavor. If the client fails to take necessary corrective action and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, the lawyer is required to withdraw. *See* Rule 1.16(b)(1). In some circumstances, withdrawal alone might be insufficient. In those cases the lawyer may be required to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. *See* Rule 1.6(b)(3); Rule 4.1, Comment [3].

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

[12] Paragraph (d) prohibits a lawyer from assisting a client's illegal or fraudulent activity against a third person, whether or not the defrauded party is a party to the transaction. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise, but does preclude such a retainer for an enterprise known to be engaged in illegal or fraudulent activity.

[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).

Exercise of Professional Judgment

[14] Paragraph (e) permits a lawyer to exercise professional judgment to waive or fail to assert a right of a client, or accede to reasonable requests of opposing counsel in such matters as court proceedings, settings, continuances, and waiver of procedural formalities, as long as doing so does not prejudice the rights of the client. Like paragraphs (f) and (g), paragraph (e) effectively creates a limited exception to the lawyer's obligations under Rule 1.1(c) (a lawyer shall not intentionally "fail to seek the objectives of the client through reasonably available means permitted by law and these Rules" or "prejudice or damage the client during the course of the representation except as permitted or required by these Rules"). If the lawyer is representing the client before a tribunal, the lawyer is required under Rule 3.3(f)(1) to comply with local customs of courtesy or practice of the bar or a particular tribunal unless the lawyer gives opposing counsel timely notice of the intent not to comply.

Refusal to Participate in Conduct a Lawyer Believes to Be Unlawful

[15] In some situations such as those described in paragraph (d), a lawyer is prohibited from aiding or participating in a client's improper or potentially improper conduct; but in other situations, a lawyer has discretion. Paragraph (f) permits a lawyer to refuse to aid or participate in conduct the lawyer *believes* to be unlawful, even if the conduct is arguably legal. In addition, under Rule 1.16(c)(2), the lawyer *may* withdraw from representing a client when the client persists in a course of action involving the lawyer's services that the lawyer reasonably *believes* is criminal or fraudulent, even if the course of action is arguably legal. In contrast, when the lawyer *knows* (or reasonably should know) that the representation will result in a violation of law or the Rules of Professional

Conduct, the lawyer *must* withdraw from the representation under Rule 1.16(b)(1). If the client "insists" that the lawyer pursue a course of conduct that is illegal or prohibited under the Rules, the lawyer must not carry out those instructions and, in addition, may withdraw from the representation under Rule 1.16(c)(13). If the lawyer is representing the client before a tribunal, additional rules may come into play. For example, the lawyer may be required to obtain the tribunal's permission to withdraw under Rule 1.16(d), and the lawyer may be required to take reasonable remedial measures under Rule 3.3 with respect to false evidence or other criminal or fraudulent conduct relating to a proceeding.

Fulfilling Professional Commitments and Treating Others with Courtesy

[16] Both Rule 1.1(c)(1) and Rule 1.2(a) require generally that a lawyer seek the client's objectives and abide by the client's decisions concerning the objectives of the representation; but those rules do not require a lawyer to be offensive, discourteous, inconsiderate or dilatory. Paragraph (g) specifically affirms that a lawyer does not violate the Rules by being punctual in fulfilling professional commitments, avoiding offensive tactics and treating with courtesy and consideration all persons involved in the legal process. Lawyers should be aware of the New York State Standards of Civility adopted by the courts to guide the legal profession (22 NYCRR Part 1200 Appendix A). Although the Standards of Civility are not intended to be enforced by sanctions or disciplinary action, conduct before a tribunal that fails to comply with known local customs of courtesy or practice, or that is undignified or discourteous, may violate Rule 3.3(f). Conduct in a proceeding that serves merely to harass or maliciously injury another would be frivolous in violation of Rule 3.1. Dilatory conduct may violate Rule 1.3(a), which requires a lawyer to act with reasonable diligence and promptness in representing a client.

RULE 1.3

DILIGENCE

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

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

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 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. Notwithstanding the foregoing, the lawyer should not use offensive tactics or fail to treat 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 diligently and promptly. Lawyers are encouraged to adopt and follow effective office procedures and systems; neglect may occur when such arrangements are not in place or are ineffective.

[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, 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. 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, Rule 1.16(e) may require the lawyer to consult with the client about the possibility of appeal before relinquishing responsibility for the matter. 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 avoid possible prejudice to client interests, a sole practitioner is well advised to prepare a plan 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.

RULE 1.4

COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of:

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

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(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 a client's 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 these Rules or other law.

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

Comment

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

Communicating with Client

[2] In instances where 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 the client 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, paragraph (a)(1)(iii) requires that 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 made clear 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 that the lawyer 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. Likewise, for routine matters such as scheduling decisions not materially affecting the interests of the client, the lawyer need not consult in advance, but should keep the client reasonably informed thereafter. 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, or arrange for an appropriate person who works with the lawyer to do so.

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 interest 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(j).

[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 those who the lawyer reasonably believes to be appropriate persons within the organization. *See* Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

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

RULE 1.5

FEES AND DIVISION OF FEES

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the

representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating 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, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing 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) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client's Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

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

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

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

Comment

[1] Paragraph (a) requires that lawyers not charge fees that are excessive or illegal under the circumstances. The factors specified in paragraphs (a)(1) through (a)(8) are not exclusive, nor will each factor be relevant in each instance. The time and labor required for a matter may be affected by the actions of the lawyer's own client or by those of the opposing party and counsel. Paragraph (a) also requires that expenses for which the client will be charged must not be excessive or illegal. A lawyer may seek payment for services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client's matter; similarly, where the client has agreed to pay the lawyer's cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

[1B] A supervising lawyer who submits a fraudulent bill for fees or expenses to a client based on submissions by a subordinate lawyer has not automatically violated this Rule. In this situation, whether the lawyer is responsible for a violation must be determined by reference to Rules 5.1, 5.2 and 5.3. As noted in Comment [8] to Rule 5.1, nothing in that Rule alters the personal duty of each lawyer in a firm to abide by these Rules and in some situations, other Rules may impose upon a supervising lawyer a duty to ensure that the books and records of a firm are accurate. *See* Rule 1.15(j).

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new clientlawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writ-

ing in certain cases. *See* 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the excessiveness standard of paragraph (a). In determining whether a particular contingent fee is excessive, or whether it is excessive to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may regulate the type or amount of the fee that may be charged.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(e). A lawyer may charge a minimum fee, if that fee is not excessive, and if the wording of the minimum fee clause of the retainer agreement meets the requirements of paragraph (d)(4). 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). A fee paid in property instead of money may, however, be subject to the requirements of Rule 1.8(a), because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made if its 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. In matters in litigation, the court's approval for the lawyer's withdrawal may be required. *See* Rule 1.16(d). It is proper, however, 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.

[5A] The New York Court Rules require every lawyer with an office located in New York to post in that office, in a manner visible to clients of the lawyer, a "Statement of Client's Rights." See 22 N.Y.C.R.R. § 1210.1. Paragraph (e) requires a lawyer in a domestic relations matter, as defined in Rule 1.0(g), to provide a prospective client with the "Statement of Client's Rights and Responsibilities," as further set forth in 22 N.Y.C.R.R. § 1400.2, at the initial conference and, in any event, prior to the signing of a written retainer agreement.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained or upon obtaining child custody or visitation. This provision also precludes a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders. *See* Rule 1.0(g) (defining "domestic relations matter" to include an action to enforce such a judgment).

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not affiliated 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. Paragraph (g) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole in a writing given to the client. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the client's agreement must be confirmed in writing. Contingent fee arrangements must comply with paragraph (c). Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. *See* Rule 5.1. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. *See* Rule 1.1.

[8] Paragraph (g) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Paragraph (h) recognizes that this Rule does not prohibit payment to a previously associated lawyer pursuant to a separation or retirement agreement.

Disputes over Fees

[9] A lawyer should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. The New York courts have established a procedure for resolution of fee disputes through arbitration and the lawyer must comply with the procedure when it is mandatory. Even when it is voluntary, the lawyer should conscientiously consider submitting to it.

RULE 1.6

CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential 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 crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

Comment

Scope of the Professional Duty of Confidentiality

[1] This Rule governs the disclosure of information protected by the professional duty of confidentiality. Such information is described in these Rules as "confidential information" as defined in this Rule. Other rules also deal with confidential information. See 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; 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; Rule 1.14(c) for information relating to representation of a client with diminished capacity; Rule 1.18(b) for the lawyer's duties with respect to information provided to the lawyer by a prospective client; Rule 3.3 for the lawyer's duty of candor to a tribunal; and Rule 8.3(c) for information gained by a lawyer or judge while participating in an approved lawyer assistance program.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. See Rule 1.0(j) for the definition of informed consent. The lawyer's duty of confidentiality 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. Typically, clients come to lawyers 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 thereby upheld.

[3] The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order. The confidentiality duty applies not only to matters communicated in confidence by the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source. The confidentiality duty, for example, prohibits a lawyer from volunteering confidential information to a friend or to any other person except in compliance with the provisions of this Rule, including the Rule's reference to other law that may compel disclosure. *See* Comments [12]-[13]; *see also* Scope.

[4] Paragraph (a) prohibits a lawyer from knowingly revealing confidential information as defined by this Rule. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal confidential 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 with persons not connected 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.

[4A] Paragraph (a) protects all factual information "gained during or relating to the representation of a client." Information relates to the representation if it has any possible relevance to the representation or is received because of the representation. The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some

circumstances, including where the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research. Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information is not "generally known" simply because it is in the public domain or available in a public file.

Use of Information Related to Representation

[4B] The duty of confidentiality also prohibits a lawyer from using confidential information to the advantage of the lawyer or a third person or to the disadvantage of a client or former client unless the client or former client has given informed consent. See Rule 1.0(j) for the definition of "informed consent." This part of paragraph (a) applies when information is used to benefit either the lawyer or a third person, such as another client, a former client or a 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 (absent the client's informed consent) use that information to buy a nearby parcel that is expected to appreciate in value due to the client's purchase, or to recommend that another client buy the nearby land, even if the lawyer does not reveal any confidential information. The duty also prohibits disadvantageous use of confidential information unless the client gives informed consent, except as permitted or required by these Rules. For example, a lawyer assisting a client in purchasing a parcel of land may not make a competing bid on the same land. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client, even to the disadvantage of the former client, after the client-lawyer relationship has terminated. *See* Rule 1.9(c)(1).

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer may make disclosures of confidential information that are impliedly authorized by a client if the disclosures (i) advance the best interests of the client and (ii) are either reasonable under the circumstances or customary in the professional community. 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. In addition, 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. Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client's interests. See Rules 1.14(b) and (c).

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions that prevent substantial harm to important interests, deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of judicial proceedings. Paragraph (b) permits, but does not require, a lawyer to disclose information relating to the representation to accomplish these specified purposes.

[6A] The lawyer's exercise of discretion conferred by paragraphs (b)(1) through (b)(3) requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under paragraphs (b)(1), (b)(2) or (b)(3), the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client. When the lawyer reasonably believes that the client will carry out the threatened harm or crime, the lawyer may disclose confidential information when permitted by paragraphs (b)(1), (b)(2) or (b)(3). A lawyer's permissible disclosure under paragraph (b) does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception,

has been satisfied by a party to the proceeding. For a lawyer's duties when representing an organizational client engaged in wrongdoing, see Rule 1.13(b).

[6B] Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death. On the other hand, an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph (b)(1); similarly, a remote possibility or small statistical likelihood that any particular unit of a mass-distributed product will cause death or substantial bodily harm to unspecified persons over a period of years does not satisfy the element of reasonably certain death or substantial bodily harm under the exception to the duty of confidentiality in paragraph (b)(1).

[6C] Paragraph (b)(2) recognizes that society has important interests in preventing a client's crime. Disclosure of the client's intention is permitted to the extent reasonably necessary to prevent the crime. In exercising discretion under this paragraph, the lawyer should consider such factors as those stated in Comment [6A].

[6D] Some crimes, such as criminal fraud, may be ongoing in the sense that the client's past material false representations are still deceiving new victims. The law treats such crimes as continuing crimes in which new violations are constantly occurring. The lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts, because refusal to end a continuing crime is equivalent to an intention to commit a new crime. Disclosure is not permitted under paragraph (b)(2), however, when a person who may have committed a crime employs a new lawyer for investigation or defense. Such a lawyer does not have discretion under

paragraph (b)(2) to use or disclose the client's past acts that may have continuing criminal consequences. Disclosure is permitted, however, if the client uses the new lawyer's services to commit a further crime, such as obstruction of justice or perjury.

[6E] Paragraph (b)(3) permits a lawyer to withdraw a legal opinion or to disaffirm a prior representation made to third parties when the lawyer reasonably believes that third persons are still relying on the lawyer's work and the work was based on "materially inaccurate information or is being used to further a crime or fraud." *See* Rule 1.16(b)(1), requiring the lawyer to withdraw when the lawyer knows or reasonably should know that the representation will result in a violation of law. Paragraph (b)(3) permits the lawyer to give only the limited notice that is implicit in withdrawing an opinion or representation, which may have the collateral effect of inferentially revealing confidential information. The lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, but paragraph (b)(3) does not permit explicit disclosure of the client's past acts unless such disclosure is permitted under paragraph (b)(2).

[7] [Reserved.]

[8] [Reserved.]

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

[10] Where a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such a claim 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, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone. The lawyer may respond directly to the person who has made an accusation that permits disclosure, pro-

vided that the lawyer's response complies with Rule 4.2 and Rule 4.3, and other Rules or applicable law. A lawyer may make the disclosures authorized by paragraph (b)(5) through counsel. The right to respond also applies to accusations of wrongful conduct concerning the lawyer's law firm, employees or associates.

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

[12] Paragraph (b) does not mandate any disclosures. However, other law may require that a lawyer disclose confidential information. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidential information appears to be required by other law, the lawyer must consult with the client to the extent required by Rule 1.4 before making the disclosure, unless such consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A tribunal or governmental entity claiming authority pursuant to other law to compel disclosure may order a lawyer to reveal confidential information. Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law. If such review is not sought or is unsuccessful, paragraph (b)(6) permits the lawyer to comply with the order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1) through (b)(6). Before making a disclosure, the lawyer should, where practicable, 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, particularly when accusations of wrongdoing in the representation of a client

have been made by a third party rather than by the client. If the disclosure will be made in connection with an adjudicative 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 the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may, however, be required by other Rules or by other law. *See* Comments [12]-[13]. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). *E.g.*, Rule 8.3(c)(1). Rule 3.3(c), on the other hand, requires disclosure in some circumstances whether or not disclosure is permitted or prohibited by this Rule.

Withdrawal

[15A] 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 pursuant to Rule 1.16(b)(1). Withdrawal may also be required or permitted for other reasons under Rule 1.16. After withdrawal, the lawyer is required to refrain from disclosing or using information protected by Rule 1.6, except as this Rule permits such disclosure. Neither this Rule, nor Rule 1.9(c), nor Rule 1.16(e) prevents the lawyer from giving notice of the fact of withdrawal. For withdrawal or disaffirmance of an opinion or representation, see paragraph (b)(3) and Comment [6E]. Where the client is an organization, the lawyer may be in doubt whether the organization will actually carry out the contemplated conduct. Where necessary to guide conduct in connection with this Rule, the lawyer may, and sometimes must, make inquiry within the organization. *See* Rules 1.13(b) and (c).

Duty to Preserve Confidentiality

[16] Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information 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 otherwise subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to

current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.,* by making a device or 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. For a lawyer's duties when sharing information with nonlawyers inside or outside the lawyer's own firm, see Rule 5.3, Comment [2].

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. Paragraph (c) does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality. However, a lawyer may be required to take specific steps to safeguard a client's information to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked "Confidential" or "Confidential—Attorneys' Eyes Only"; the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") may require a lawyer to take specific precautions with respect to a client's or adversary's medical records; and court rules may require a lawyer to block out a client's Social Security number or a minor's name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules.

Lateral Moves, Law Firm Mergers, and Confidentiality

[18A] When lawyers or law firms (including in-house legal departments) contemplate a new association with other lawyers or law firms though lateral hiring or merger, disclosure of limited information may be necessary to resolve conflicts of interest pursuant to Rule 1.10 and to address financial, staffing, operational, and other practical issues. However, Rule 1.6(a) requires lawyers and law firms to protect their clients' confidential information, so lawyers and law firms may not disclose such information for their own advantage or for the advantage of third parties absent a client's informed consent or some other exception to Rule 1.6.

[18B] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily permitted regarding basic information such as: (i) the identities of clients or other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer's total book of business; (v) the financial terms of each lawyer-client relationship; and (vi) information about aggregate current and historical payment of fees (such as realization rates, average receivables, and aggregate timeliness of payments). Such information is generally not "confidential information" within the meaning of Rule 1.6.

[18C] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily *not* permitted, however, if information is protected by Rule 1.6(a), 1.9(c), or Rule 1.18(b). This includes information that a lawyer knows or reasonably believes is protected by the attorney-client privilege, or is likely to be detrimental or embarrassing to the client, or is information that the client has requested be kept confidential. For example, many clients would not want their lawyers to disclose their tardiness in paying bills; the amounts they spend on legal fees in particular matters; forecasts about their financial prospects; or information relating to sensitive client matters (e.g., an unannounced corporate takeover, an undisclosed possible divorce, or a criminal investigation into the client's conduct).

[18D] When lawyers are exploring a new association, whether by lateral move or by merger, all lawyers involved must individually consider fiduciary obligations to their existing firms that may bear on the timing and scope of disclosures to clients relating to conflicts and financial concerns, and should consider whether to ask clients for a waiver of confiden-

tiality if consistent with these fiduciary duties—*see* Rule 1.10(e) (requiring law firms to check for conflicts of interest). Questions of fiduciary duty are legal issues beyond the scope of the Rules.

[18E] For the unique confidentiality and notice provisions that apply to a lawyer or law firm seeking to sell all or part of its practice, see Rule 1.17 and Comment [7] to that Rule.

[18F] Before disclosing information regarding a possible lateral move or law firm merger, law firms and lawyers moving between firms—both those providing information and those receiving information—should use reasonable measures to minimize the risk of any improper, unauthorized or inadvertent disclosures, whether or not the information is protected by Rule 1.6(a), 1.9(c), or 1.18(b). These steps might include such measures as: (1) disclosing client information in stages; initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages; (2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or (3) agreeing not to disclose financial or conflict information outside the firm(s) during and after the lateral hiring negotiations or merger process.

RULE 1.7

CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

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

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

(2) the representation is not prohibited by law;

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

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

Comment

General Principles

[1] Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the law-

yer's ability to exercise professional judgment on behalf of each client. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "differing interests," "informed consent" and "confirmed in writing," see Rules 1.0(f), (j) and (e), respectively.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of interest exists, *i.e.*, whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation, (iii) decide whether the representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is consentable under paragraph (b); and if so (iv) consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include all of the clients who may have differing interests under paragraph (a)(1) and any clients whose representation might be adversely affected 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). *See* Rule 1.10(e), which requires every law firm to create, implement and maintain a conflict-checking system.

[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(b)(1). 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], [29A].

[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 acquired 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 Rules 1.16(d) and (e). 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

[6] The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client's informed consent. For example, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is 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 may reasonably fear that the lawyer will pursue that client's case less effectively out of deference to the other client, that is, that the lawyer's exercise of professional judgment on behalf of that client will be adversely affected by the lawyer's interest in retaining the current client. Similarly, a conflict may arise when a lawyer is required to cross-examine a client appearing as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client 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] Differing interests can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

[8] Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions

that each client 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 adversely affect the lawyer's 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 adversely affected 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 financial, property, business or other personal 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 5.7 on responsibilities regarding nonlegal services and Rule 1.8 pertaining to a number of personal-interest conflicts, including business transactions with clients.

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related, 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 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 who has a significant intimate or close family relationship with another lawyer ordinarily

may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(j).

[12] A lawyer is prohibited from engaging in sexual relations with a client in domestic relations matters. In all other matters a lawyer's sexual relations with a client are circumscribed by the provisions of Rule 1.8(j).

Interest of Person Paying for Lawyer's Services

[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 exercise of professional judgment on behalf of a client will be adversely affected 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. As paragraph (b) indicates, however, some conflicts are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client's consent nor provide representation on the basis of the client's consent. A client's consent to a nonconsentable conflict is ineffective. 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 consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, a 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 regarding competence and Rule 1.3 regarding diligence.

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, federal criminal statutes prohibit certain representations by a former government lawyer despite the informed consent of the former governmental client. In addition, there are some instances where conflicts are nonconsentable under decisional law.

[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 mediation (because mediation is not a proceeding before a "tribunal" as defined in Rule 1.0(w)), 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, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. *See* Rule 1.0(j). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. 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] concerning the 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 client 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 is that each party obtains 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. Where the fact, validity or propriety of client consent is called into question, the lawyer has the burden of establishing that the client's consent was properly obtained in accordance with the Rule.

Client Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of (i) a document from the client, (ii) a document that the lawyer promptly transmits to the client confirming an oral informed consent, or (iii) a statement by the client made on the record of any proceeding before a tribunal, whether before, during or after a trial or hearing. *See* Rule 1.0(e) for the definition of "confirmed in writing." *See also* Rule 1.0(x) ("writing" includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. The Rule does not require that the information communicated to the client by the lawyer necessary to make the consent "informed" be in writing or in any particular form in all cases. *See* Rules 1.0(e) and (j). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing. *See* Comment [18].

Revoking Consent

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

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the conditions set forth in paragraph (b). The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure 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 understanding necessary to make the consent "informed" and the waiver effective. *See* Rule 1.0(j). The lawyer should also disclose the measures that will be taken to protect the client should a conflict arise, including procedures such as screening that would be put in place. *See* Rule 1.0(t) for the definition of "screening." The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client. For example, if the client is unsophisticated about legal matters generally or about the particular type of matter at hand, the lawyer should provide more detailed information about both the nature of the anticipated conflict and the adverse consequences to the client that may ensue should the potential conflict become an actual one. In other instances, such as where the client is a child or an incapacitated or impaired person, it may be impossible to inform the client sufficiently, and the lawyer should not seek an advance waiver. 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, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or advised by in-house or other counsel in giving consent. Thus, in some circumstances, even general and open-ended waivers by experienced users of legal services may be effective.

[22A] Even if a client has validly consented to waive future conflicts, however, the lawyer must reassess the propriety of the adverse concurrent representation under paragraph (b) when an actual conflict arises. If the actual conflict is materially different from the conflict that has been waived, the lawyer may not rely on the advance consent previously obtained. Even if the actual conflict is not materially different from the conflict the client has previously waived, the client's advance consent

cannot be effective if the particular circumstances that have created an actual conflict during the course of the representation would make the conflict nonconsentable under paragraph (b). *See* Comments [14]–[17] and [28] addressing nonconsentable conflicts.

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)(1). 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 as well as civil cases. Some examples are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs or co-defendants in a personal injury case, an insured and insurer, or beneficiaries of the estate of a decedent. In a criminal case, the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, multiple 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 representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of this risk include: (i) where the cases are pending, (ii) whether the issue is substantive or procedural, (iii) the temporal relationship between the matters, (iv) the significance of the issue to the immediate and long-term interests of the clients involved, and (v) the clients' reasonable expectations in retaining the lawyer. Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients' interests. If there is significant

risk of an adverse effect on the lawyer's professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation.

[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). 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 paragraph (a)(1) arise in contexts other than litigation. For a discussion of such conflicts in transactional matters, see Comment [7]. Regarding paragraph (a)(2), relevant factors in determining whether there is a significant risk that the lawyer's professional judgment will be adversely affected include: (i) the importance of the matter to each client, (ii) the duration and intimacy of the lawyer's relationship with the client or clients involved, (iii) the functions being performed by the lawyer, (iv) the likelihood that significant disagreements will arise, (v) the likelihood that negotiations will be contentious, (vi) the likelihood that the matter will result in litigation, and (vii) the likelihood that the client will suffer prejudice from the conflict. The issue is often one of proximity (how close the situation is to open conflict) and degree (how serious the conflict will be if it does erupt). *See* Comments [8], [29] and [29A].

[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 at the outset or may arise during the representation. In order to avoid the development of a disqualifying conflict, 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 regardless of whether it is shared, may not be privileged in a subsequent dispute between the parties) and that the lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other. *See* Comment [31].

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another, 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. Examples include 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, and 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 civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis. For example, clients may wish to be represented by a single lawyer in helping to organize a business, working out a financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution of an estate or resolving a dispute between clients. The alternative to common representation can be that each party may have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation that might otherwise be avoided, or that some parties will have no lawyer at all. Given these and other relevant factors, clients may prefer common representation to separate representation or no representation. A lawyer should consult with each client concerning the implications of the common representation, including the advantages and the risks involved, and the effect on the attorney-client privilege, and obtain each client's informed consent, confirmed in writing, to the common representation.

[29A] Factors may be present that militate against a common representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, absent the informed consent of all clients, the lawyer will be forced

to withdraw from representing all of the clients if the common representation fails. *See* Rule 1.9(a). In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between or among 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, it is unlikely that the clients' interests can be adequately served by common representation. For example, a lawyer who has represented one of the clients for a long period or in multiple matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

[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. It must therefore 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. At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should 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 even as among the commonly represented clients. 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 two 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 limitation 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, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client's affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client's overall mode of doing business, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances, the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

[34A] Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer's client.

[34B] Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer's ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer's corporate client.

Lawyer as Corporate Director

[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 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

CURRENT CLIENTS: SPECIFIC CONFLICT OF INTEREST RULES

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction 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:

(1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

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 conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:

(1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or

(2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, 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;

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

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred; and

(4) a lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, or a law school clinical or pro bono program, may provide financial assistance to indigent clients but may not promise or assure financial assistance prior to retention, or as an inducement to continue the lawyer-client relationship. Funds raised for any

legal services or public interest organization for purposes of providing legal services will not be considered useable for providing financial assistance to indigent clients, and financial assistance referenced in this subsection may not include loans or any other form of support that causes the client to be financially beholden to the provider of the assistance.

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and

(3) the client's confidential information 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, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims 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; or

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

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

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

(2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

(j) (1) A lawyer shall not:

(i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;

(ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm; or

(iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

(2) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.

(k) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

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's investment on behalf of a client. For these reasons business transactions between a lawyer and client are not advisable. If a lawyer nevertheless elects to enter into a business transaction with a current client, the requirements of paragraph (a) must be met if the client and lawyer have differing interests in the transaction and the client expects the lawyer to exercise professional judgment therein for the bene-

fit of the client. This will ordinarily be the case even when the transaction is not 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, such as the sale of title insurance or investment services to existing clients of the lawyer's legal practice. *See* Rule 5.7. It also applies to lawyers purchasing property from estates they represent.

[2] Paragraphs (a)(1), (a)(2) and (a)(3) set out the conditions that a lawyer must satisfy under this Rule. Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated in writing to the client 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(j) for the 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 adversely affected by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the client's expense. 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. A lawyer has a continuing duty to monitor the inherent conflicts of interest that arise out of the lawyer's business transaction with a client or because the lawyer has an ownership interest in property in which the client also has an interest. A lawyer is

also required to make such additional disclosures to the client as are necessary to obtain the client's informed consent to the continuation of the representation.

[3A] The self-interest of a lawyer resulting from a business transaction with a client may interfere with the lawyer's exercise of independent judgment on behalf of the client. If such interference will occur should a lawyer agree to represent a prospective client, the lawyer should decline the proffered employment. After accepting employment, a lawyer should not acquire property rights that would adversely affect the lawyer's professional judgment in representing the client. Even if the property interests of a lawyer do not presently interfere with the exercise of independent judgment, but the likelihood of interference can be reasonably foreseen by the lawyer, the lawyer should explain the situation to the client and should decline employment or withdraw unless the client gives informed consent to the continued representation, confirmed in writing. A lawyer should not seek to persuade a client to permit the lawyer to invest in an undertaking of the client nor make improper use of a professional relationship to influence the client to invest in an enterprise in which the lawyer is interested.

[4] If the client is independently represented in the transaction, paragraph (a)(2) is inapplicable, and the requirement of full disclosure in paragraph (a)(1) is satisfied by a written disclosure by either the lawyer involved in the transaction or 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.

[4A] Rule 1.8(a) does not apply to business transactions with former clients, but the line between current and former clients is not always clear. A lawyer entering into a business transaction with a former client may not use information relating to the representation to the disadvantage of the former client unless the information has become generally known. *See* Rule 1.9(c).

[4B] 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.

[4C] This Rule also does not apply to ordinary fee arrangements between client and lawyer reached at the inception of the client-lawyer relationship, which are governed by Rule 1.5. The requirements of the Rule ordinarily must be met, however, when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee. For example, the requirements of paragraph (a) must ordinarily be met if a lawyer agrees to take stock (or stock options) in the client in lieu of cash fees. Such an exchange creates a risk that the lawyer's judgment will be skewed in favor of closing a transaction to such an extent that the lawyer may fail to exercise professional judgment as to whether it is in the client's best interest for the transaction to close. This may occur where the client expects the lawyer to provide professional advice in structuring a securities-for-services exchange. If the lawyer is expected to play any role in advising the client regarding the securities-for-services exchange, especially if the client lacks sophistication, the requirements of fairness, full disclosure and written consent set forth in paragraph (a) must be met. When a lawyer represents a client in a transaction concerning literary property, Rule 1.8(d) does not prohibit the lawyer from agreeing that the lawyer's fee shall consist of a share of the ownership of the literary property or a share of the royalties or license fees from the property, but the lawyer must ordinarily comply with Rule 1.8(a).

[4D] An exchange of securities for legal services will also trigger the requirements of Rule 1.7 if the lawyer's ownership interest in the client would, or reasonably may, affect the lawyer's exercise of professional judgment on behalf of the client. For example, where a lawyer has agreed to accept securities in a client corporation as a fee for negotiating and documenting an equity investment, or for representing a client in connection with an initial public offering, there is a risk that the lawyer's judgment will be skewed in favor of closing the transaction to such an extent that the lawyer may fail to exercise professional judgment. (The lawyer's judgment may be skewed because unless the transaction closes, the securities will be worthless.) Unless a lawyer reasonably concludes that he or she will be able to provide competent, diligent and loyal representation to the client, the lawyer may not undertake or continue the representation, even with the client's consent. To determine whether a reasonable possibility of such an adverse effect on the representation exists, the lawyer should analyze the nature and relationship of the particular interest and the specific legal services to be rendered. Some salient factors may be (i) the size of the lawyer's investment in proportion to the holdings of other investors,

(ii) the potential value of the investment in relation to the lawyer's or law firm's earnings or other assets, and (iii) whether the investment is active or passive.

[4E] If the lawyer reasonably concludes that the lawyer's representation of the client will not be adversely affected by the agreement to accept client securities as a legal fee, the Rules permit the representation, but only if full disclosure is made to the client and the client's informed consent is obtained and confirmed in writing. *See* Rules 1.0(e) (defining "confirmed in writing"), 1.0(j) (defining "informed consent"), and 1.7.

[4F] A lawyer must also consider whether accepting securities in a client corporation as payment for legal services constitutes charging or collecting an unreasonable or excessive fee in violation of Rule 1.5. Determining whether a fee accepted in the form of securities is unreasonable or excessive requires a determination of the value of the securities at the time the agreement is reached and may require the lawyer to engage the services of an investment professional to appraise the value of the securities to be given. The lawyer and client can then make their own advised decisions as to whether the securities-for-fees exchange results in a reasonable fee.

[5] A lawyer's 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 a business associate of the lawyer, at the expense of a client. 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. But 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 use of client information to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. Rules that permit or require use of client information to the disadvantage of the client include Rules 1.6, 1.9(c) and 3.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client if the transaction meets general standards of fairness. If a client offers the lawyer a gift, paragraph (c) does not prohibit the lawyer from accepting it, although

such a gift may be voidable by the client. Before accepting a gift offered by a client, a lawyer should urge the client to secure disinterested advice from an independent, competent person who is cognizant of all of the circumstances. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a gift be made to the lawyer or for the lawyer's benefit.

[6A] This Rule does not apply to success fees, bonuses and the like from clients for legal services. These are governed by Rule 1.5.

[7] If effectuation of a 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 related to the donee and a reasonable lawyer would conclude that the transaction is fair and reasonable, as set forth in paragraph (c).

[8] This Rule does not prohibit a lawyer or a partner or associate of the lawyer from being named as executor of the client's estate or named to another fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will adversely affect the lawyer's 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 or Media Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the subject matter of the representation creates a conflict between the interest of the client and the personal interests of the lawyer. The lawyer may be tempted to subordinate the interests of the client to the lawyer's own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from the client television, radio, motion picture, newspaper, magazine, book, or other literary or media rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of the literary or media rights to the prejudice of the client. To prevent this adverse impact on the representation, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the representation, even though the representation has previously ended. Likewise,

arrangements with third parties, such as book, newspaper or magazine publishers or television, radio or motion picture producers, pursuant to which the lawyer conveys whatever literary or media rights the lawyer may have, should not be entered into prior to the conclusion of all aspects of the matter giving rise to the representation.

[9A] Rule 1.8(d) does not prohibit a lawyer representing a client in a transaction concerning intellectual property from agreeing that the lawyer's fee shall consist of an ownership share in the property, if the arrangement conforms to paragraph (a) and Rule 1.5.

Financial Assistance

[9B] Paragraph (e) eliminates the former requirement that the client remain "ultimately liable" to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer's fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer's own account. However, like the former New York rule, paragraph (e) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.

[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 against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, 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). Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's 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 may exist if the lawyer will be involved in representing differing interests or if there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing. *See* Rules 1.0(e) (definition of "confirmed in writing"), 1.0(j) (definition of "informed consent"), and 1.0(x) (definition of "writing" or "written").

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 consents. 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. Paragraph (g) is a corollary of both these Rules and provides that, before any settlement offer 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 is accepted. *See also* Rule 1.0(j) (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 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 currently 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 the lawyer's own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

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

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and

maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. 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 matters 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 often 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 if the sexual relationship leads to the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairing the lawyer's exercise of professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client evidentiary privilege. A client's sexual involvement with the client's lawyer, especially if the sexual relations create emotional involvement, will often render it unlikely that the client could rationally determine whether to consent to the conflict created by the sexual relations. If a client were to consent to the conflict created by the sexual relations without fully appreciating the nature and implications of that conflict, there is a significant risk of harm to client interests. Therefore, sexual relations between lawyers and their clients are dangerous and inadvisable. Out of respect for the desires of consenting adults, however, paragraph (j) does not flatly prohibit client-lawyer sexual relations in matters other than domestic relations matters. Even when sexual relations between a lawyer and client are permitted under paragraph (j), however, they may lead to incompetent

representation in violation of Rule 1.1. Because domestic relations clients are often emotionally vulnerable, domestic relations matters entail a heightened risk of exploitation of the client. Accordingly, lawyers are flatly prohibited from entering into sexual relations with domestic relations clients during the course of the representation even if the sexual relationship is consensual and even if prejudice to the client is not immediately apparent. For a definition of "sexual relations" for the purposes of this Rule, see Rule 1.0(u).

[17A] The prohibitions in paragraph (j)(1) apply to all lawyers in a firm who know of the representation, whether or not they are personally representing the client. The Rule prohibits any lawyer in the firm from exploiting the client-lawyer relationship by directly or indirectly requiring or demanding sexual relations as a condition of representation by the lawyer or the lawyer's firm. Paragraph (j)(1)(i) thus seeks to prevent a situation where a client may fear that a willingness or unwillingness to have sexual relations with a lawyer in the firm may have an impact on the representation, or even on the firm's willingness to represent or continue representing the client. The Rule also prohibits the use of coercion, undue influence or intimidation to obtain sexual relations with a person known to that lawyer to be a client or a prospective client of the firm. Paragraph (j)(1)(ii) thus seeks to prevent a lawyer from exploiting the professional relationship between the client and the lawyer's firm. Even if a lawyer does not know that the firm represents a person, the lawyer's use of coercion or intimidation to obtain sexual relations with that person might well violate other Rules or substantive law. Where the representation of the client involves a domestic relations matter, the restrictions stated in paragraphs (j)(1)(i) and (j)(1)(ii), and not the per se prohibition imposed by paragraph (j)(1)(iii), apply to lawyers in a firm who know of the representation but who are not personally representing the client. Nevertheless, because domestic relations matters may be volatile and may entail a heightened risk of exploitation of the client, the risk that a sexual relationship with a client of the firm may result in a violation of other Rules is likewise heightened, even if the sexual relations are not per se prohibited by paragraph (j).

[17B] A law firm's failure to educate lawyers about the restrictions on sexual relations—or a firm's failure to enforce those restrictions against lawyers who violate them—may constitute a violation of Rule 5.1, which obligates a law firm to make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

[18] Sexual relationships between spouses or those 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 sexual relationship and therefore constitute an impermissible conflict of interest. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) applies to sexual relations between a lawyer for the organization (whether inside counsel or outside counsel) and a constituent of the organization who supervises, directs or regularly consults with that lawyer or a lawyer in that lawyer's firm concerning the organization's legal matters.

Imputation of Prohibitions

[20] Where a lawyer who is not personally representing a client has sexual relations with a client of the firm in violation of paragraph (j), the other lawyers in the firm are not subject to discipline solely because those improper sexual relations occurred. There may be circumstances, however, where a violation of paragraph (j) by one lawyer in a firm gives rise to violations of other Rules by the other lawyers in the firm through imputation. For example, sexual relations between a lawyer and a client may give rise to a violation of Rule 1.7(a), and such a conflict under Rule 1.7 may be imputed to all other lawyers in the firm under Rule 1.10(a).

RULE 1.9

DUTIES TO FORMER CLIENTS

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

(b) Unless the former client gives informed consent, confirmed in writing, 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 or paragraph (c) of this Rule that is material to the matter.

(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 confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current 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 these Rules. 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 a former client. So also, a lawyer who has prosecuted an accused person could not properly represent that person 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, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that

may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation. On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

[4] [Moved to Comment to Rule 1.10.]

[5] [Moved to Comment to Rule 1.10.]

[6] [Moved to Comment to Rule 1.10.]

[7] Independent of the prohibition against subsequent representation, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. *See* Rules 1.6, 1.9(c).

[8] Paragraph (c) generally extends the confidentiality protections of Rule 1.6 to a lawyer's former clients. Paragraph (c)(1) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used 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. Paragraph (c)(2) provides that a lawyer may not reveal information acquired in the course of representing a client except as these Rules would permit or require with respect to a current client. *See* Rules 1.6, 3.3.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraph (a). See also Rule 1.0(j) for the definition of "informed consent." With regard to the effectiveness of an advance waiver, see Rule 1.7, Comments [22]–[22A]. 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

(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 Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

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

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

(1) the firm agrees to represent a new client;

(2) the firm agrees to represent an existing client in a new matter;

(3) the firm hires or associates with another lawyer; or

(4) an additional party is named or appears in a pending matter.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

(h) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

Comment

Definition of "Firm"

[1] For purposes of these Rules, the term "firm" includes, but is not limited to, (i) a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law, and (ii) lawyers employed in a legal services organization, a government law office or the legal department of a corporation or other organization. See Rule 1.0(h). Whether two or more lawyers constitute a "firm" within this definition will depend on the 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] [Reserved]

[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. 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(t), 5.3.

Lawyers Moving Between Firms

[4A] The principles of imputed disqualification are modified when lawyers have been associated in a firm and then end their association. The nature of contemporary law practice and the organization of law firms have made the fiction that the law firm is the same as a single lawyer unrealistic in certain situations. In crafting a rule to govern imputed conflicts, there are several competing considerations. First, the former client must be reasonably assured that the client's confidentiality interests are not compromised. Second, the principles of imputed disqualification should not be so broadly cast as to preclude others from having reasonable choice of counsel. Third, the principles of imputed disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after leaving a firm. In this connection, it should be recognized that today most lawyers practice in firms, that many limit their practice to, or otherwise concentrate in, one area of law, and that many move from one association to another multiple times in their careers. If the principles of imputed disqualification were defined too strictly, the result would be undue curtailment of the opportunity of lawyers to move from one practice setting to another, of the opportunity of clients to choose counsel, and of the opportunity of firms to retain qualified lawyers. For these reasons, a functional analysis that focuses on preserving the former client's reasonable confidentiality interests is appropriate in balancing the competing interests.

[5] Paragraph (b) permits a law firm, under certain circumstances, to represent a client 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 repre-

sented the client. However, under Rule 1.7 the law firm may not represent a client with interests adverse to those of a current client of the firm. Moreover, the firm may not represent the client where the matter is the same or substantially related to a matter in which (i) the formerly associated lawyer represented the client, and (ii) the firm or any lawyer currently in the firm has information protected by Rule 1.6 and Rule 1.9(c) that is material to the matter.

[5A] In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter.

[5B] Rule 1.10(c) permits a law firm to represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or the firm with which the lawyer was previously associated, represented a client whose interests are materially adverse to that client, provided the newly associated lawyer did not acquire any confidential information of the previously represented client that is material to the current matter.

Client Consent

[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, confirmed in writing. In some cases, the risk may be so severe that the conflict cannot 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, Comments [22]–[22A]. For a definition of "informed consent," see Rule 1.0(j).

Former Government Lawyers

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b), not this Rule.

Relationship Between this Rule and Rule 1.8(k)

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8(a) through (i), this Rule imputes that prohibition to other lawyers associated in a firm with the personally prohibited lawyer. Under Rule 1.8(k), however, where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the other lawyers in the firm are not subject to discipline under Rule 1.8 solely because such sexual relations occur.

Conflict-Checking Procedures

[9] Under paragraph (e), every law firm, no matter how large or small (including sole practitioners), is responsible for creating, implementing and maintaining a system to check proposed engagements against current and previous engagements and against new parties in pending matters. The system must be adequate to detect conflicts that will or reasonably may arise if: (i) the firm agrees to represent a new client, (ii) the firm agrees to represent an existing client in a new matter, (iii) the firm hires or associates with another lawyer, or (iv) an additional party is named or appears in a pending matter. The system will thus render effective assistance to lawyers in the firm in avoiding conflicts of interest. *See also* Rule 5.1.

[9A] Failure to create, implement and maintain a conflict-checking system adequate for this purpose is a violation of this Rule by the firm. In cases in which a lawyer, despite reasonably diligent efforts to do so, could not acquire the information that would have revealed a conflict because of the firm's failure to maintain an adequate conflict-checking system, the firm shall be responsible for the violation. However, a lawyer who knows or should know of a conflict in a matter that the lawyer is handling remains individually responsible for the violation of these Rules, whether or not the firm's conflict-checking system has identified the conflict. In cases in which a violation of paragraph (e) by the firm is a substantial factor in causing a violation of these Rules by a lawyer, the firm, as well as the individual lawyer, is responsible for the violation. As to whether a client-lawyer relationship exists or is continuing, see Scope [9]–[10]; Rule 1.3, Comment [4].

[9B] The records required to be maintained under paragraph (e) must be in written form. *See* Rule 1.0(x) for the definition of "written," which includes tangible or electronic records. To be effective, a conflict-checking system may also need to supplement written information with

recourse to the memory of the firm's lawyers through in-person, telephonic, or electronic communications. An effective conflict-checking system as required by this Rule may not, however, depend solely on recourse to lawyers' memories or other such informal sources of information.

[9C] The nature of the records needed to render effective assistance to lawyers will vary depending on the size, structure, history, and nature of the firm's practice. At a minimum, however, a firm must record information that will enable the firm to identify (i) each client that the firm represents, (ii) each party in a litigated, transactional or other matter whose interests are materially adverse to the firm's clients, and (iii) the general nature of each matter.

[9D] To the extent that the records made and maintained for the purpose of complying with this Rule contain confidential information, a firm must exercise reasonable care to protect the confidentiality of these records. *See* Rule 1.6(c).

[9E] The nature of a firm's conflict-checking system may vary depending on a number of factors, including the size and structure of the firm, the nature of the firm's practice, the number and location of the firm offices, and the relationship among the firm's separate offices. In all cases, however, an effective conflict-checking system should record and maintain information in a way that permits the information to be checked systematically and accurately when the firm is considering a proposed engagement. A small firm or a firm with a small number of engagements may be able to create and maintain an effective conflict-checking system through the use of hard-copy rather than electronic records. But larger firms, or firms with a large number of engagements, may need to create and maintain records in electronic form so that the information can be accessed quickly and efficiently.

Organizational Clients

[9F] Representation of corporate or other organizational clients makes it prudent for a firm to maintain additional information in its conflict-checking system. For example, absent an agreement with the client to the contrary, a conflict may arise when a firm desires to oppose an entity that is part of a current or former client's corporate family (*e.g.*, an affiliate, subsidiary, parent or sister organization). *See* Rule 1.7, Comments [34]-[34B]. Although a law firm is not required to maintain records showing every corporate affiliate of every corporate client, if a law firm frequently represents corporations that belong to large corporate families,

the law firm should make reasonable efforts to institute and maintain a system for alerting the firm to potential conflicts with the members of the corporate client's family.

[9G] Under certain circumstances, a law firm may also need to include information about the constituents of a corporate client. Although Rule 1.13 provides that a firm is the lawyer for the entity and not for any of its constituents, confusion may arise when a law firm represents small or closely held corporations with few shareholders, or when a firm represents both the corporation and individual officers or employees but bills the corporate client for the legal services. In other situations, a client-lawyer relationship may develop unintentionally between the law firm and one or more individual constituents of the entity. Accordingly, a firm that represents corporate clients may need a system for determining whether or not the law firm has a client-lawyer relationship with individual constituents of an organizational client. If so, the law firm should add the names of those constituents to the database of its conflict-checking system.

[9H] Rule 1.10(e) requires a law firm to avoid conflicts of interest by checking proposed engagements against current and previous engagements. When lawyers move from one firm to another firm as lateral hires, or when two law firms merge, the lateral lawyers' conflicts and the merging firms' conflicts arising under Rule 1.9(a) and (b) will be imputed to the hiring or newly merged firms under Rule 1.10(a). To fulfill the duty to check for conflicts *before* hiring laterals or before merging firms, the hiring or merging should ordinarily obtain such information as (i) the identity of each client that the lateral lawyers or merging firms currently represent; (ii) the identity of each client that the lateral lawyers or merging firms, within a reasonable period in the past, either formerly represented within the meaning of Rule 1.9(a), or about whom the lateral lawyers or the lawyers in the merging firms acquired material confidential information within the meaning of Rule 1.9(b); (iii) the identity of other parties to the matters in which the lateral lawyers or merging firms represented those clients; and (iv) the general nature of each such matter. The hiring or merging firms may also request aggregate financial data for all clients or from groups of clients (such as past billings, pending receivables, timeliness of payment, and probable future billings) to determine whether the employment or merger is economically justified.

[9I] Whether lawyers may disclose information in response to such requests depends on the nature of the information. Some of this information is ordinarily not confidential (*e.g.*, the names of clients and

adversaries in publicly disclosed matters, the general nature of such matters, and *aggregate* information about legal fees from all clients or from groups of clients), but other information is ordinarily confidential (*e.g.*, non-public criminal or matrimonial representations, or client-specific payment information). The lateral lawyers or merging firms should carefully assess the nature of the information being requested to determine whether it is confidential before asking lawyers to disclose it. Some measures to assist attorneys in abiding by confidentiality requirements in the lateral and merger context are discussed in Comments [18A]-[18F] to Rule 1.6.

RULE 1.11

SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

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

(1) shall comply with Rule 1.9(c); and

(2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).

(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 firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(c) Except as law may otherwise expressly provide, 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 that, 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 that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(e) As used in this Rule, the term "matter" as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions.

(f) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflicts 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(j) for the definition of "informed consent."

[2] Paragraphs (a), (d) and (f) 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. Paragraph (b) sets forth special imputation rules for former government lawyers, with screening and notice provisions, and rule 1.10 is not applicable to these conflicts. See Comments [6]-[7B] concerning imputation of the conflicts of former government lawyers.

[3] Paragraphs (a)(2), (d) and (f) 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 private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On

the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. A former government lawyer is therefore disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent to entering public service. The limitation on disqualification in paragraphs (a)(2) and (d) to matters involving a specific party or specific parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[4A] By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. Accordingly, unless the information acquired during government service is "generally known" or these Rules would otherwise permit or require its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of Rule 1.11 adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely and effectively screened. Because Rule 1.11 is not among the Rules enumerated in Rule 1.10, Rule 1.10 is not applicable to (and therefore does not impute) conflicts arising under Rule 1.11. Thus, the purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the private client of a law firm with which the former public officer or official is associated from obtaining an unfair advantage by using the lawyer's confidential government information about the private client's adversary.

[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 municipality and subsequently is employed by a federal agency. The question 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 [9].

Former Government Lawyers: Using Screening to Avoid Imputed Disqualification

[6] Paragraphs (b) and (c) contemplate the use of screening procedures that permit the law firm of a personally disqualified former government lawyer to avoid imputed disqualification. Nevertheless, there may be circumstances where, despite screening, representation by the personally disqualified lawyer's firm could still undermine the public's confidence in the integrity of the legal system. Such a circumstance may arise, for example, where the personally disqualified lawyer occupied a highly visible government position prior to entering private practice, or where other facts and circumstances of the representation itself create an appearance of impropriety. Where the particular circumstances create an appearance of impropriety, a law firm must decline the representation. See Rule 1.0(t) for the definition of "screened" and "screening."

[7] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraphs (b) and (c) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who

are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. Although the size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraphs (b) and (c).

[7A] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and other lawyers in the firm in a given matter.

[7B] To enable the government agency to determine compliance with the Rule, notice to the appropriate government agency 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 actual knowledge of the information. It does not operate with respect to information that merely could be imputed to the lawyer.

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

[9A] Paragraph (d)(1) prohibits a lawyer currently serving as a government officer or employee from participating in a matter in which the lawyer participated personally and substantially while in private practice or other non-governmental employment, unless under applicable law no one else is, or by lawful designation could be, authorized to act in the

lawyer's stead. Informed consent on the part of the government agency is not required where such necessity exists. Conversely, informed consent does not suffice to overcome the conflict in the absence of necessity.

[9B] Unlike paragraphs (a) and (c), paragraph (d)(1) contains no special rules providing for imputation of the conflict addressed in paragraph (d)(1) to other lawyers in the same agency. Moreover, Rule 1.10 by its terms does not apply to conflicts under paragraph (d)(1). Thus, even where paragraph (d)(1) bars one lawyer in a government law office from working on a matter, other lawyers in the office may ordinarily work on the matter unless prohibited by other law. Where a government law office's representation is materially adverse to a government lawyer's former private client, however, the representation would, absent informed consent of the former client, also be prohibited by Rule 1.9. Rule 1.10 remains applicable to that former client conflict so as to impute the conflict to all lawyers associated in the same government law office. In applying Rule 1.10 to such conflicts, see Rule 1.0(h) (defining "firm" and "law firm").

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

RULE 1.12

SPECIFIC CONFLICTS OF INTEREST FOR FORMER JUDGES, ARBITRATORS, MEDIATORS OR OTHER THIRD-PARTY NEUTRALS

(a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) an arbitrator, mediator or other third-party neutral; or

(2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

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

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

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(e) 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] A lawyer acts in a "judicial capacity" within the meaning of paragraph (a) when the lawyer serves as a judge or other adjudicative officer. Where a judge or other adjudicative officer in a multimember court, leaves judicial office to practice law, the former judge or adjudicative officer is not prohibited from representing a client in a matter that was pending in the court if the former judge or adjudicative officer did not act upon the merits in that matter. So also, the fact that a former judge or adjudicative officer exercised administrative responsibility in a court does not prevent the former judge or adjudicative officer from acting as a lawyer in a matter where the judge or adjudicative officer had previously exercised remote or incidental administrative responsibility that did not affect the merits. *See* Rule 1.11, Comment [4] (a former government lawyer is disqualified "only from particular matters I which the lawyer participated personally and substantially"). A former judge or adjudicative officer may not, however, accept private employment in a matter upon the merits of which the judge or adjudicative officer has acted in a judicial capacity and—unlike conflicts for lawyers who have acted in a capacity listed in Rule 1.12 (b)—a conflict arising under paragraph (a) cannot be waived. The term "adjudicative officer" in paragraphs (b)(2) and (c) includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers.

[2] A lawyer who has served as an arbitrator, mediator or other third-party neutral may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their

informed consents, confirmed in writing. *See* Rules 1.0(j), (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 obtain information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Paragraph (d) therefore 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 paragraph (d). "Screened" and "screening" are defined in Rule 1.0(t).

[4A] A firm seeking to avoid imputed disqualification under this Rule must prohibit the personally disqualified lawyer from sharing in the fees in the matter.

[4B] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraph (d) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A

small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (d).

[4C] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and others in the firm in a given matter.

[5] To enable the tribunal to determine compliance with the Rule, notice to the parties and any appropriate tribunal generally should be given as soon as practicable after the need for screening becomes apparent.

RULE 1.13

ORGANIZATION AS CLIENT

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

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

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an 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 in 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 in

violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent 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, members, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Rule apply equally to unincorporated associations. "Other constituents" as used in this Rule 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, for example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews between the lawyer and the client's employees or other constituents made in the course of that investigation 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.

[2A] There are times when the organization's interests may differ from those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists, (ii) that the lawyer does not represent the constituent in connection with

the matter, unless the representation has been approved in accordance with Rule 1.13(d), (iii) that the constituent may wish to obtain independent representation, and (iv) that any attorney-client privilege that applies to discussions between the lawyer and the constituent belongs to the organization and may be waived by the organization. Care must be taken to ensure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent, and that discussions between the lawyer for the organization and the constituent may not be privileged.

[2B] Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

Acting in the Best Interest of the Organization

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer, even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. Under Rule 1.0(k), a lawyer's knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The terms "reasonable" and "reasonably" connote a range of conduct that will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization, the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer's area of expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience and familiarity with the client.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility within the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Measures to be taken may include, among others, asking the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer

may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it may be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. *See* Rule 1.4.

[5] The organization's highest authority to which 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

[6] 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, Rule 1.8, Rule 1.16, Rule 3.3 or Rule 4.1. Rules 1.6(b)(2) and (b)(3) may permit the lawyer in some circumstances to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event withdrawal from the representation under Rule 1.16(b)(1) may be required.

[7] The authority of a lawyer to disclose information relating to a representation under Rule 1.6 does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged past violation of law. Having a lawyer who cannot disclose confidential information concerning past acts relevant to the representation for which the lawyer was retained enables an organizational client to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer for an organization who reasonably believes that the lawyer's discharge was because of actions taken pursuant to paragraph (b), or who withdraws in circumstances that require or permit the lawyer to take action under paragraph (b), must proceed as "reasonably necessary in the best interest of the organization." Under some circumstances, the duty of communication under Rule 1.4 and the duty under Rule 1.16(e) to protect a client's interest upon termination of the representation, in conjunction with this Rule, may require the lawyer to inform the organization's highest authority of the lawyer's discharge or withdrawal, and of what the lawyer reasonably believes to be the basis for the discharge or withdrawal.

Government Agency

[9] The duties defined in this Rule apply 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. 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. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules. *See* Scope [9]. Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would 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. 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 [10].

[10] *See* Comment [2A].

[11] *See* Comment [2B].

Concurrent Representation

[12] Paragraph (d) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, subject to the provisions of Rule 1.7. If the corporation's informed consent to such a concurrent representation is needed, the lawyer should advise the principal officer or major shareholder that any consent given on behalf of the corporation by the conflicted officer or shareholder may not be valid, and the lawyer should explain the potential consequences of an invalid consent.

Derivative Actions

[13] 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.

[14] 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 normal incidents of an organization's affairs, to be defended by the organization's lawyer like any other suits. 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 conventional 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 responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. The conventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities upon the lawyer. When the client is a minor or suffers from a diminished mental capacity, maintaining the conventional 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.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client attentively and with respect.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer should consider whether the presence of such persons will affect the attorney-client 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, with or without a disability, the question 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 reasonably believes 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 conventional 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 reasonably necessary protective measures. 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 interest, and the goals of minimizing intrusion into the client's decision-making autonomy and maximizing respect for 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: (i) the client's ability to articulate reasoning leading to a decision, (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) 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 a minor or a person 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 unnecessarily expensive or traumatic for the client. Seeking a guardian or conservator without the client's consent (including doing so over the client's objection) is appropriate only in the limited circumstances where a client's diminished capacity is such that the lawyer reasonably believes that no other practical method of protecting the client's interests is readily available. The lawyer should always consider less restrictive protective actions before seeking the appointment of a guardian or conservator. The lawyer should act as petitioner in such a proceeding only when no other person is available to do so.

[7A] Prior to withdrawing from the representation of a client whose capacity is in question, the lawyer should consider taking reasonable protective action. *See* Rule 1.16(e).

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 in 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 will act adversely to the client's interests before discussing matters related to the client.

RULE 1.15

PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check and overdraft reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where

such funds are to be maintained. No special account or trust aforementioned may have overdraft protection.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the

possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an

application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this

Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

Comment

[1] A lawyer should hold the funds and property of others using the care required of a professional fiduciary. Securities and other property should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts, including an account established pursuant to the "Interest on Lawyer Accounts" law where appropriate. *See* State Finance Law § 97-v(4)(a); Judiciary Law § 497(2); 21 N.Y.C.R.R. § 7000.10. Separate trust accounts may be warranted or required when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which portion of the funds belongs to the lawyer.

[3] Lawyers often receive funds from which the lawyer's fee will or may be paid. A lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed to the lawyer. However, a lawyer may not withhold the client's share of the funds to coerce the client into accepting the lawyer's claim for fees. While a lawyer may be entitled under applicable law to assert a retaining lien on funds in the lawyer's possession, a lawyer may not enforce such a lien by taking the lawyer's fee from funds that the lawyer holds in an attorney's trust account, escrow account or special account, except as may be provided in an applicable agreement or directed by court order. Furthermore, any disputed portion of the funds must be kept in or transferred into a trust

account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds is to be distributed promptly.

[4] Paragraph (c)(4) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

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

RULE 1.16

DECLINING OR TERMINATING REPRESENTATION

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(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 with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

(11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

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), 6.5; *see also* Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation under paragraph (a), (b)(1) or (b)(4), as the case may be, if the client demands that the lawyer engage in conduct that is illegal or that violates these Rules 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] Court approval or notice to the court is often required by applicable law, and when so required by applicable law is also required by paragraph (d), 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 Rule 1.6 and Rule 3.3.

Discharge

[4] As provided in paragraph (b)(3), 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(b).

Optional Withdrawal

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

[7A] In accordance with paragraph (c)(4), a lawyer should use reasonable foresight in determining whether a proposed representation will involve client objectives or instructions with which the lawyer has a fundamental disagreement. A client's intended action does not create a

fundamental disagreement simply because the lawyer disagrees with it. *See* Rule 1.2 regarding the allocation of responsibility between client and lawyer. The client has the right, for example, to accept or reject a settlement proposal; a client's decision on settlement involves a fundamental disagreement only when no reasonable person in the client's position, having regard for the hazards of litigation, would have declined the settlement. In addition, the client should be given notice of intent to withdraw and an opportunity to reconsider.

[8] Under paragraph (c)(5), a lawyer may withdraw if the client refuses to abide by the terms of an agreement concerning fees or court costs (or other expenses or disbursements).

[8A] Continuing to represent a client may impose an unreasonable burden unexpected by the client and lawyer at the outset of the representation. However, lawyers are ordinarily better suited than clients to foresee and provide for the burdens of representation. The burdens of uncertainty should therefore ordinarily fall on lawyers rather than clients unless they are attributable to client misconduct. That a representation will require more work or significantly larger advances of expenses than the lawyer contemplated when the fee was fixed is not grounds for withdrawal under paragraph (c)(5).

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, under paragraph (e) 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) A lawyer retiring from a private practice of law; a law firm, one or more members of which are retiring from the private practice of law with the firm; or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of these Rules. Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.

(b) Confidential information.

(1) With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as confidential information under Rule 1.6.

(2) Notwithstanding Rule 1.6, the seller may provide the prospective buyer with information as to individual clients:

(i) concerning the identity of the client, except as provided in paragraph (b)(6);

(ii) concerning the status and general nature of the matter;

(iii) available in public court files; and

(iv) concerning the financial terms of the client-lawyer relationship and the payment status of the client's account.

(3) Prior to making any disclosure of confidential information that may be permitted under paragraph (b)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be

disclosed without revealing client confidential information, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to paragraph (b)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless the seller shall have obtained the consent of the client in accordance with Rule 1.6(a)(1).

(4) Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.

(5) Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.

(6) If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.

(c) Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:

(1) the client's right to retain other counsel or to take possession of the file;

(2) the fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

(3) the fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;

(4) proposed fee increases, if any, permitted under paragraph (e); and

(5) the identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in New York State, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.

(d) When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

(e) The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

Comment

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

Termination of Practice by Seller

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

in the agreement governing the sale of the practice may contain reasonable restrictions on a lawyer's resuming private practice. *See* Rule 5.6, Comment [1], regarding restrictions on right to practice.

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

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within a geographic area, defined as the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted. Its provisions therefore accommodate the lawyer who sells the practice on the occasion of moving to another city and county that does not border on the city or county.

[5] [Reserved.]

Sale of Entire Practice

[6] The Rule requires that the seller's entire practice be sold. The prohibition against sale of less than an entire practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The buyers are required to undertake all client matters in the practice, subject to client consent. This requirement is not violated even if a buyer is unable to undertake a particular client matter because of a conflict of interest and the seller therefore remains as attorney of record for the matter in question.

Client Confidences, Consent and Notice

[7] Giving the buyer access to client-specific information relating to the representation and to the file requires client consent. Rule 1.17 provides that before such information can be disclosed by the seller to the buyer, the client must be given actual written notice of the contemplated sale, including the identity of the buyer, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed under paragraph (c)(2).

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. The selling lawyer must make a good-faith effort to notify all of the lawyer's current clients. Where clients cannot be given actual notice and therefore cannot themselves consent to the purchase or direct any other disposition of their files, they are nevertheless protected by the fact that the buyer has the duty to maintain their confidences under paragraph (b)(4).

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

Fee Arrangements Between Client and Buyer

[10] The sale may not be financed by increases in fees charged to the clients of the purchased practice except to the extent permitted by subparagraph (e) of this Rule. Under subparagraph (e), the buyer must honor existing arrangements between the seller and the client as to fees unless the seller's retainer agreement with the client permits a fee increase or the buyer obtains a client's specific agreement to a fee increase in compliance with the strict standards of Rule 1.8(a) (governing business transactions between lawyers and clients).

Other Applicable Ethical Standards

[11] Lawyers participating in the sale or purchase of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. Examples include (i) the seller's obligation to exercise competence in identifying a buyer qualified to assume the practice and the buyer's obligation to undertake the representation competently under Rule 1.1, (ii) the obligation of the seller and the buyer to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to under Rule 1.7, and (iii) the obligation of the seller and the buyer to protect information relating to the representation under Rule 1.6 and Rule 1.9. *See also* Rule 1.0(j) for the definition of "informed consent."

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale. *See* Rule 1.16. If a tribunal refuses to give its permis-

sion for the substitution and the seller therefore must continue in the matter, the seller does not thereby violate the portion of this Rule requiring the seller to cease practice in the described geographic area.

Applicability of the Rule

[13] [Reserved.]

[14] This Rule does not apply to: (i) admission to or retirement from a law partnership or professional association, (ii) retirement plans and similar arrangements, (iii) a sale of tangible assets of a law practice, or (iv) the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice. This Rule governs the sale of an entire law practice upon retirement, which is defined in paragraph (a) as the cessation of the private practice of law in a given geographic area. Rule 5.4(a)(2) provides for the compensation of a lawyer who undertakes to complete one or more unfinished pieces of legal business of a deceased lawyer.

RULE 1.18

DUTIES TO PROSPECTIVE CLIENTS

(a) Except as provided in Rule 1.18(e), 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 that information, except as Rule 1.9 would permit with respect to information of a former client.

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

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

> **(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or**
>
> **(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and**
>
> > **(i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;**
> >
> > **(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;**

(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

(e) A person is not a prospective client within the meaning of paragraph (a) if the person:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter.

Comment

[1] Prospective clients, like current 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. Prospective clients should therefore 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 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. In contrast, a consultation does not occur if a person provides information to a lawyer

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 the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client"—*see* Rule 1.18(e).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether 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 or Rule 1.9, then consent from all affected current or former clients must be obtained before accepting the representation. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected current and former clients and the prospective client.

[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(j) for the definition of "informed consent," and with regard to the effectiveness of an advance waiver see Rule 1.7, Comments [22]-[22A] and Rule 1.9, Comment [9]. If permitted by law and 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] Under paragraph (c), even in the absence of an agreement 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 that 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, confirmed in writing, 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 1.10. Paragraph (d)(2)(i) 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. Before proceeding under paragraph (d)(1) or paragraph (d)(2), however, a lawyer must be mindful of the requirement of paragraph (d)(3) that "a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter."

[7A] Paragraph (d)(2) sets out the basic procedural requirements that a law firm must satisfy to ensure that a personally disqualified lawyer is effectively screened from participation in the matter. This Rule requires that the firm promptly: (i) notify, as appropriate, lawyers and relevant nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client, and (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and others in the firm.

[7B] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraph (d)(2) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of infor-

mation with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, but it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (d)(2).

[7C] In order to prevent any other lawyer in the firm from acquiring confidential information about the matter from the disqualified lawyer, it is essential that notification be given and screening procedures implemented promptly. If any lawyer in the firm acquires confidential information about the matter from the disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the disqualified lawyer and other lawyers in the firm in a given matter.

[8] Notice under paragraph (d)(2), including a general description of the subject matter about which the lawyer was consulted 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 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, psychological, 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. Nevertheless, 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 responsibilities as advisor may include the responsibility to indicate that more may be involved than strictly legal considerations. For the allocation of responsibility in decision making between lawyer and client, see Rule 1.2.

[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 compe-

tence of the accounting profession or of financial or public relations 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 advisable 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) Unless disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is protected by Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction or if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client. 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 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, or of intellectual property or a similar asset.

[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 a 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, because such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of the search may be limited by time constraints or the non-cooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If, after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted knowingly to make a false statement of fact or law in providing an evaluation under this Rule. *See* Rule 4.1. A knowing omission of information that must be disclosed to make statements in the evaluation not false or misleading may violate this Rule.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation, if the disclosures (i) advance the best interests of the client and (ii) are either reasonable under the circumstances or customary in the professional community. *See* Rule 1.6(a)(2). 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 lawyer has consulted with the client and the client has been adequately informed concerning the conditions of the evaluation, the nature of the information to be disclosed and important possible effects on the client's interests. *See* Rules 1.0(j), 1.6(a).

Financial Auditors' Requests for Information

[6] When a question is raised by the client's financial auditor concerning the legal situation of a client, 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. In addition to 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 or a person serving in another capacity that 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 permitted to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike 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 a third-party neutral and 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 may be asked subsequently to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the 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(w)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

RULE 3.1

NON-MERITORIOUS CLAIMS AND CONTENTIONS

(a) 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. A lawyer for the defendant in a criminal proceeding or for 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.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

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 is never 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 a claim or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Lawyers are required, however, to inform themselves about the facts of their clients' cases and the applicable law, and determine that they can make good-faith arguments in support of their clients' positions.

Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the action has no reasonable purpose other than to harass or maliciously injure a person, or if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification or reversal of existing law (which includes the establishment of new judge-made law). The term "knowingly," which is used in Rule 3.1(b)(1) and (b)(3), is defined in Rule 1.0(k).

[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

DELAY OF LITIGATION

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Such tactics are prohibited if their only substantial purpose is to frustrate an opposing party's attempt to obtain rightful redress or repose. It is not a justification that such tactics are 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 or needless expense. Seeking or realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 3.3

CONDUCT BEFORE A TRIBUNAL

(a) A lawyer shall not knowingly:

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

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

(3) offer or use 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 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 before a tribunal 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) 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.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

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(w) 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 has offered false evidence in a deposition.

[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 and may not 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 by 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 because 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 based on the lawyer's own knowledge, as in an affi-

davit or declaration 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. *See also* Rule 8.4(b), Comments [2]-[3].

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

Offering or Using False Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer or use 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 or use 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 (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

[6A] The duties stated in paragraphs (a) and (b)—including the prohibitions against offering and using false evidence—apply to all lawyers, including lawyers for plaintiffs and defendants in civil matters, and to both prosecutors and defense counsel in criminal cases. In criminal matters, therefore, Rule 3.3(a)(3) requires a prosecutor to refrain from

offering or using false evidence, and to take reasonable remedial measures to correct any false evidence that the government has already offered. For example, when a prosecutor comes to know that a prosecution witness has testified falsely, the prosecutor should either recall the witness to give truthful testimony or should inform the tribunal about the false evidence. At the sentencing stage, a prosecutor should correct any material errors in a presentence report. In addition, prosecutors are subject to special duties and prohibitions that are set out in Rule 3.8.

[7] If a criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may have the option of offering the testimony in a narrative form, though this option may require advance notice to the court or court approval. The lawyer's ethical duties under paragraphs (a) and (b) may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

[8] The prohibition against offering or using false evidence applies only 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(k) for the definition of "knowledge." 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) prohibits a lawyer from offering or using evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes to be false. Offering such proof may impair the integrity of an adjudicatory proceeding. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of a criminal defense 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 criminal defendant's decision to testify.

Remedial Measures

[10] A lawyer who has offered or used material evidence in the belief that it was true 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. 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 confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing 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 for the lawyer to 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. The client could therefore in effect coerce the lawyer into being a party to a fraud on the court.

Preserving Integrity of the Adjudicative Process

[12] Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Accordingly, paragraph (b) requires a lawyer who represents a client in an adjudicative proceeding 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. Such conduct includes, among other things, 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 related

to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

[12A] A lawyer's duty to take reasonable remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

[13] Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. A lawyer should not engage in conduct that offends the dignity and decorum of proceedings or that is intended to disrupt the tribunal. While maintaining independence, a lawyer should be respectful and courteous in relations with a judge or hearing officer before whom the lawyer appears. In adversary proceedings, ill feeling may exist between clients, but such ill feeling should not influence a lawyer's conduct, attitude, and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

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 opposing position is expected to be presented by the adverse party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there may be no 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 opposing party, if absent, just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] A lawyer's compliance with the duty of candor imposed by this Rule does not automatically 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, however, may

be required by Rule 1.16(d) 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. *See also* Rule 1.16(c) 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) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructionist tactics in discovery procedure, and the like. The Rule applies to any conduct that falls within its general terms (for example, "obstruct another party's access to evidence") that is a crime, an intentional tort or prohibited by rules or a ruling of a tribunal. An example is "advis[ing] or caus[ing] a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."

[2] Documents and other 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. Paragraph (a) protects that right. Evidence that has been properly requested must be produced unless there is a good-faith basis for not

doing so. Applicable state and federal law may make it an offense to destroy material for the purpose of impairing its availability in a pending or reasonably foreseeable proceeding, even though no specific request to reveal or produce evidence has been made. Paragraph (a) applies to evidentiary material generally, including computerized information.

[2A] Falsifying evidence, dealt with in paragraph (a), is also generally a criminal offense. Of additional relevance is Rule 3.3(a)(3), dealing with use of false evidence in a proceeding before a tribunal. 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] Paragraph (b) applies generally to any inducement to a witness that is prohibited by law. It is not improper to pay a witness's reasonable expenses or to compensate an expert witness on terms permitted by law. However, any fee contingent upon the content of a witness' testimony or the outcome of the case is prohibited.

[3A] Paragraph (d) deals with improper statements relating to the merits of a case when representing a client before a tribunal: alluding to irrelevant matters, asserting personal knowledge of facts in issue, and asserting a personal opinion on issues to be decided by the trier of fact. *See also* Rule 4.4, prohibiting the use of any means that have no substantial purpose other than to embarrass or harm a third person. However, a lawyer may argue, upon analysis of the evidence, for any position or conclusion supported by the record. The term "admissible evidence" refers to evidence considered admissible in the particular context. For example, admission of evidence in an administrative adjudication or an arbitration proceeding may be governed by different standards than those applied in a jury trial.

[4] In general, a lawyer is prohibited from giving legal advice to an unrepresented person, other than the advice to secure counsel, when the interests of that person are or may have a reasonable possibility of being in conflict with the interests of the lawyer's client. See Rule 4.3.

[5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for

example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

RULE 3.5

MAINTAINING AND PRESERVING THE IMPARTIALITY OF TRIBUNALS AND JURORS

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

(i) in the course of official proceedings in the matter;

(ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;

(iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or

(iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts;

(3) seek to or cause another person to influence a juror or prospective juror by means prohibited by law;

(4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order;

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

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

(ii) the juror has made known to the lawyer a desire not to communicate;

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

(iv) the communication is an attempt to influence the juror's actions in future jury service; or

(6) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. In addition, gifts and loans to judges and judicial employees, as well as contributions to candidates for judicial election, are regulated by the New York Code of Judicial Conduct, with which an advocate should be familiar. *See* New York Code of Judicial Conduct, Canon 4(D)(5), 22 N.Y.C.R.R. § 100.4(D)(5) (prohibition of a judge's receipt of a gift, loan, etc., and exceptions) and Canon 5(A)(5), 22 N.Y.C.R.R. § 100.5(A)(5) (concerning lawyer contributions to the cam-

paign committee of a candidate for judicial office). A lawyer is prohibited from aiding a violation of such provisions. Limitations on contributions in the Election Law may also be relevant.

[2] Unless authorized to do so by law or court order, a lawyer is prohibited from communicating ex parte with persons serving in a judicial capacity in an adjudicative proceeding, such as judges, masters or jurors, or to employees who assist them, such as law clerks. *See* New York Code of Judicial Conduct, Canon 3(B)(6), 22 N.Y.C.R.R. § 100.3(B)(6).

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. Paragraph (a)(5) permits a lawyer to do so unless the communication is prohibited by law or a court order, but the lawyer must respect the desire of a 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 misbehavior 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.

[4A] Paragraph (b) prohibits lawyers who are not connected with a case from communicating (or causing another to communicate) with jurors concerning the case.

[4B] Paragraph (c) extends the rules concerning communications with jurors and members of the venire to communication with family members of the jurors and venire members.

[4C] Paragraph (d) imposes a reporting obligation on lawyers who have knowledge of improper conduct by or toward jurors, members of the venire, or family members thereof.

RULE 3.6

TRIAL PUBLICITY

(a) A lawyer who is participating in or has participated in a criminal or civil 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) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:

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

(2) in a criminal matter 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 matter that could result in incarceration;

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

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining

that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:

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

(2) information contained in a public record;

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

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

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

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

(7) in a criminal matter:

(i) the identity, age, 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 identity of investigating and arresting officers or agencies and the length of the investigation; and

(iv) the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial 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.

(e) 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 making statements that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. It recognizes that the public value of informed commentary is great and that the likelihood of prejudice to a proceeding because of the commentary of a lawyer who is not involved in the proceeding is small. Thus, the Rule applies only to lawyers who are participating or have participated in the investigation or litigation of a matter and their associates.

[4] There are 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. Paragraph (b) specifies certain statements that ordinarily will have prejudicial effect.

[5] Paragraph (c) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice. Nevertheless, some statements in criminal cases are also required to meet the fundamental requirements of paragraph (a), for example, those identified in paragraph (c)(7)(iv). Paragraph (c) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement; statements on other matters may be permissible under paragraph (a).

[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] 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. Paragraph (d) permits such responsive statements, provided they contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8 Comment [5] 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 before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

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

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

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is 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 also can create a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal may properly object when the trier of fact may be confused or misled by a lawyer's serving as both advocate and witness. The opposing party may properly object 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. The requirement that the testimony of the advocate-witness be on a significant issue of fact provides a materiality limitation.

[3] To protect the tribunal, the Rule prohibits a lawyer from simultaneously serving as advocate and witness except in those circumstances specified in paragraph (a). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Testimony relating solely to a formality is uncontested when the lawyer reasonably believes that no substantial evidence will be offered in opposition to the testimony. 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 lawyer 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 among the interests of the client, of the tribunal, and of 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 Rule 1.7, 1.9 and 1.10, which may separately require disqualification of the lawyer-advocate, have no application to the tribunal's determination of the balancing of judicial and party interests required by paragraph (a)(3).

[5] The tribunal is not likely to be misled when a lawyer acts as advocate before a tribunal in a matter in which another lawyer in the lawyer's firm testifies as a witness. Therefore, paragraph (b) permits the non-testifying lawyer to act as advocate before the tribunal except (1) when another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client, or (2) when either Rule 1.7 or Rule 1.9 would prohibit the non-testifying lawyer from acting as advocate before the tribunal. Moreover, unless Rules 1.7 or 1.9 preclude it, the non-testifying lawyer and the testifying lawyer may continue to represent the client outside of the tribunal, with the client's informed consent, in pretrial activities such as legal research, fact gathering, and preparation or argument of motions and briefs on issues of law, and may be consulted during the trial by the lawyer serving as advocate.

Conflict of Interest

[6] In determining whether it is permissible to act as advocate before a tribunal in which the lawyer will be a witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rule 1.7 or Rule 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 serve simultaneously 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 such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. *See* Rule 1.7. See Rule 1.0(e) for the definition of "confirmed in writing" and Rule 1.0(j) for the definition of "informed consent."

RULE 3.8

SPECIAL RESPONSIBILITIES OF PROSECUTORS AND OTHER GOVERNMENT LAWYERS

(a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

(c) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) disclose that evidence to an appropriate court or prosecutor's office; or

(2) if the conviction was obtained by that prosecutor's office,

(A) notify the appropriate court and the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

(B) disclose that evidence to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, and a court authorizes delay for good cause shown; and

(C) undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.

(d) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted, in a prosecution by the prosecutor's office, of an offense that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.

(e) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (c) and (d), though subsequently determined to have been erroneous, does not constitute a violation of 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. Applicable state or federal 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. A government lawyer in a criminal case is considered a "prosecutor" for purposes of this Rule.

[2] A defendant who has no counsel may waive a preliminary hearing or other important pretrial rights 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. This would not be applicable, however, to an accused appearing pro se with the approval of the tribunal, or to the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (b) 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] [Reserved.]

[5] Rule 3.6 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 that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium against the accused. A prosecutor in a criminal case should make reasonable efforts to prevent persons under the prosecutor's supervisory authority, which may include investigators, law enforcement personnel, employees and other persons assisting or associated with the prosecutor, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.6. See Rule 5.3. Nothing in this Comment is intended to restrict the statements that a prosecutor may make that comply with Rule 3.6(c) or Rule 3.6(d).

[6] Like other lawyers, prosecutors are subject to Rule 5.1 and Rule 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Prosecutors should bear in mind the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case, and should exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[6A] Reference to a "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function. Like other lawyers, prosecutors are subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when the lawyer comes to know of its falsity. *See* Rule 3.3, Comment [6A].

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (c) requires reasonably timely disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (c) requires the prosecutor to examine the evidence and undertake, or make reasonable efforts to cause to be undertaken, further inquiry or investigation to support a reasonable belief that the conviction should or should not be set aside. Paragraph (c) also requires the prosecutor to notify the court and defendant that the prosecu-

tor possesses such evidence, and to disclose that evidence to the defendant, absent court-authorized delay for good cause. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and in the case of an unrepresented defendant, may also be accompanied by a request to the court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (d), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek a remedy consistent with justice, applicable law, and the circumstances of the case.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (c) and (d), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

RULE 3.9

ADVOCATE IN NON-ADJUDICATIVE MATTERS

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

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 arguments regarding the matters under consideration. The legislative body or administrative agency is entitled to know that the lawyer is appearing in a representative capacity. Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen. Representation in such matters is governed by Rules 4.1 through 4.4, and 8.4.

[1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.

[2] [Reserved.]

[3] [Reserved.]

RULE 4.1

TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

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. As to 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 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; so is the existence of an undisclosed principal, except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Illegal or Fraudulent Conduct by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client as to conduct that the lawyer knows is illegal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's illegality or fraud by withdrawing from the representation. *See* Rule 1.16(c)(2). 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. *See* Rules 1.2(d), 1.6(b)(3).

RULE 4.2

COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

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

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

(c) A lawyer who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

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 un-counseled disclosure of information relating to the representation.

[2] Paragraph (a) applies to communications with any party who is represented by counsel concerning the matter to which the communication relates.

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

[4] This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person 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 party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented party or 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 investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement (as defined by law) 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 state or federal rights of the accused. The fact that a communication does not violate a state or federal right is insufficient to establish that the communication is permissible under this Rule. This Rule is not intended to effect any change in the scope of the anti-contact rule in criminal cases.

[6] [Reserved.]

[7] In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization's lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) 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 unrepresented constituent. If an individual constituent of the organization is represented in the matter

by the person's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. 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* Rules 1.13, 4.4.

[8] The prohibition on communications with a represented party applies only in circumstances where the lawyer knows that the party 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 knowledge may be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.

[9] In the event the party 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.

[10] A lawyer may not make a communication prohibited by paragraph (a) through the acts of another. *See* Rule 8.4(a).

Client-to-Client Communications

[11] Persons represented in a matter may communicate directly with each other. A lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b). Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel.

[12] A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing, or unfair conduct with regard to the represented person. The lawyer should advise the client against such conduct. A lawyer shall not advise a client to communicate with a represented person if the lawyer knows that the represented person is legally incompetent. *See* Rule 4.4.

[12A] When a lawyer is proceeding *pro se* in a matter, or is being represented by his or her own counsel with respect to a matter, the lawyer's direct communications with a counterparty are subject to the no-contact rule, Rule 4.2. Unless authorized by law, the lawyer must not engage in direct communications with a party the lawyer knows to be represented by counsel without either (i) securing the prior consent of the represented party's counsel under Rule 4.2(a), or (ii) providing opposing counsel with reasonable advance notice that such communications will be taking place.

RULE 4.3

COMMUNICATING WITH UNREPRESENTED PERSONS

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

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. As to misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(a), Comment [2A].

[2] The Rule distinguishes between situations involving unrepresented parties 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 party, 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 or harm 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, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it 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 and law firms sometimes receive a document, electronically stored information, or other "writing as defined in Rule 1.0(x), that was mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. A document, electronically stored information, or other writing is "inadvertently sent" within the meaning of paragraph (b) when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or other writing is accidentally included with information that was intentionally transmitted. One way to resolve this situation is for lawyers and law firms to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer or law firm knows or reasonably should know that such a document or other writing was sent inadvertently, this Rule requires only that the receiving lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the receiving lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion. Whether the lawyer or law firm

is required to take additional steps, such as returning the document or other writing, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document or other writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or other writing that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document, electronically stored information or other writing" includes not only paper documents, but also 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. *See* Rule 1.0(x).

[3] Refraining from reading or continuing to read a document or other writing once a lawyer realizes that it was inadvertently sent and returning the document to the sender or permanently deleting electronically stored information, honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document or other writing, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document or other writing, or to return the document or other writing to the sender or permanently delete electronically stored information, or both. Accordingly, in deciding whether to retain or use an inadvertently received document or other writing, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation, decisions to refrain from reading such a document or other writing or instead to return them, or both, are matters of professional judgment reserved to the lawyer. *See* Rules 1.2, 1.4.

RULE 4.5

COMMUNICATION AFTER INCIDENTS INVOLVING PERSONAL INJURY OR WRONGFUL DEATH

(a) In the event of a specific incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(b) An unsolicited communication by a lawyer or law firm, seeking to represent an injured individual or the legal representative thereof under the circumstance described in paragraph (a) shall comply with Rule 7.3(e).

Comment

[1] Paragraph (a) imposes a 30-day (or 15-day) restriction on unsolicited communications directed to potential claimants relating to a specific incident involving potential claims for personal injury or wrongful death, by lawyers or law firms who represent actual or potential defendants or entities that may defend or indemnify those defendants. However, if potential claimants are represented by counsel, it is proper for defense counsel to communicate with potential plaintiffs' counsel even during the 30-day (or 15-day) period. *See also* Rule 7.3(e).

RULE 5.1

RESPONSIBILITIES OF LAW FIRMS, PARTNERS, MANAGERS AND SUPERVISORY LAWYERS

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

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

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the con-

duct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Comment

[1] Paragraph (a) applies to law firms; paragraph (b) applies to lawyers with management responsibility in a law firm or a lawyer with direct supervisory authority over another lawyer.

[2] Paragraph (b) requires lawyers with management authority within a firm or those having direct supervisory authority over other lawyers to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to these Rules. Such policies and procedures include those designed (i) to detect and resolve conflicts of interest (*see* Rule 1.10(e)), (ii) to identify dates by which actions must be taken in pending matters, (iii) to account for client funds and property, and (iv) to ensure that inexperienced lawyers are appropriately supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (b) can depend on the firm's structure and the nature of its practice. In a small firm 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 lawyers with management authority may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (d) expresses a general principle of personal responsibility for acts of other lawyers in the law firm. *See also* Rule 8.4(a).

[5] Paragraph (d) imposes such responsibility on a lawyer who orders, directs or ratifies wrongful conduct and on lawyers who are partners or who have comparable managerial authority in a law firm who know or reasonably should know of the conduct. 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. Partners and lawyers with comparable authority, as well as those who supervise other lawyers, are indirectly responsible for improper conduct of which they know or should have known in the exercise of reasonable managerial or supervisory authority. 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 misconduct or to prevent or mitigate avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

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

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of another lawyer. 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 these Rules. *See* Rule 5.2(a).

RULE 5.2

RESPONSIBILITIES OF A SUBORDINATE LAWYER

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

(b) A subordinate lawyer does not violate these Rules 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 these 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. To evaluate the supervisor's conclusion that the question is arguable and the supervisor's resolution of it is reasonable in light of applicable Rules of Professional Conduct and other law, it is advisable that the subordinate lawyer undertake research, consult with a designated senior partner or special committee, if any (*see* Rule 5.1, Comment [3]), or use other appropriate means. 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

LAWYER'S RESPONSIBILITY FOR CONDUCT OF NONLAWYERS

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

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

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Comment

[1] This Rule requires a law firm to ensure that work of nonlawyers is appropriately supervised. In addition, a lawyer with direct supervisory authority over the work of nonlawyers must adequately supervise

those nonlawyers. Comments [2] and [3] to Rule 5.1, which concern supervision of lawyers, provide guidance by analogy for the methods and extent of supervising nonlawyers.

[2] With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm, including nonlawyers outside the firm working on firm matters, is compatible with the professional obligations of the lawyers and firm. Lawyers typically employ nonlawyer assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such nonlawyer assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. Likewise, lawyers may employ nonlawyers outside the firm to assist in rendering those services. *See* Comment [6] to Rule 1.1 (retaining lawyers outside the firm). A law firm must ensure that such nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information—*see* Rule 1.6 (c) (requiring lawyers to take reasonable care to avoid unauthorized disclosure of confidential information. Lawyers also should be responsible for the work done by their nonlawyer assistants. 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. A law firm should 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 will act in a way compatible with the professional obligations of the lawyer. A lawyer with supervisory authority over a nonlawyer within or outside the firm has a parallel duty to provide appropriate supervision of the supervised nonlawyer.

[2A] Paragraph (b) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules if engaged in by a lawyer. For guidance by analogy, see Rule 5.1, Comments [5]-[8].

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include (i) retaining or contracting with an investigative or paraprofessional service, (ii) hiring a document management company to create and maintain a database for complex litigation, (iii) sending client documents to a third party for printing or scanning, and (iv) using an Internet-based service to

store client information. When using such services outside the firm, a lawyer or law firm must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer and law firm. The extent of the reasonable efforts required under this Rule will depend upon the circumstances, including: (a) the education, experience and reputation of the nonlawyer; (b) the nature of the services involved; (c) the terms of any arrangements concerning the protection of client information; (d) the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality; (e) the sensitivity of the particular kind of confidential information at issue; (f) whether the client will be supervising all or part of the nonlawyer's work. *See also* Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4 (professional independence of the lawyer) and 5.5 (unauthorized practice of law). 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.

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 or another lawyer associated in the firm 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 that fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.

(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) Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6.

(d) A lawyer shall not practice with or in the form of an entity 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 member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or

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

Comment

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

[1A] Paragraph (a)(2) governs the compensation of a lawyer who undertakes to complete one or more unfinished pieces of legal business of a deceased lawyer. Rule 1.17 governs the sale of an entire law practice upon retirement, which is defined as the cessation of the private practice of law in a given geographic area.

[1B] Paragraph (a)(3) permits limited fee sharing with a nonlawyer employee, where the employee's compensation or retirement plan is based in whole or in part on a profit-sharing arrangement. Such sharing of profits with a nonlawyer employee must be based on the total profitability of the law firm or a department within a law firm and may not be based on the fee resulting from a single case.

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

RULE 5.5

UNAUTHORIZED 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.

(b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

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 in another jurisdiction by a lawyer through the lawyer's direct action, and paragraph (b) prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law.

[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.

RULE 5.6

RESTRICTIONS ON RIGHT TO PRACTICE

(a) A lawyer shall not participate in offering or making:

(1) a partnership, shareholder, 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

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

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Comment

[1] An agreement restricting the right of a lawyer who has left a firm (a "departed lawyer") to practice after leaving a firm limits the freedom of clients to choose a lawyer and limits the professional autonomy of lawyers. Paragraph (a) prohibits such agreements except (i) restrictions incident to provisions concerning retirement benefits for service with the firm or (ii) restrictions justified by special circumstances described in this Comment. Throughout this Comment, the phrase "law firm" shall have the meaning given in the definition in Rule 1.0(h).

Scope of Rule

[1A] This Rule and this Comment are intended to address the duties of lawyers and law firms solely under the Rules of Professional Conduct. They are not intended to address the obligations of a law firm or a departed lawyer under the law of fiduciary duties, partnership law, contract law, tort law, or other substantive law.

[1B] Paragraph (a)(1) applies to any written or oral agreement governing or intended to govern: (i) the operation of a law firm; (ii) the terms of partnership, shareholding, or of counsel status at a law firm; and (iii) the terms of an individual lawyer's full-time or part-time employment at a law firm or other entity.

[1C] Paragraph (a)(1) applies whether the agreement is embodied in a written or oral contract, a firm or employee handbook, a memorandum, or any other kind of document. Paragraph (a)(1) prohibits any agreement (other than a provision relating to retirement benefits) that prohibits or limits a departed lawyer from contacting or serving the firm's current, former, or prospective clients, except that: (i) an agreement may include provisions to protect confidential or proprietary information belonging to the law firm or to the law firm's current, former, or prospective clients; and (ii) an agreement may include provisions that impose reasonable restrictions or remedies on a departed lawyer in the circumstances described in Comment [1F].

[1D] Paragraph (a)(1) applies not only to agreements regarding lawyers in private practice but also to agreements between employed ("in-house") attorneys and the clients or entities that employ them, whether in a legal or non-legal capacity. However, paragraph (a)(1) does not prevent an entity and its employed lawyers from agreeing to restrictions on post-departure *non-legal* functions. In every type of law firm, the departed lawyer and the law firm must balance their rights and obligations to each other in a manner consistent with the Rules of Professional Conduct and the law governing contracts, partnerships, and fiduciary obligations, all while recognizing the primacy of client interests and client autonomy. With this in mind, Comment [1E] addresses restrictions that ordinarily violate the Rule, and Comment [1F] addresses restrictions that ordinarily do not violate the Rule.

Prohibited Agreements

[1E] Agreements that ordinarily violate paragraph (a)(1) (unless they fit within the exception for retirement benefits) include, but are not limited to, agreements that purport to do any of the following: (i) prohibit or limit a departed lawyer from contacting or representing some or all current, former, or prospective clients of the firm; (ii) prohibit or limit a departed lawyer from practicing law for any period of time following his or her withdrawal (*e.g.*, imposing a mandatory "garden leave"); (iii) prohibit or limit a departed lawyer from contacting or soliciting law firm employees after the lawyer has departed from the firm; or (iv) impose more severe financial penalties on departed lawyers who intend to compete, actually compete, are suspected of competing, or are presumed to be competing with the firm than are imposed on departed lawyers who do not compete.

Permissible Agreements

[1F] Agreements that ordinarily do not violate paragraph (a)(1) include, but are not limited to, agreements permitting a firm to impose reasonable restrictions or remedies if: (i) a departed lawyer has approved, within a reasonable time before departing from the firm, a specific, significant financial undertaking with respect to the firm that remains outstanding where the lawyer's departure will have a material effect on the firm's ability to satisfy that undertaking; or (ii) a departed lawyer has, before leaving the firm, breached material employment or partnership responsibilities to the firm in a manner that has caused or is likely to cause material financial or reputational harm to the firm.

Reasonable Management Discretion

[1G] Paragraph (a)(1) is not intended to prohibit a law firm in the ordinary course of its operations from exercising reasonable management discretion regarding case assignments, case staffing, promotions, demotions, compensation, or other aspects of a law firm's operations, finances, and management. The Rule is intended to prevent overly restrictive practices with respect to lawyers who have provided notice of an intention to leave a firm, or who have taken affirmative steps toward planning to leave the firm (with or without notice to the firm).

[2] Paragraph (a)(2) 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) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is *de minimis*.

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or

regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and Rule 1.6(c) with respect to the confidential information of a client receiving legal services.

(c) For purposes of this Rule, "nonlegal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

Comment

[1] For many years, lawyers have provided nonlegal services to their clients. By participating in the delivery of these services, lawyers can serve a broad range of economic and other interests of clients. Whenever a lawyer directly provides nonlegal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany a client-lawyer relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, 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 confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter. Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, the recipient is likely to be confused as to whether and when the relationship is protected as a client-lawyer relationship. Therefore, where the legal and nonlegal services are not distinct, paragraph (a)(1) requires that the lawyer providing nonlegal services adhere to all of the requirements of these Rules with respect to the nonlegal services. Paragraph (a)(1) applies to the provision of nonlegal services by a law firm if the person for whom the nonlegal services are being performed is also receiving legal services from the firm that are not distinct from the nonlegal services.

[2] Even when the lawyer believes that the provision of nonlegal services is distinct from any legal services being provided, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of a client-lawyer relationship. Therefore, paragraph (a)(2) requires that the lawyer providing the

nonlegal services adhere to these Rules, unless the person understands that the nonlegal services are not the subject of a client-lawyer relationship. Nonlegal services also may be provided through an entity with which a lawyer is affiliated, for example, as owner, controlling party or agent. In this situation, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of a client-lawyer relationship. Therefore, paragraph (a)(3) requires that the lawyer involved with the entity providing nonlegal services adhere to all of these Rules with respect to the nonlegal services, unless the person understands that the nonlegal services are not the subject of a client-lawyer relationship.

[3] These Rules will be presumed to apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services unless the lawyer complies with paragraph (a)(4) by communicating in writing to the person receiving the nonlegal services that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services. Such a communication should be made before entering into an agreement for the provision of nonlegal services in a manner sufficient to ensure that the person understands the significance of the communication. In certain circumstances, however, additional steps may be required to ensure that the person understands the distinction. For example, while the written disclaimer set forth in paragraph (a)(4) will be adequate for a sophisticated user of legal and nonlegal services, a more detailed explanation may be required for someone unaccustomed to making distinctions between legal services and nonlegal services. Where appropriate and especially where legal services are provided in the same transaction as nonlegal services, the lawyer should counsel the client about the possible effect of the proposed provision of services on the availability of the attorney-client privilege. The lawyer or law firm will not be required to comply with these requirements if its interest in the entity providing the nonlegal services is so small as to be de minimis.

[4] Although a lawyer may be exempt from the application of these Rules with respect to nonlegal services on the face of paragraph (a), the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Rules that are dependent upon the existence of a representation or client-lawyer relationship. Other Rules, such as those prohibiting lawyers from misusing the confidences or secrets of a former client (see Rule 1.9), requiring lawyers to report certain lawyer

misconduct (see Rule 8.3), and prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (see Rule 8.4), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer not covered by paragraph (a). A lawyer or law firm rendering legal services is always subject to these Rules.

Provision of Legal and Nonlegal Services in the Same Transaction

[5] In some situations it may be beneficial to a client to purchase both legal and nonlegal services from a lawyer, law firm or affiliated entity in the same matter or in two or more substantially related matters. Examples include: (i) a law firm that represents corporations and also provides public lobbying, public relations, investment banking and business relocation services, (ii) a law firm that represents clients in environmental matters and also provides engineering consulting services to those clients, and (iii) a law firm that represents clients in litigation and also provides consulting services relating to electronic document discovery. In these situations, the lawyer may have a financial interest in the nonlegal services that would constitute a conflict of interest under Rule 1.7(a)(2), which governs conflicts between a client and a lawyer's personal interests.

[5A] Under Rule 1.7(a)(2), a concurrent conflict of interest exists when a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or personal interests. When a lawyer or law firm provides both legal and nonlegal services in the same matter (or in substantially related matters), a conflict with the lawyer's own interests will nearly always arise. For example, if the legal representation involves exercising judgment about whether to recommend nonlegal services and which provider to recommend, or if it involves overseeing the provision of the nonlegal services, then a conflict with the lawyer's own interests under Rule 1.7(a)(2) is likely to arise. However, when seeking the consent of a client to such a conflict, the lawyer should comply with both Rule 1.7(b) regarding the conflict affecting the legal representation of the client and Rule 1.8(a) regarding the business transaction with the client.

[5B] Thus, the client may consent if: (i) the lawyer complies with Rule 1.8(a) with respect to the transaction in which the lawyer agrees to provide the nonlegal services, including obtaining the client's informed consent in a writing signed by the client, (ii) the lawyer reasonably believes that the lawyer can provide competent and diligent legal repre-

sentation despite the conflict within the meaning of Rule 1.7(b), and (iii) the client gives informed consent pursuant to Rule 1.7(b), confirmed in writing. In certain cases, it will not be possible to provide both legal and nonlegal services because the lawyer could not reasonably believe that he or she can represent the client competently and diligently while providing both legal and nonlegal services in the same or substantially related matters. Whether providing dual services gives rise to an impermissible conflict must be determined on a case-by-case basis, taking into account all of the facts and circumstances, including factors such as: (i) the experience and sophistication of the client in obtaining legal and nonlegal services of the kind being provided in the matter, (ii) the relative size of the anticipated fees for the legal and nonlegal services, (iii) the closeness of the relationship between the legal and nonlegal services, and (iv) the degree of discretion the lawyer has in providing the legal and nonlegal services.

[6] In the context of providing legal and nonlegal services in the same transaction, Rule 1.8(a) first requires that: (i) the nonlegal services be provided on terms that are fair and reasonable to the client, (ii) full disclosure of the terms on which the nonlegal services will be provided be made in writing to the client in a manner understandable by the client, (iii) the client is advised to seek the advice of independent counsel about the provision of the nonlegal services by the lawyer, and (iv) the client gives informed consent, as set forth in Rule 1.8(a)(3), in a writing signed by the client, to the terms of the transaction in which the nonlegal services are provided and to the lawyer's inherent conflict of interest.

[7] In addition, in the context of providing legal and nonlegal services in the same transaction, Rule 1.8(a) requires a full disclosure of the nature and extent of the lawyer's financial interest or stake in the provision of the nonlegal services. By its terms, Rule 1.8(a) requires that the nonlegal services be provided on terms that are fair and reasonable to the client. (Where the nonlegal services are provided on terms generally available to the public in the marketplace, that requirement is ordinarily met.) Consequently, as a further safeguard against conflicts that may arise when the same lawyer provides both legal and nonlegal services in the same or substantially related matters, a lawyer may do so only if the lawyer not only complies with Rule 1.8(a) with respect to the nonlegal services, but also obtains the client's informed consent, pursuant to Rule 1.7(b), confirmed in writing, after fully disclosing the advantages and risks of obtaining legal and nonlegal services from the same or affiliated

providers in a single matter (or in substantially related matters), including the lawyer's conflict of interest arising from the lawyer's financial interest in the provision of the nonlegal services.

[8] [Reserved.]

[9] [Reserved.]

[10] [Reserved.]

[11] [Reserved.]

RULE 5.8

CONTRACTUAL RELATIONSHIPS BETWEEN LAWYERS AND NONLEGAL PROFESSIONALS

(a) The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed "independent professional judgment and undivided loyalty uncompromised by conflicts of interest." Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State.

Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a), provided that:

(1) the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules;

(2) the lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm, nor, as provided in Rule 7.2(a)(1), shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

(3) the fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the "Statement of Client's Rights In Cooperative Business Arrangements" pursuant to section 1205.4 of the Joint Appellate Divisions Rules.

(b) For purposes of paragraph (a):

(1) each profession on the list maintained pursuant to a Joint Rule of the Appellate Divisions shall have been designated sua sponte, or approved by the Appellate Divisions upon application of a member of a nonlegal profession or nonlegal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:

(i) have been awarded a bachelor's degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university and work experience;

(ii) are licensed to practice the profession by an agency of the State of New York or the United States Government; and

(iii) are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession;

(2) the term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

(c) This Rule shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understand-

ings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

Comment

Contractual Relationships Between Lawyers and Nonlegal Professionals

[1] Lawyers may enter into interprofessional contractual relationships for the systematic and continuing provision of legal and nonlegal professional services, provided the nonlegal professional or nonlegal professional service firm with which the lawyer or law firm is affiliated does not own, control, supervise or manage, directly or indirectly, in whole or in part, the lawyer's or law firm's practice of law. The nonlegal professional or nonlegal professional service firm may not play a role in, for example, (i) deciding whether to accept or terminate an engagement to provide legal services in a particular matter or to a particular client, (ii) determining the manner in which lawyers are hired or trained, (iii) assigning lawyers to handle particular matters or to provide legal services to particular clients, (iv) deciding whether to undertake pro bono and other public-interest legal work, (v) making financial and budgetary decisions relating to the legal practice, and (vi) determining the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

[2] The contractual relationship permitted by this Rule may include the sharing of premises, general overhead or administrative costs and services on an arm's length basis. Such financial arrangements, in the context of an agreement between lawyers and other professionals to provide legal and other professional services on a systematic and continuing basis, are permitted subject to the requirements of paragraph (a) and Rule 7.2(a). Similarly, lawyers participating in such arrangements remain subject to general ethical principles in addition to those set forth in this Rule including, at a minimum, Rule 1.7, Rule 1.8(f), Rule 1.9, Rule 5.7(b) and Rule 7.5(a). Thus, the lawyer or law firm may not, for example, include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional, enter into formal partnerships with nonlawyers, or practice in an organization authorized to practice law for a profit in which nonlawyers own any interest. Moreover, a lawyer or law firm may not enter into an agreement or arrangement for the use of a name in respect of which a nonlegal professional or nonlegal professional service firm has or exercises a proprietary interest if, under or pursuant to the agreement or arrangement, that nonlegal professional or firm acts or is entitled to act in a manner inconsistent with paragraph (a)(2) or Comment

[1]. More generally, the existence of a contractual relationship permitted by this Rule does not by itself create a conflict of interest in violation of Rule 1.8(a). Whenever a law firm represents a client in a matter in which the nonlegal professional service firm's client is also involved, the law firm's interest in maintaining an advantageous relationship with a nonlegal professional service firm might, in certain circumstances, adversely affect the professional judgment of the law firm.

[3] Each lawyer and law firm having a contractual relationship under paragraph (a) has an ethical duty to observe these Rules with respect to the lawyer's or law firm's own conduct in the context of that relationship. For example, the lawyer or law firm cannot permit the obligation to maintain client confidences, as required by Rule 1.6, to be compromised by the contractual relationship or by its implementation by or on behalf of nonlawyers involved in the relationship. In addition, the prohibition in Rule 8.4(a) against circumventing a Rule through actions of another applies generally to the lawyer or law firm in the contractual relationship.

[4] The contractual relationship permitted by paragraph (a) may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional or nonlegal professional service firm. When in the context of such a contractual relationship a lawyer or law firm refers a client to the nonlegal professional or nonlegal professional service firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the nonlegal professional or nonlegal professional services firm to handle the relevant affairs and interests of the client. Referrals should be made only when requested by the client or deemed to be reasonably necessary to serve the client. Thus, even if otherwise permitted by paragraph (a), a contractual relationship may not require referrals on an exclusive basis. *See* Rule 7.2(a).

[5] To ensure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under paragraph (a) only if the nonlegal party thereto is a professional or professional service firm meeting appropriate standards regarding ethics, education, training and licensing. The Appellate Divisions maintain a public list of eligible professions at 22 N.Y.C.R.R. § 1205.5. A member of the nonlegal profession or a professional service firm may apply for the inclusion of particular professions on the list or professions may be added to the list by the Appellate Divisions sua sponte. A lawyer or law firm not wishing to affiliate with a nonlawyer on a systematic and continuing

basis, but only to engage a nonlawyer on an ad hoc basis to assist in a specific matter, is not governed by this Rule when so dealing with the nonlawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with this Rule. Likewise, the requirements of this Rule need not be met when a lawyer retains an expert witness in a particular litigation.

[6] Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the nonlegal professional or nonlegal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by paragraph (a) as a single law firm for purposes of these Rules, as would be the case if the nonlegal professional or nonlegal professional service firm were in an "of counsel" relationship with the lawyer or law firm. If the parties to the relationship are treated as a single law firm, the principal effects would be that conflicts of interest are imputed as between them pursuant to Rule 1.10(a) and that the law firm would be required to maintain systems for determining whether such conflicts exist pursuant to Rule 1.10(f). To the extent that the rules of ethics of the nonlegal profession conflict with these Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal obligations arising from a relationship with nonlawyer professionals, who are themselves subject to regulation.

RULE 6.1

VOLUNTARY PRO BONO SERVICE

Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.

(a) Every lawyer should aspire to:

(1) provide at least 50 hours of pro bono legal services each year to poor persons; and

(2) contribute financially to organizations that provide legal services to poor persons. Lawyers in private practice or employed by a for-profit entity should aspire to contribute annually in an amount at least equivalent to (i) the amount typically billed by the lawyer (or the firm with which the lawyer is associated) for one hour of time; or (ii) if the lawyer's work is performed on a contingency basis, the amount typically billed by lawyers in the community for one hour of time; or (iii) the amount typically paid by the organization employing the lawyer for one hour of the lawyer's time; or (iv) if the lawyer is underemployed, an amount not to exceed one-tenth of one percent of the lawyer's income.

(b) Pro bono legal services that meet this goal are:

(1) professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel;

(2) activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and

(3) professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

(c) Appropriate organizations for financial contributions are:

(1) organizations primarily engaged in the provision of legal services to the poor; and

(2) organizations substantially engaged in the provision of legal services to the poor, provided that the donated funds are to be used for the provision of such legal services.

(d) This Rule is not intended to be enforced through the disciplinary process, and the failure to fulfill the aspirational goals contained herein should be without legal consequence.

Comment

[1] As our society has become one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance. This is true for all people, rich, poor or of moderate means. However, because the legal problems of the poor often involve areas of basic need, their inability to obtain legal services can have dire consequences. The vast unmet legal needs of the poor in New York have been recognized in several studies undertaken over the past two decades. Each lawyer—including members of the judiciary and government lawyers, and regardless of professional prominence or professional work load—is strongly encouraged to provide or to assist in providing pro bono legal services to the poor.

[2] Paragraph (a) urges all lawyers to provide a minimum of 50 hours of pro bono legal service annually without fee or expectation of fee, either directly to poor persons or to organizations that serve the legal or other basic needs of persons of limited financial means. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of the lawyer's career, the lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2A] Paragraph (a)(2) provides that, in addition to providing the services described in paragraph (a), lawyers should provide financial support to organizations that provide legal services to the poor. This goal is separate from and not a substitute for the provision of legal services described in paragraph (a). To assist the funding of civil legal services for low income people, when selecting a bank for deposit of funds into an "IOLA" account pursuant to Judiciary Law § 497, a lawyer should take into consideration the interest rate offered by the bank on such funds.

[2B] Paragraphs (a)(1) and (a)(2) recognize the critical need for legal services that exists among poor persons. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rulemaking and the provision of free training or mentoring to those who represent poor persons.

[3] "Poor persons" under paragraphs (a)(1) and (a)(2) include both (i) individuals who qualify for participation in programs funded by the Legal Services Corporation and (ii) individuals whose incomes and financial resources are slightly above the guidelines utilized by Legal Services Corporation programs but nevertheless cannot afford counsel. To satisfy the goal of paragraph (a)(1), lawyers may provide legal services to individuals in either of those categories, or, pursuant to paragraph (b)(3), may provide legal services to organizations such as homeless shelters, battered women's shelters, and food pantries that serve persons in either of those categories.

[4] To qualify as pro bono service within the meaning of paragraph (a)(1) the service must be provided without fee or expectation of fee, so the intent of the lawyer to render free legal services is essential. Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this Rule. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono service outlined in paragraph (b)(1). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by making financial contributions to organizations that help meet the legal and other basic needs of the poor, as described in paragraphs (a)(2), (c)(1) and (c)(2) or by performing some of the services outlined in paragraph (b)(2) or (b)(3).

[6] [Reserved.]

[7] In addition to rendering pro bono services directly to the poor and making financial contributions, lawyers may fulfill the goal of rendering pro bono services by serving on the boards or giving legal

advice to organizations whose mission is helping poor persons. While a lawyer may fulfill the annual goal to perform pro bono service exclusively through activities described in paragraphs (a)(1) and (a)(2), all lawyers are urged to render public-interest and pro bono service in addition to assisting the poor.

[8] Paragraphs (c)(1) and (c)(2) essentially reiterate the goal as set forth in (a)(2) with the further provision that the lawyer should seek to ensure that the donated money be directed to providing legal assistance to the poor rather than the general charitable objectives of such organizations.

[9] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal service called for by this Rule.

RULE 6.2

[RESERVED]

RULE 6.3

MEMBERSHIP IN A LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm. 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 Rules 1.7 through 1.13; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

Comment

[1] Lawyers should be encouraged to support and participate in legal services 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.

[1A] This Rule applies to legal services organizations organized and operating on a not-for-profit basis.

[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 benefitted by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the organization, but need not identify the client. 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.

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. For example, a lawyer concentrating 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. A lawyer's identification with the organization's aims and purposes, under some circumstances, may give rise to a personal-interest conflict with client interests implicating the lawyer's obligations under other Rules, particularly Rule 1.7. A lawyer is also professionally obligated to protect the integrity of the law reform program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially affected.

RULE 6.5

PARTICIPATION IN LIMITED PRO BONO LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, 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) shall comply with Rules 1.7, 1.8 and 1.9, concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest; and

(2) shall comply with Rule 1.10 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9.

(b) Except as provided in paragraph (a)(2), Rule 1.7 and Rule 1.9 are inapplicable to a representation governed by this Rule.

(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.

(e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation.

Comment

[1] Legal services organizations, courts, government agencies, bar associations and various non-profit organizations have established programs through which lawyers provide free short-term limited legal services, such as advice or the completion of legal forms, to 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 utilize the conflict-checking system required by Rule 1.10(e) before providing the short-term limited legal services contemplated by this Rule. *See also* Rules 1.7, 1.8, 1.9, 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, these Rules, including Rules 1.6 and Rule 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, 1.8 and 1.9 only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is affected by these Rules.

[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 Rules 1.7 and 1.9 are 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 only when the lawyer knows that the lawyer's firm is affected by Rules 1.7, 1.8 or 1.9.

[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.

RULE 7.1

ADVERTISING

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

(1) contains statements or claims that are false, deceptive or misleading; or

(2) violates a Rule.

(b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

(1) legal and nonlegal education; degrees and other scholastic distinctions; dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law-related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;

(2) names of clients regularly represented, provided that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and

(4) legal fees for initial consultation; contingent fee rates in civil matters, when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement

clearly describing the scope of each advertised service, hourly rates, and fixed fees for specified legal and nonlegal services.

(c) An advertisement shall not:

(1) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

(2) include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;

(3) use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;

(4) be made to resemble legal documents.

(d) An advertisement that complies with paragraph (e) may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer's services with the services of other lawyers;

(3) testimonials or endorsements of clients, and of former clients; or

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in paragraph (d) provided:

(1) its dissemination does not violate paragraph (a);

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and

(3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome"; and

(4) in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing.

(f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize meta-tags or other hidden computer codes that, if displayed, would violate these Rules.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements shall appear on the home page.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(k) All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a

period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

(l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

(p) All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law § 488(3).

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(r) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

Comment

Advertising

[1] The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of competent legal counsel. Hence, important functions of the legal profession are to educate people to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

[2] The public's need to know about legal services can be fulfilled in part through advertising. People of limited means who have not made extensive use of legal services in many instances rely on advertising to find appropriate counsel. While a lawyer's reputation may attract some clients, lawyers may also make the public aware of their services by advertising to obtain work.

[3] Advertising by lawyers serves two principal purposes: first, it educates potential clients regarding their need for legal advice and assists them in obtaining a lawyer appropriate for those needs. Second, it enables lawyers to attract clients. To carry out these two purposes and because of the critical importance of legal services, it is of the utmost importance that lawyer advertising not be false, deceptive or misleading. Truthful statements that are misleading are 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, or about the results a lawyer can achieve, for which there is no reasonable factual foundation. For example, a lawyer might truthfully state, "I have never lost a case," but that statement would be misleading if the lawyer settled virtually all cases that the lawyer handled. A communication to anyone that states or implies that the lawyer has the ability to influence improperly a court, court officer, governmental agency or government official is improper under Rule 8.4(e).

[4] To be effective, advertising must attract the attention of viewers, readers or recipients and convey its content in ways that will be understandable and helpful to them. Lawyers may therefore use advertising techniques intended to attract attention, such as music, sound effects, graphics and the like, so long as those techniques do not render the advertisement false, deceptive or misleading. Lawyer advertising may use actors or fictionalized events or scenes for this purpose, provided appropriate disclosure of their use is made. Some images or techniques, however, are highly likely to be misleading. So, for instance, legal advertising should not be made to resemble legal documents.

[5] The "Attorney Advertising" label serves to dispel any confusion or concern that might be created when nonlawyers receive letters or emails from lawyers. The label is not necessary for advertising in newspapers or on television, or similar communications that are self-evidently advertisements, such as billboards or press releases transmitted to news outlets, and as to which there is no risk of such confusion or concern. The ultimate purpose of the label is to inform readers where they might otherwise be confused.

[6] Not all communications made by lawyers about the lawyer or the law firm's services are advertising. Advertising by lawyers consists of communications made in any form about the lawyer or the law firm's services, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication. However, noncommercial communications motivated by a not-for-profit organization's interest in political expression and association are generally not considered advertising. Of course, all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law. By definition, communications to existing clients are excluded from the Rules governing advertising. A client who is a current client in any matter is an existing client for all purposes of these

Rules. (Whether a client is a current client for purposes of conflicts of interest and other issues may depend on other considerations. Generally, the term "current client" for purposes of the advertising exemption should be interpreted more broadly than it is for determining whether a client is a "current client" for purposes of a conflict of interest analysis.)

[7] Communications to former clients that are germane to the earlier representation are not considered to be advertising. Likewise, communications to other lawyers, including those made in bar association publications and other publications targeted primarily at lawyers, are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm. Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However, a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising. Communications, such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer's services, are not advertising. Accordingly, the special restrictions on advertising and solicitation would not apply to a lawyer's response to a prospective client who has asked the lawyer to outline the lawyer's qualifications to undertake a proposed retention or the terms of a potential retention.

[8] The circulation or distribution to prospective clients by a lawyer of an article or report published about the lawyer by a third party is advertising if the lawyer's primary purpose is to obtain retentions. In circulating or distributing such materials the lawyer should include information or disclaimers as necessary to dispel any misconceptions to which the article may give rise. For example, if a lawyer circulates an article discussing the lawyer's successes that is reasonably likely to create an expectation about the results the lawyer will achieve in future cases, a disclaimer is required by paragraph (e)(3). If the article contains misinformation about the lawyer's qualifications, any circulation of the article by the lawyer should make any necessary corrections or qualifications. This may be necessary even when the article included misinformation through no fault of the lawyer or because the article is out of date, so that material information that was true at the time is no longer true. Some communications by a law firm that may constitute marketing or branding are not necessarily advertisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts or the like with the law firm name, logo, and contact

information printed on them do not constitute "advertisements" within the definition of this Rule if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter.

Recognition of Legal Problems

[9] The legal professional should help the public to recognize legal problems because such problems may not be self-revealing and might not be timely noticed. Therefore, lawyers should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise. A lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients. Such a program might be considered to be advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm. A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for nonlawyers should caution them not to attempt to solve individual problems on the basis of the information contained therein.

[10] As members of their communities, lawyers may choose to sponsor or contribute to cultural, sporting, charitable or other events organized by not-for-profit organizations. If information about the lawyer or law firm disseminated in connection with such an event is limited to the identification of the lawyer or law firm, the lawyer's or law firm's contact information, a brief description of areas of practice, and the fact of sponsorship or contribution, the communication is not considered advertising.

Statements Creating Expectations, Characterizations of Quality, and Comparisons

[11] Lawyer advertising may include statements that are reasonably likely to create an expectation about results the lawyer can achieve, statements that compare the lawyer's services with the services of other lawyers, or statements describing or characterizing the quality of the lawyer's or law firm's services, only if they can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated and are accompanied by the following disclaimer: "Prior

results do not guarantee a similar outcome." Accordingly, if true and accompanied by the disclaimer, a lawyer or law firm could advertise "Our firm won 10 jury verdicts over $1,000,000 in the last five years," "We have more Patent Lawyers than any other firm in X County," or "I have been practicing in the area of divorce law for more than 10 years." Even true factual statements may be misleading if presented out of the context of additional information needed to properly understand and evaluate the statements. For example, a truthful statement by a lawyer that the lawyer's average jury verdict for a given year was $100,000 may be misleading if that average was based on a large number of very small verdicts and one $10,000,000 verdict. Likewise, advertising that truthfully recites judgment amounts would be misleading if the lawyer failed to disclose that the judgments described were overturned on appeal or were obtained by default.

[12] Descriptions of characteristics of the lawyer or law firm that are not comparative and do not involve results obtained are permissible even though they cannot be factually supported. Such statements are understood to be general descriptions and not claims about quality, and would not be likely to mislead potential clients. Accordingly, a law firm could advertise that it is "Hard-Working," "Dedicated," or "Compassionate" without the necessity to provide factual support for such subjective claims. On the other hand, descriptions of characteristics of the law firm that compare its services with those of other law firms and that are not susceptible of being factually supported could be misleading to potential clients. Accordingly, a lawyer may not advertise that the lawyer is the "Best," "Most Experienced," or "Hardest Working." Similarly, some claims that involve results obtained are not susceptible of being factually supported and could be misleading to potential clients. Accordingly, a law firm may not advertise that it will obtain "Big $$$," "Most Money," or "We Win Big."

Bona Fide Professional Ratings

[13] An advertisement may include information regarding bona fide professional ratings by referring to the rating service and how it has rated the lawyer, provided that the advertisement contains the "past results" disclaimer as required under paragraphs (d) and (e). However, a rating is not "bona fide" unless it is unbiased and nondiscriminatory. Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Fur-

ther, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group.

Meta-Tags

[14] Meta-tags are hidden computer software codes that direct certain Internet search engines to the web site of a lawyer or law firm. For example, if a lawyer places the meta-tag "NY personal injury specialist" on the lawyer's web site, then a person who enters the search term "personal injury specialist" into a search engine will be directed to that lawyer's web page. That particular meta-tag is prohibited because Rule 7.4(a) generally prohibits the use of the word "specialist." However, a lawyer may use an advertisement employing meta-tags or other hidden computer codes that, if displayed, would not violate a Rule.

Advertisements Referring to Fees and Advances

[15] All advertisements that contain information about the fees or expenses charged by the lawyer or law firm, including advertisements indicating that in the absence of a recovery no fee will be charged, must comply with the provisions of section 488(3) of the Judiciary Law. However, a lawyer or law firm that offers any of the fee and expense arrangements permitted by section 488(3) must not, either directly or in any advertisement, state or imply that the lawyer's or law firm's ability to advance or pay costs and expenses of litigation is unique or extraordinary when that is not the case. For example, if an advertisement promises that the lawyer or law firm will advance the costs and expenses of litigation contingent on the outcome of the matter, or promises that the lawyer or law firm will pay the costs and expenses of litigation for indigent clients, then the advertisement must not say that such arrangements are "unique in the area," "unlike other firms," available "only at our firm," "extraordinary," or words to that effect, unless that is actually the case. However, if the lawyer or law firm can objectively demonstrate that this arrangement is unique or extraordinary, then the lawyer or law firm may make such a claim in the advertisement.

Retention of Copies; Filing of Copies; Designation of Principal Office

[16] Where these Rules require that a lawyer retain a copy of an advertisement or file a copy of a solicitation or other information, that obligation may be satisfied by any of the following: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

[17] A law firm that has no office it considers its principal office may comply with paragraph (h) by listing one or more offices where a substantial amount of the law firm's work is performed.

RULE 7.2

PAYMENT FOR REFERRALS

(a) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

(1) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and

(2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).

(b) A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school;

(ii) operated or sponsored by a bona fide, nonprofit community organization;

(iii) operated or sponsored by a governmental agency; or

(iv) operated, sponsored, or approved by a bar association;

(2) a military legal assistance office;

(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;

(ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;

(iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

(iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;

(v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations; and

(vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

Comment

Paying Others to Recommend a Lawyer

[1] Except as permitted under paragraphs (a)(1)–(a)(2) of this Rule or under Rule 1.17, lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer. *See* Rule 8.4(a) (lawyer may not violate or attempt to violate a Rule, knowingly assist another to do so, or do so through the acts of another). A communication contains a recommendation of it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (a), however, does not prohibit a lawyer from paying for advertising and communications permitted by these Rules, including the costs of print directory listings, online directory listings, newspaper ads, television and radio airtime, domain name registrations, sponsorship fees, Internet-based advertisements, search engine optimization, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel, business development staff, and web site designers. Moreover, a lawyer may pay others for generating clients leads, such as Internet-based client leads, as long as (i) the lead generator does not recommend the lawyers, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (Advertising) and 7.3 (Solicitation and Recommendation of Professional Employment). 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, or 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 (Lawyer's Responsibility for Conduct of Nonlawyers).

[2] A lawyer may pay the usual charges of a qualified legal assistance organization. A lawyer so participating should make certain that the relationship with a qualified legal assistance organization in no way interferes with independent professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary, rather than competence and quality of service.

[3] A lawyer who accepts assignments or referrals from a qualified legal assistance organization must act reasonably to ensure that the activities of the plan or service are compatible with the lawyer's professional obligations. *See* Rule 5.3. The lawyer must ensure that the organization's communications with potential clients are in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the organization's communications falsely suggested that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic or real-time interactive electronic contacts that would violate this Rule.

[4] A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. *See* Rules 2.1, 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer must not pay anything solely for the referral, but the lawyer does not violate paragraph (a) by agreeing to refer clients to the other lawyer or nonlawyer so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. A lawyer may enter into such an arrangement only if it is nonexclusive on both sides, so that both the lawyer and the nonlawyer are free to refer clients to others if that is in the best interest of those clients. Conflicts of interest created by such arrangements are governed by Rule 1.7. A lawyer's interest in receiving a steady stream of referrals from a particular source must not undermine the lawyer's professional judgment on behalf of clients. Recip-

rocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprising multiple entities.

[5] Campaign contributions by lawyers to government officials or candidates for public office who are, or may be, in a position to influence the award of a legal engagement may threaten governmental integrity by subjecting the recipient to a conflict of interest. Correspondingly, when a lawyer makes a significant contribution to a public official or an election campaign for a candidate for public office and is later engaged by the official to perform legal services for the official's agency, it may appear that the official has been improperly influenced in selecting the lawyer, whether or not this is so. This appearance of influence reflects poorly on the integrity of the legal profession and government as a whole. For these reasons, just as the Code prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Code prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.

[6] In determining whether a disinterested person would conclude that a contribution to a candidate for government office, government official, political campaign committee or political party is or has been made for the purpose of obtaining or being considered eligible to obtain a government legal engagement, the factors to be considered include (a) whether legal work awarded to the contributor or solicitor, if any, was awarded pursuant to a process that was insulated from political influence, such as a "Request for Proposal" process, (b) the amount of the contribution or the contributions resulting from a solicitation, (c) whether the contributor or any law firm with which the lawyer is associated has sought or plans to seek government legal work from the official or candidate, (d) whether the contribution or solicitation was made because of an existing personal, family or non-client professional relationship with the government official or candidate, (e) whether prior to the contribution or solicitation in question, the contributor or solicitor had made comparable

contributions or had engaged in comparable solicitations on behalf of governmental officials or candidates for public office for which the lawyer or any law firm with which the lawyer is associated did not perform or seek to perform legal work, (f) whether the contributor has made a contribution to the government official's or candidate's opponent(s) during the same campaign period and, if so, the amounts thereof, and (g) whether the contributor is eligible to vote in the jurisdiction of the governmental official or candidate, and if not, whether other factors indicate that the contribution or solicitation was nonetheless made to further a genuinely held political, social or economic belief or interest rather than to obtain a legal engagement.

RULE 7.3

SOLICITATION AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

(a) A lawyer shall not engage in solicitation:

(1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or

(2) by any form of communication if:

(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;

(ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;

(iii) the solicitation involves coercion, duress or harassment;

(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:

(1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:

(i) a copy of the solicitation;

(ii) a transcript of the audio portion of any radio or television solicitation; and

(iii) if the solicitation is in a language other than English, an accurate English-language translation.

(2) Such solicitation shall contain no reference to the fact of filing.

(3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.

(4) Solicitations filed pursuant to this subdivision shall be open to public inspection.

(5) The provisions of this paragraph shall not apply to:

(i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at persons affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

(iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).

(d) A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(f) Any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

Comment

Solicitation

[1] In addition to seeking clients through general advertising (either by public communications in the media or by private communications to potential clients who are neither current clients nor other lawyers), many lawyers attempt to attract clients through a specialized category of advertising called "solicitation." Not all advertisements are solicitations within the meaning of this Rule. All solicitations, however,

are advertisements with certain additional characteristics. By definition, a communication that is not an advertisement is not a solicitation. Solicitations are subject to all of the Rules governing advertising and are also subject to additional Rules, including filing a copy of the solicitation with the appropriate attorney disciplinary authority (including a transcript of the audio portion of any radio or television solicitation and, if the solicitation is in a language other than English, an accurate English language translation). These and other additional requirements will facilitate oversight by disciplinary authorities.

[2] A "solicitation" means any advertisement: (i) that is initiated by a lawyer or law firm (as opposed to a communication made in response to an inquiry initiated by a potential client), (ii) with a primary purpose of persuading recipients to retain the lawyer or law firm (as opposed to providing educational information about the law, *see* Rule 7.1, Comment [7]), (iii) that has as a significant motive for the lawyer to make money (as opposed to a public-interest lawyer offering pro bono services), and (iv) that is directed to or targeted at a specific recipient or group of recipients, or their family members or legal representatives. Any advertisement that meets all four of these criteria is a solicitation, and is governed not only by the Rules that govern all advertisements but also by special Rules governing solicitation.

Directed or Targeted

[3] An advertisement may be considered to be directed to or targeted at a specific recipient or recipients in two different ways. First, an advertisement is considered "directed to or targeted at" a specific recipient or recipients if it is made by in-person or telephone contact or by real-time or interactive computer-accessed communication or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages). Advertisements made by in-person or telephone contact or by real-time or interactive computer-accessed communication are prohibited unless the recipient is a close friend, relative, former client or current client. Advertisements addressed so that they will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages) are subject to various additional rules governing solicitation (including filing and public inspection) because otherwise they would not be readily subject to disciplinary oversight and review. Second, an advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of

people whose legal needs arise out of a specific incident to which the advertisement explicitly refers. The term "specific incident" is explained in Comment [5].

[4] Unless it falls within Comment [3], an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients. For example, an advertisement in a public medium is not directed to or targeted at "a specific recipient or group of recipients" simply because it is intended to attract potential clients with needs in a specified area of law. Thus, a lawyer could advertise in the local newspaper that the lawyer is available to assist homeowners in reducing property tax assessments. Likewise, an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine is geared toward inventors. Similarly, a lawyer could advertise on television or in a newspaper or web site to the general public that the lawyer practices in the area of personal injury or Workers' Compensation law. The fact that some recipients of such advertisements might actually be in need of specific legal services at the time of the communication does not transform such advertisements into solicitations.

Solicitations Relating To a Specific Incident Involving Potential Claims for Personal Injury or Wrongful Death

[5] Solicitations relating to a specific incident involving potential claims for personal injury or wrongful death are subject to a further restriction, in that they may not be disseminated until 30 days (or in some cases 15 days) after the date of the incident. This restriction applies even where the recipient is a close friend, relative, or former client, but not where the recipient is a current client. A "specific incident" is a particular identifiable event (or a sequence of related events occurring at approximately the same time and place) that causes harm to one or more people. Specific incidents include such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like.

[6] A solicitation that is intended to attract potential claims for personal injury or wrongful death arising from a common cause but at disparate times and places, does not relate to a specific incident and is not subject to the special 30-day (or 15-day) rule, even though it is addressed so that it will be delivered to specific recipients or their families or agents (as with letters, emails, express packages), or is made in a public medium such as newspapers, television, billboards, web sites or the like and makes reference to a specific person or group of people, *see* Comments [3]–[4].

For example, solicitations intended to be of interest only to potential claimants injured over a period of years by a defective medical device or medication do not relate to a specific incident and are not subject to the special 30-day (or 15-day) rule.

[7] An advertisement in the public media that makes no express reference to a specific incident does not become a solicitation subject to the 30-day (or 15-day) rule solely because a specific incident has occurred within the last 30 (or 15) days. Thus, a law firm that advertises on television or in newspapers that it can "help injured people explore their legal rights" is not violating the 30-day (or 15-day) rule by running or continuing to run its advertisements even though a mass disaster injured many people within hours or days before the advertisement appeared. Unless an advertisement in the public media explicitly refers to a specific incident, it is not a solicitation subject to the 30-day (or 15-day) blackout period. However, if a lawyer causes an advertisement to be delivered (whether by mail, email, express service, courier, or any other form of direct delivery) to a specific recipient (i) with knowledge that the addressee is either a person killed or injured in a specific incident or that person's family member or agent, and (ii) with the intent to communicate with that person because of that knowledge, then the advertisement is a solicitation subject to the 30-day (or 15-day) rule even if it makes no reference to a specific incident and even if it is part of a mass mailing.

Extraterritorial Application of Solicitation Rules

[8] All of the special solicitation rules, including the special 30-day (or 15-day) rule, apply to solicitations directed to recipients in New York State, whether made by a lawyer admitted in New York State or a lawyer admitted in any another jurisdiction. Solicitations by a lawyer admitted in New York State directed to or targeted at a recipient or recipients outside of New York State are not subject to the filing and related requirements set out in Rule 7.3(c). Whether such solicitations are subject to the special 30-day (or 15-day) rule depends on the application of Rule 8.5.

In-Person, Telephone and Real-Time or Interactive Computer-Accessed Communication

[9] Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion,

may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or in real-time or interactive computer-accessed communication. These same risks are also present in all other real-time or interactive electronic communications, whether by computer, phone or related electronic means—*see* Rule 1.0(c) (defining "computer-accessed communication")—and are regulated in the same manner. The prohibitions on in-person or telephone contact and the prohibitions on contact by real-time or interactive computer-accessed communication do not apply if the recipient is a close friend, relative, former or current client. Communications with these individuals do not pose the same dangers as solicitations to others. However, when the special 30-day (or 15-day) rule applies, it does so even where the recipient is a close friend, relative, or former client. Ordinarily, email communications and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communication. However, instant messaging ("IM"), chat rooms, and other similar types of conversational computer-accessed communications—whether sent or received via a desktop computer, a portable computer, a cell phone, or any similar electronic or wireless device, and whether sent directly or via social media—are considered to be real-time or interactive communication.

RULE 7.4

IDENTIFICATION OF PRACTICE AND SPECIALTY

(a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).

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

(c) A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:

(1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: This certification is not granted by any governmental authority."

(2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: ''This certification is not granted by any governmental authority within the State of New York.''

(3) A statement is prominently made if:

(i) when written, it is clearly legible and capable of being read by the average person, and is in a font size at least two font sizes larger than the largest text used to state the fact of certification; and

(ii) when spoken aloud, it is intelligible to the average person, and is at a cadence no faster, and a level

of audibility no lower, than the cadence and level of audibility used to state the fact of certification.

Comment

[1] Paragraph (a) permits a lawyer to indicate areas of practice in which the lawyer practices, or that his or her practice is limited to those areas.

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

[3] Paragraph (c) permits a lawyer to state that the lawyer specializes or is certified as a specialist in a field of law if such certification is granted by an organization approved or accredited by the American Bar Association or by the authority having jurisdiction over specialization under the laws of another jurisdiction provided that the name of the certifying organization or authority must be included in any communication regarding the certification together with the disclaimer required by paragraph (c).

RULE 7.5

PROFESSIONAL NOTICES, LETTERHEADS AND NAMES

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate these Rules or any statute or court rule.

(b) (1) A lawyer or law firm in private practice shall not practice under:

(i) a false, deceptive or misleading a trade name;

(ii) a false, deceptive, or misleading domain name; or

(iii) a name that is misleading as to the identity of the lawyer or lawyers practicing under such name.

(2) Specific Guidance Regarding Law Firm Names

(i) Such terms as "legal aid," "legal service office," "legal assistance office," "defender office," and the like may be used only by bona fide legal assistance organizations.

(ii) A law firm name, trade name, or domain name may not use the terms "non-profit" or "not-for-profit" unless the law firm qualifies for those designations under applicable law.

(iii) A lawyer or law firm in private practice may not include the name of a nonlawyer in its firm name.

(iv) The name of a professional corporation shall contain "PC" or such symbols permitted by law.

(v) The name of a limited liability company or limited liability partnership shall contain "LLC," "LLP" or such symbols permitted by law.

(vi) A lawyer or law firm may utilize a telephone number that contains a trade name, domain name, nickname, moniker, or motto that does not otherwise violate these Rules.

(3) A lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis may not include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith.

(4) A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

Comment

Professional Affiliations and Designations

[1] A lawyer's or law firm's name, trade name, domain name, web site, social media pages, office sign, business cards, letterhead, and professional designations are communications concerning a lawyer's services and must not be false, deceptive, or misleading. They must comply with this Rule and with Rule 7.1.

[2] A lawyer or law firm may not use any name that is false, deceptive, or misleading. It is not false, deceptive, or misleading for a firm to be designated by the names of all or some of its current members or by the names of retired or deceased members where there has been a continuing line of succession in the firm's identity. A lawyer or law firm may practice under a trade name or domain name if it is not false, deceptive, or misleading. A lawyer or law firm also may practice under a distinctive website address, social media username, or comparable professional designation, provided that the name is not false, deceptive, or misleading.

[3] By way of example, the name of a law firm in private practice is deceptive or misleading if it implies a connection with (i) a government agency, (ii) a deceased or retired lawyer who was not a former member of the firm in a continuing line of succession, (iii) a lawyer not associated with the firm or a predecessor firm, (iv) a nonlawyer, or (v) a public or charitable legal services organization. A lawyer or law firm may not use a name, trade name, domain name, or other designation that includes words such as "Legal Services," "Legal Assistance," or "Legal Aid" unless the lawyer or law firm is a bona fide legal assistance organization.

[4] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

[5] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a "firm" as defined in Rule 1.0(h), because to do so would be false and misleading. In particular, it is misleading for lawyers to hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners. It is also misleading for lawyers to hold themselves out as being counsel, associates, or other affiliates of a law firm if that is not a fact, or to hold themselves out as partners, counsel, or associates if they only share offices. Likewise, law firms may not claim to be affiliated with other law firms if that is not a fact.

Professional Web Sites, Cards, Office Signs, and Letterhead

[6] A lawyer or law firm may use internet web sites, social media pages, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided they do not violate any statute or court rule and are in accordance with Rule 7.1. Thus, a lawyer may use the following:

(i) a professional card identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the lawyer's law firm, the names of the law firm's members, counsel, and associates, and any information permitted under Rule 7.2(c);

(ii) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm, counsel, and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state or describe the nature of the legal practice to the extent permitted under Rule 7.2(c);

(iii) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice to the extent permitted under Rule 7.2(c);

(iv) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.2(c). A letterhead of a law firm may also give the names of members, associates, and counsel, names and dates relating to deceased and retired members, and the names and dates of predecessor firms in a continuing line of succession; and

(v) internet web sites or social media pages or sites that comply with these Rules.

Professional Status

[7] To avoid misleading clients, courts, and the public, lawyers should be scrupulous in representing their professional status. For example:

(i) A lawyer or law firm may be designated "Counsel," "Special Counsel," "Of Counsel," and the like on a letterhead or professional card if there is a continuing relationship with another lawyer or law firm other than as a partner or associate;

(ii) A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or law firm devotes a substantial amount of professional time to representing that client;

(iii) To alert clients, the public, and those who deal with a lawyer or law firm about possible limitations on liability, the name of a professional corporation shall contain "PC" or such symbols permitted by law, and the name of a limited liability company or limited liability partnership shall contain "LLC," "PLLC," "LLP" or such symbols permitted by law;

(iv) A law firm name, trade name, or domain name may not include the terms "non-profit" or "not-for-profit" unless the law firm qualifies for those designations under applicable law, such as the New York Not-for-Profit Corporation Law ("NPCL").

[8] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but all enumerations of the lawyers listed on the firm's letterhead and in other permissible listings should make clear the jurisdictional limitations on those members, counsel, and associates of the firm not licensed to practice in all listed jurisdictions.

Trade Names and Domain Names

[9] Some lawyers and law firms may prefer to practice under trade names and/or domain names to make it easier for clients to remember or locate them. A lawyer may practice under a trade name or domain name that is not false, deceptive, or misleading. Provided a lawyer or law firm uses a name otherwise complying with these Rules, it is proper to practice under the lawyer's or law firm's own name, initials, trade name, domain name, abbreviations, areas of practice, variations of the foregoing, or a combination of those features, among other things.

[10] For example, with respect to trade names, a law firm whose practice includes real estate matters may use and practice under a name such as AbleBaker Real Estate Lawyers, A&B Real Estate Lawyers, or Dirt Lawyers. Likewise, a law firm may use and practice under a trade name such as Albany Personal Injury Lawyers if the firm practices in Albany and its practice includes personal injury law. With respect to domain names, if the law firm of Able & Baker practices real estate law, the firm may use and practice under a descriptive domain name such as

www.realestatelaw.com or www.ablerealestatelaw.com, or under a colloquial domain name such as www.dirtlawyers.com, as long as the name is not false, deceptive, or misleading.

[11] Neither trade names nor domain names may be false, deceptive, or misleading. A law firm may not use a trade name such as "Win Your Case," or a domain name such as www.winyourcase.com because those names imply that the law firm can obtain favorable results regardless of the particular facts and circumstances. In all events, neither a trade name nor a domain name may be false, deceptive, or misleading or violate Rule 7.1 or any other Rule.

Telephone Numbers

[12] A lawyer or law firm may use telephone numbers that spell words or contain a trade name, domain name, nickname, moniker, or motto that does not otherwise violate these Rules. As with domain names, lawyers and law firms may always properly use telephone numbers consisting of (i) their own names or initials, or (ii) combinations of names, initials, numbers, and words. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-RED-LAW, or RB-LEGAL. By way of further example, a personal injury law firm may use the numbers 1-800-ACCIDENT, 1-800-HURT-BAD, or 1-800-INJURY-LAW, but may not use the numbers 1-800-WINNERS, 1-800-2WIN-BIG, or 1-800-GET-CASH. (Phone numbers with more letters than the number of digits in a phone number are acceptable as long as the words do not violate a Rule.)

RULE 8.1

CANDOR IN THE BAR ADMISSION PROCESS

(a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

Comment

[1] 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 as well as that of another.

[2] This Rule is subject to the provisions of the Fifth Amendment to 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.

RULE 8.2

JUDICIAL OFFICERS AND CANDIDATES

(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.

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. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. False statements of fact by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer may engage in constitutionally protected speech, but is bound by valid limitations on speech and 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 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer 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 to cooperate with authorities empowered to investigate 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 result in violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with

the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to a tribunal or other authority empowered to investigate or act upon the violation.

[3A] Paragraph (b) requires a lawyer in certain situations to respond to a lawful demand for information concerning another lawyer or a judge. This Rule is subject to the provisions of the Fifth Amendment to the United States Constitution and corresponding provisions of state law. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

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

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in a bona fide assistance program for lawyers or judges. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) encourages lawyers and judges to seek assistance and treatment through such a program. Without such an exception, lawyers and judges may hesitate to seek assistance and treatment from these programs, and this may result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

RULE 8.4

MISCONDUCT

A lawyer or law firm shall not:

(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) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(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:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules 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;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status, sexual orientation, gender identity, or gender expression. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

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 their behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. The assertion of the lawyer's constitutional rights consistent with
Rule 8.1, Comment [2] does not constitute failure to cooperate. The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court.

[4] A lawyer may refuse to comply with an obligation imposed by law if such refusal is based upon a reasonable good-faith belief that no valid obligation exists because, for example, the law is unconstitutional, conflicts with other legal or professional obligations, or is otherwise invalid. As set forth in Rule 3.4(c), a lawyer may not disregard a specific ruling or standing rule of a tribunal, but can take appropriate steps to test the validity of such a rule or ruling.

[4A] A lawyer harms the integrity of the law and the legal profession when the lawyer states or implies an ability to influence improperly any officer or agency of the executive, legislative or judicial branches of government.

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

[5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).

RULE 8.5

DISCIPLINARY AUTHORITY AND CHOICE OF LAW

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

(b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

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

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

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the conduct occurs.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct, imposing 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 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, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a court before which the lawyer is admitted to practice either generally or for purposes of that proceeding, the lawyer shall be subject only to the rules of the jurisdiction in which the court sits unless the rules of the court, including its choice-of-law rules, provide otherwise. As to all other conduct, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the admitting jurisdiction in which the lawyer principally practices or, if the predominant effect of the conduct clearly is in another jurisdiction in which the lawyer is licensed to practice, 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 court, the predominant effect of such conduct could be where the lawyer principally practices, where the conduct occurred, where the court in which the proceeding is ultimately brought sits, or in another jurisdiction.

[5] When a lawyer is licensed to practice in New York and another jurisdiction and the 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 an admitting jurisdiction other than the one in which the lawyer principally practices. For conduct governed by paragraph (b)(2), as long as the lawyer's conduct conforms

to the rules of the jurisdiction in which the lawyer principally practices, the lawyer should not be subject to discipline unless the predominant effect of the lawyer's conduct will clearly occur in another admitting jurisdiction.

[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 or among competent regulatory authorities in the affected jurisdictions provide otherwise.

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SINGLE-USER LICENSE FOR:

NEW YORK RULES OF PROFESSIONAL CONDUCT (2021)

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