

# Staying Ethical in an In-House Legal Environment

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In conjunction with:



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**Locke Lord LLP and Association of Corporation Counsel—Northeast**

**Present**

**Staying Ethical in an In-House Legal Environment**

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# Staying Ethical in an In-House Legal Environment

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# ABA Model Rules

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“The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most states. Before the adoption of the Model Rules, the ABA model was the 1969 Model Code of Professional Responsibility. Preceding the Model Code were the 1908 Canons of Professional Ethics (last amended in 1963).”

[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html)



# Application of Rules to In-House Counsel

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- Rules apply to in-house counsel whether you are acting in legal capacity or in business capacity.
- Problem: Rules not written with in-house lawyers in mind.

# Application of Rules to In-House Counsel

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- Problems?
  - One client
  - Employee of the client
  - Interpersonal relationships
  - Access to information
  - Multiple hats

# Rule 1.1 Competence

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- Rule 1.1 “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

# Rule 1.1 Competence—General

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- Business leadership expects in-house counsel to know how to do everything.
- Daunting task.
- Use continuing legal education to your advantage—find courses that align to the company's legal problems and your role within the company.

# Rule 1.1 Competence—Technology

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- Competence includes competence in technology.
- ABA 2017 formal opinion: when transmitting client information over the internet in order to keep it confidential, lawyers must:
  - Understand and use reasonable electronic security measures;
  - Train lawyers and non-lawyer assistants in technology and information security; and
  - Conduct due diligence on vendors providing communication technology.

# Rule 1.1 Competence—CLE

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- Lawyer must comply with all continuing legal education requirements to which the lawyer is subject. Rule 1.1, Comment 6
- Failure may subject you to discipline, including suspension.
- If suspended, may also call into question whether advice is privileged.

# Rule 5.5 Unauthorized Practice of Law

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- General Rule: “A lawyer may not practice law in jurisdiction in violation of the legal profession in that jurisdiction or assist another in doing so.”
- In-house counsel exception: A lawyer admitted in another US jurisdiction, and not disbarred or suspended from practice in that jurisdiction, may provide legal services to his employer or its organizational affiliates as long as there is no requirement for pro hac vice admission in the matter.

# Rule 5.5 Unauthorized Practice of Law

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- This permission does not extend to the provision of personal legal services to officers and employees of the employer.
- Rhode Island:
  - Requires that the employment be by a “corporation or other entity at an office in this state.”
  - Requires registration and payment of a fee.
- Massachusetts:
  - Services must be provided “through an office or other systematic and continuous presence” in Massachusetts.
  - Requires registration and payment of a fee; annual filing; and notice of change in employer.



# Rule 5.5 Unauthorized Practice of Law

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- Consequence—almost blew the privilege:
  - An associate at Gucci America was admitted in California but changed his bar status to inactive prior to joining the company.
  - In a case against Guess, a magistrate judge held that because he was not a licensed attorney, none of his communications relevant to the case were subject to the attorney-client privilege.
  - The ruling was eventually overturned, but could have been disastrous.

# Rule 5.5 Unauthorized Practice of Law

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## Take away:

- Maintain your license and keep up with CLE requirements of your state and Rhode Island if you are registered as in-house counsel.
- Check local rules to be sure there is no registration requirement.
- Do not hold yourself out as a lawyer in that jurisdiction until you register.
- Include a disclaimer indicating the limits of your licensure.
- Do due diligence on prospective hires to be sure their license is valid.

# Model Rule 1.7 Conflict of Interest: Current Client

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- A lawyer shall not represent a client if the representation involves a concurrent conflict of interest unless.
  - The lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client.
  - The representation is not prohibited by law.
  - The representations are not in connection with the same litigation or other dispute resolution proceeding.
  - Each affected client gives informed consent, confirmed in writing.

The RI rule follows the Model Rule. Massachusetts' rule is worded differently, but the outcome is the same.

# Parent-Subsidiary Conflict?

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- In-house counsel may ethically provide services to a subsidiary; however, there is a potential for a conflict of interest under Rule 1.7 if their interests are different.
- Examples:
  - Transactions between companies
  - When one becomes insolvent
  - Where ownership or indebtedness varies or is partial

# Parent-Subsidiary Conflict?

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- Must recognize that when services are provided to the subsidiary, then the subsidiary, not the parent, is the client.
- Must reasonably believe that the representation of each client will not be materially affected.
- Both the parent and the subsidiary must consent in writing to such representation after full disclosure.

# Parent-Subsidiary Conflict

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- Must maintain a personal, direct and responsible relationship with each client and allegiance in performance of particular services may not be divided.
- Unless the parent's interests in the matter are identical that of the subsidiary, the parent may not direct the manner in which the services are performed for the subsidiary or dictate the advice to be given.
- Must maintain client confidentiality of each client.

# Rule 1.9 Duties to Former Clients

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- Rule 1.9 (a) and (b) Conflict of interest with former client
- Rule 1.10 Imputation to others in organization's legal department
- Rule 1.9(c) Duty of confidentiality to former client

# Model Rule 1.9 Duties to Former Clients

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- Cannot be adverse to a former client in a matter where the lawyer represented that former client on the same or substantially related matter.
- Cannot represent a client in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client if the lawyer has material confidential information.



# Rule 1.9 Duties to Former Clients

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- If in-house counsel worked for another company, “former client” is the prior employer.
- ABA opinion requires personal involvement—just supervision may not be a conflict.
- The scope of a “matter” is a question of fact—the test is whether the lawyer was so involved in the prior matter that the subsequent representation can be regarded as a changing of sides.

# Rule 1.9 Duties to Former Clients

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- Matters are “substantially related” if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.
- The latter is so-called “playbook” information.

# Model Rule 1.10 Imputation of Conflicts of Interest: General Rule

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- Model Rule 1.10 imputes a former client conflict to other lawyers in the same “firm.”
- Comment 1 makes it clear that lawyers employed in the legal department of a corporation or other organization constitute a firm for purposes of this Rule.

# Rule 1.10 Imputation of Conflicts of Interest: General Rule

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- When a lawyer joins a “firm” (the in-house law department), Rhode Island allows other lawyers in the legal department to work on the same or substantially related matter adverse to a former client as long as the personally disqualified lawyer is screened and notice is given to the former client.
- Massachusetts allows for screening as long as the lateral doesn’t have material confidential information. Requires screening and notice to the former client.

# Model Rule 1.10: Imputation to Outside Firm

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- GC worked as in-house counsel for a company in a patent matter.
- She moved to a new company. Her new and old employers ended up in infringement litigation over the patent. She worked on the case for her new employer and shared confidential information.
- Court disqualified **outside counsel**.
- Huge, expensive mess GC had to explain to senior management and the Board.

# Model Rule 1.10 Imputation of Conflicts of Interest: General Rule

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Take away:

- Keep a list of major litigation and ask new hires if they worked on these matters if they are coming from the adverse party.
- Speak up if you have a former client conflict.
- Check the rules to see if screening/notice is sufficient or if consent is required.

# Who do you represent?

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- Applicable Model Rules:
  - Model Rule 1.13 Organization as a Client
  - Model Rule 1.7 Conflict of Interest

# Model Rule 1.13 Who do you Represent?

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Model Rule 1.13(a) “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

Problem: Corporations can only act through their employees/officers/directors. Thus you never deal directly with the client *per se*, but only with agents of the client.



# Model Rule 1.13 Who do you Represent?

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- Must explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- Must provide so-called "Upjohn" warning.

# Civil *Miranda* Warnings

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- Leading case is *Upjohn Co. v. U.S.* (1981) 449 U.S. 383:
  - The in-house counsel represents the corporation not the individual employee.
  - The employee should be advised that they may want to retain their own attorney.
  - Communications from the employee to in-house counsel is privileged, but the privilege belongs to the corporation.
  - Individual employee has no control over disclosure of the information to third parties because the corporation owns the privilege, not the employee.

# Model Rule 1.13 Who do you Represent?

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- If your employer's interests are aligned with the constituent's interest:
  - You may represent both.
  - BUT, get something in writing that if a conflict develops, you can continue to represent the company and the individual will need to hire separate counsel.
- 2012 RI opinion held that in-house counsel could not share with his company notes he took when he represented both the company and the employee because he had no conflict of interest waiver.

# Reporting of Fraud

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- Model Rule 1.13(b)-(e)
- Sarbanes-Oxley 307

# Model Rule 1.13(b) Reporting Up

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- Must report up if you know:
  - That an employee is engaged in an action (or intends to act or refuses to act) that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization; and
  - That the action or inaction is likely to result in substantial injury to the organization.

# Model Rule 1.13(b) Reporting Up

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## Comment 4 to Rule 1.13

- Requires the lawyer to take into consideration the **seriousness** of the violation and its consequences, the **responsibility** in the organization and the apparent **motivation** of the person involved, the **policies of the organization** as to such matters and any other relevant information.
- Depending on the circumstances, if the employee reconsiders her actions after advice of counsel, the lawyer may reasonably conclude that the best interest of the organization does not require the matter to be referred to higher authority.
- Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization.

# Model Rule 1.13(c) Permissible Reporting Out

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- May include reporting outside the organization if:
  - the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law; and
  - the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization.

# Model Rule 1.13(e) Reporting Retaliation

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- If a lawyer reasonably believes that he or she has been discharged because of the reporting up, Rule 1.13(e) requires the lawyer to report to the highest authority, and report out if the highest authority was already informed.



# Post-Enron Environment for In-House Counsel

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- After Enron
- Where were the lawyers?
  - Increased and direct federal involvement in regulation of the legal profession.
  - ABA, state bar associations and state courts are no longer sufficient to enforce compliance with state laws and rules.
  - In-house counsel no longer only has obligations to the corporation as the client.
  - Increasingly focused on the lawyer's responsibility for the client's behavior.

# Sarbanes-Oxley 307

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- Regulates attorneys “appearing and practicing” before the SEC (effectively all public company attorneys) mandating reporting.
- In-house counsel continues as a trusted advisor, but now also has the role of “cop on the beat” and “gatekeeper” in partnership with the SEC and other governmental agencies, and now has obligations to the public as well as the corporation.
- Criminal sanctions attach (17 CFR Part 205).
- Codifies Model Rule 1.13 “reporting up” requirements with more teeth.
- Attorneys are now responsible for executive wrongdoing.

# Transactions with Persons Other Than Clients

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- Model Rule 4.1 Truthfulness with Persons Other Than Clients
- Model Rule 4.2 Communication with Persons Represented by Counsel

# Rule 4.1 Truthfulness in Statements to Others

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

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

# Rule 4.1 Truthfulness in Statements to Others

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- You are required to be truthful when dealing with others on a client's behalf.
- But you have no affirmative duty to inform an opposing party of relevant facts.
- A misrepresentation can occur if you incorporate or affirm a statement of another person that you know is false—example: you distribute schedules to a purchase or finance agreement and know information from the CFO is false.

# Rule 4.1 Truthfulness in Statements to Others

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- The Rule refers to statements of fact.
- You are permitted to negotiate.
- Some example of negotiations:
  - Estimates of price or value placed on the subject of a transaction
  - A party's intentions as to an acceptable settlement of a claim

# Rule 4.2 Communication with Person Represented by Counsel

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

# Rule 4.2 Communication with Person Represented by Counsel

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- Applies even if the represented person initiates or consents to the communication.
- If you are acting as both the business person and the lawyer on a matter, you need to be careful if the business person on the other side has a lawyer.
- The **lawyer**, and not the business person, needs to consent to your communicating directly with the business person.



# Confidential Information and Attorney-Client Privilege

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Confidential information under the ethics rules is more than merely information protected by the attorney-client privilege.

# Definition of Confidential Information

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- Rhode Island: Any information relating to the representation of a client. It is more than merely information protected by the attorney-client privilege.
- Massachusetts: Any 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 lawyer has agreed to keep confidential. A comment excludes information that is “generally known” in the local community or in the trade, field or profession to which the information relates.

# Definition of Confidential Information

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- Assume anything related to company is confidential.
- Be mindful of telephone calls or conversations in public places.
- “No-gossip” rule.
- Applies to social media
  - Don’t post anything embarrassing to you or the company.
  - Don’t comment on pending litigation or other legal matters involving the company.
  - Don’t disparage opposing counsel or the judge.
  - Don’t share confidential or privileged information.

# Attorney-Client Privilege

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- Privilege applies only if:
  - Asserted holder is or seeks to become a client;
  - Person to whom communication is made (a) is a member of the court bar or a subordinate thereof, and (b) in connection with this communication is acting as an attorney;
  - Communication relates to a fact of which the attorney was informed (a) by the client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
  - Privilege has been (a) claimed and (b) not waived by the client.
- Leading Rhode Island case is *State v. Von Bulow*, 475 A.2d 995 (R.I. 1984), *cert. denied*, 469 U.S. 875 (1984).

# Purposes of Privilege

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- Sound legal advice or advocacy
  - Requires that the attorney be fully informed by the client
  - Effectively furthers the interests of justice.
- Privilege encourages clients to seek early legal advice, and to be forthcoming.
- Because privilege inhibits the search for the truth, it is strictly limited to communications properly within its scope.

# Corporate Clients

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- Corporations are entitled to claim the attorney-client privilege.
- But, corporate client must rely on its employees and agents to communicate.
- Critical question to ask: Is the employee communicating with the attorney as the client, or for some other, unprotected purpose?

# State Law Tests of Corporate Privilege

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## ■ “Control Group” Test

- Focuses on the rank of the communicating employee within the corporate hierarchy.
- Widely used in the 1960’s and 1970’s, but now only used in a few jurisdictions, including Illinois.
- Corporate decision-makers, or certain of their advisors .

## ■ Subject Matter Test

- Focuses on the content of the communication.
- **Majority View:** To be covered by the corporation’s attorney-client privilege, the communication must concern matters within the scope of the communicator’s employment and must be made at the direction of a corporate supervisor.

# Control Group Members

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- Only communications that are ordinarily privileged are those made by top management who have the ability to make final decisions.
- May include employees whose advisory role to top management in a particular area is such that a decision normally would not be made without their advice or input, and whose opinion in fact forms the basis of any final decision by those with actual authority.
- Excludes those upon whom such an advisor relies on for information.



# Federal Law Test

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- Leading U.S. Supreme Court case is *Upjohn Co. v. U.S.*, (1981) 449 US 383.
  - US Supreme Court rejected the control group test, but did not establish any test to replace it, and did not mention the subject matter test.
  - After *Upjohn*, some Federal courts apply something that may be broadly considered a subject matter test.
  - Case-by-case factual determination of which communications are the corporate client's for purposes of the privilege.
  - Subject matter test has been adopted by Rhode Island Courts. See, e.g., *McKnight v. Honeywell Safety Products, Inc.*, 2019 WL 452741 (D.R.I. February 5, 2019) (Sullivan, M.J.)

# Privilege for In-House Counsel

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- “[T]he general rule . . . is that a lawyer’s status as in-house counsel does not dilute the privilege.” *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014) (“*KBR I*”) (quoting *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)).
- But, most courts apply the “primary purpose” test to determine if the communication was primarily for the purpose of legal advice, rather than a business purpose. *Id.* at 759.

# Cautionary Notes \

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- “[T]he mere fact that a communication is made directly to an attorney, or an attorney is copied on a memorandum, does not mean that the communication . . . is necessarily privileged.” *Komoulis v. Ind. Fin. Mktng. Group, Inc.*, 29 F. Supp 3d 142, 146 (E.D.N.Y. 2014).
- “[I]nvestigatory reports and materials are not protected by the attorney-client privilege or the work product doctrine merely because they are provided to, or prepared by, counsel.” *Id.* (“predominant purpose was to provide human resources and thus business advice, not legal advice”).

# Cautionary Notes

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- Recent cases have upheld claims of privilege over internal investigations, but do still limit protection as to some factual content, and raise issues concerning implied waiver. See, e.g., *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015) (“*KBR II*”).
- Recent decision in the District of Delaware held that if a company claims advice of counsel as a defense, all communications with counsel are subject to disclosure. See *Johns Hopkins University v. Alcon Laboratories, Inc.*, 2017 WL 5172395 (D. Del.); *but see* *KBR II*, 796 F.3d at 147.

# Practical Advice

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- Think carefully before forwarding or sharing any documents or e-mails with privileged content. You should only do so on a “need to know” basis, and never outside of the attorney-client relationship.
- If a corporate employee prepares documents at the request of in-house or outside counsel, or does so to seek legal advice, those documents should be clearly labeled “privileged and confidential.” Notes of meetings with counsel should be handled similarly.
- But do not be overly broad in labeling documents as privileged or confidential.

# Practical Advice

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- Attempt to segregate business advice from legal advice.
- Set out the legal purpose of your communication at the beginning of the email/document.
- Train your executives and legal department on
  - The difference between legal and business advice and when the privilege properly applies
  - How to request legal services vs. business advice.

# Question & Answer

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**Form of language for representing both the company and the employee**

*Joint Representation and Possible Future Conflict.* As we discussed, employer and each employee could be represented by separate counsel in this litigation, but there are cost considerations, as well as strategic advantages for each of us in joint representation. Because we believe that employees' interest and employer's interests are identical, or nearly so, we are willing to undertake this joint representation provided that the employer and employees understand and agree to the terms and conditions in this letter. Rule 1.7 of the Rhode Island Rules of Professional Conduct requires me to explain to you the implications of this common representation and the advantages and the risks involved. We anticipate that joint representation will allow coordination of defense efforts and will also result in cost savings for you.

Employer and employees acknowledge and agree that a conflict of interest may arise in the course of our joint representation (*e.g.*, a substantial discrepancy in the parties' testimony, incompatibility in position in relation to an opposing party, or differences related to settlement of the claims or liabilities in question). Employer and employees acknowledge and agree that in the event a conflict of interest does arise, counsel may withdraw from representing the employee who has created the conflict (the "conflicted employee") and may continue to represent the employer and the other employees. In such event, the conflicted employee understands that he or she will be responsible for obtaining his or her own legal representation and for the cost of that representation. Additionally, any information that the conflicted employee previously disclosed to us may be used against him or her on behalf of the employer or other employees.

In the unlikely event that employer or employees commence litigation against one another regarding the subject of the joint representation, each understands that our advice to them and our prior communications with them during the joint representation may not be shielded from disclosure in such litigation. We are advising of these possibilities solely to comply with our ethical requirements and are not suggesting that the employer and employees may have claims against one another.

*Joint Representation Agreement and Waiver.* Employees waive any objection to, or any possible conflict in, our joint representation of them and employer in the litigation, and each consents to our joint representation of them in the litigation.

*Representation of Employer.* Employees understand that counsel currently represents and in the future may represent employer in matters that are not substantially related to this litigation. Employees acknowledge and agree that we may continue or undertake to represent employer in such existing or future matters and that our communications with employer regarding those matters will be confidential and not disclosed to employees.

*Confidentiality Issues and Shared Information.* As we discussed, one of the necessary consequences of joint representation of multiple clients by a single lawyer is the sharing of confidential information concerning the subject matter of the joint representation. Employer and employees acknowledge and agree that communications between our Firm and any or all of them



relating to this matter will be treated as confidential and privileged as to third parties under the attorney-client privilege and all other applicable privileges and protections, and will not be disclosed outside the group without their informed consent or as otherwise permitted by the rules of professional conduct or other law. Employer and employees also acknowledge and agree that we may, but need not always, share with employer, but we reserve the right not to share all information received from employer with employees, relevant or material communications or information that we receive concerning this matter, including communications from any of them, subject to the laws or regulations applicable in this jurisdiction. Further, because we will be jointly retained by all of you, in the event of a dispute between or among any of you, the attorney-client privilege generally will not protect communications that have taken place between us and any of you for purposes of that dispute. Moreover, the attorney-client privilege and duties of confidentiality applicable to our representation of you may be waived by any one of you without the consent of all of you.

*Opportunity to Consult Independent Counsel.* Employees acknowledge and agree that, prior to entering into this agreement, they have been advised and have had the opportunity to consult with independent counsel regarding the terms and conditions of this agreement.

**The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics**

**Formal Opinion 2004-02: Representing Corporations and Their Constituents in the Context of Governmental Investigations**

**Topic**

Multiple Representations; Corporations and Corporate Constituents

**Digest**

Multiple representations of a corporation and one or more of its constituents are ethically complex, and are particularly so in the context of governmental investigations. If the interests of the corporation and its constituent actually or potentially differ, counsel for a corporation will be ethically permitted to undertake such a multiple representation, provided the representation satisfies the requirements of DR 5-105(C) of the New York Code of Professional Responsibility: (i) corporate counsel concludes that in the view of a disinterested lawyer, the representation would serve the interests of both the corporation and the constituent; and (ii) both clients give knowledgeable and informed consent, after full disclosure of the potential conflicts that might arise. In determining whether these requirements are satisfied, counsel for the corporation must ensure that he or she has sufficient information to apply DR 5-105(C)'s disinterested lawyer test in light of the particular facts and circumstances at hand, and that in obtaining the information necessary to do so, he or she does not prejudice the interests of the current client, the corporation. Even if the lawyer concludes that the requirements of DR 5-105(C) are met at the outset of a multiple representation, the lawyer must be mindful of any changes in circumstances over the course of the representation to ensure that the disinterested lawyer test continues to be met at all times. Finally, the lawyer should consider structuring his or her relationships with both clients by adopting measures to minimize the adverse effects of an actual conflict, should one develop. These may include prospective waivers that would permit the attorney to continue representing the corporation in the event that the attorney must withdraw from the multiple representation, contractual limitations on the scope of the representation, explicit agreements as to the scope of the attorney-client privilege and the permissible use of any privileged information obtained in the course of the representations, and/or the use of co-counsel or shadow counsel to assist in the representation of the constituent client.

**Code:** DR 2-110; DR 4-101; DR 5-105; DR 5-107; DR 5-108; DR 5-109; DR 7-104

**Question**

Under what circumstances may a lawyer simultaneously represent a corporation and one or more of its officers, directors, employees or other constituents in the context of a governmental investigation? What disclosures must the lawyer make to her current and prospective clients and what consents must she obtain prior to undertaking such a representation? How may the lawyer

structure her relationship with her clients so as to minimize adverse consequences if conflicts between their interests arise?

## **Opinion**

In an era in which each day's edition of The Wall Street Journal brings fresh reports of companies under investigation, it has become increasingly common for lawyers to be asked to undertake simultaneous representation of a corporation and one or more of its officers, directors, employees or other constituents (sometimes collectively referred to as "constituents") in the context of a governmental investigation. In addition, in an era in which corporations are under increasing pressure to demonstrate that they are "good corporate citizens" by cooperating fully with governmental investigations, it has become increasingly likely that simultaneous representation of a corporation and its constituents may involve the representation of differing interests.

At the same time, there is relatively little guidance available to attorneys on the ethical issues implicated by a request for simultaneous representation of a corporation and an officer or employee of that corporation in the context of a governmental investigation. We have found no ethics opinions addressing the topic.<sup>1</sup> In addition, reported case law on multiple representation – which tends to be limited to issues such as when conflicts will require the disqualification of counsel or the reversal of a conviction – is of only limited assistance.<sup>2</sup>

As a result, we believe it would be helpful and timely to outline the ethical issues implicated by multiple representation of a corporate client and one or more officers, directors, employees or other constituents in the context of a governmental investigation. In particular, this Opinion focuses on: (1) the circumstances under which a lawyer for the corporation may ethically undertake simultaneous representation of one or more employees of the corporation; (2) the disclosures that must be made and the consents that must be obtained in order to render such multiple representation ethically permissible; and (3) the steps that can or should be considered to minimize potential harm to the corporate and employee clients if conflicts between their interests arise.<sup>3</sup> Although this Opinion deals specifically with multiple representations in the context of governmental investigations, we believe that most, if not all, of the concepts discussed in this opinion would apply to any multiple representation of a corporation and one or more of its constituents.

While there is no per se bar to simultaneous representation of corporate and employee clients in the context of governmental investigations, the Code of Professional Responsibility imposes three important restrictions on the permissibility of such representations. First, the lawyer must be able to conclude that a disinterested lawyer would, given the facts at hand, regard multiple representation as in the interest of both the corporate client and the employee client. Second, the lawyer must obtain the consent of both clients after full disclosure of the advantages and risks involved in multiple representation. Third, the lawyer must be alert to changes in circumstances that would render continuation of multiple representation impermissible.

In addition, the lawyer contemplating multiple representation should consider whether steps might be taken to structure his relationship with each client so as to minimize adverse consequences in the event that a conflict between them arises. For example, it may be

appropriate or even necessary for the lawyer to seek a prospective waiver from his clients permitting him to continue his representation of the corporate client in the event that a conflict arises between the corporate client and the employee client. Additionally, or alternatively, the lawyer may conclude that the disinterested lawyer test is more clearly satisfied if he jointly represents one or both clients with co-counsel or shadow counsel.

### **The Standard Articulated in DR 5-105**

DR 5-105 articulates the ethical standard governing the permissibility of representing multiple clients in a matter. Subject only to the exception contained in DR 5-105(C), the provisions of DR 5-105(A) and (B) prohibit undertaking or continuing in multiple representation “if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected” or “if it would be likely to involve the lawyer in representing differing interests.”

As defined by the Code, differing interests “include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest.” 22 N.Y.C.R.R. § 1200.1(a); see also NYSBA Comm. on Prof’l Ethics Op. 674 (n.d.). Accordingly, a finding of “adverse” or “differing” interests does not require “actual detriment” or any actual conflict; rather, a broad prophylactic rule is appropriate because it “not only preserves the client’s expectation of loyalty but also promotes public confidence in the integrity of the bar.” *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 131, 674 N.E.2d 663, 667 (1996) (discussing, on motion to disqualify, similar standard under DR 5-108 regarding conflicts with former clients).

Under DR 5-105, a lawyer may undertake or continue multiple representation of clients with potentially differing interests only if:

a disinterested lawyer would believe that the lawyer can competently represent the interests of each [client] and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

DR 5-105(C).

### **The Disinterested Lawyer Test**

Thus, under DR 5-105, the first determination that must be made before undertaking simultaneous representation of a corporate client and an employee client is that a disinterested lawyer would believe that a single lawyer could competently represent the interests of each client. In addition, since DR 5-105 also speaks to continuing a multiple representation, it requires the attorney to remain alert to potential conflicts and to reassess, as circumstances change, whether the disinterested lawyer test is still satisfied.

A “disinterested lawyer” is an objective, hypothetical lawyer “whose only aim would be to give the client the best advice possible about whether the client should consent to a conflict” or potential conflict. Simon’s New York Code of Prof’l Responsibility Ann. 554-55 (2003). If the lawyer believes that such a disinterested lawyer “would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for” consent to multiple representation.” EC 5-16.

In some instances, it will be obvious that the disinterested lawyer test cannot be satisfied with respect to the simultaneous representation of a corporate client and an employee client. For example, if the government is investigating securities law violations relating to the filing of false or misleading financial statements, a disinterested lawyer could not reasonably conclude that a single lawyer could competently represent both the corporation and an employee who has admitted wrongdoing in connection with the financial statements under investigation.

In such a scenario, the corporation would have a strong interest in avoiding or limiting criminal or civil liability by, among other things, cooperating fully with the government and providing any information sought by the government regarding the preparation of the financial statements.<sup>4</sup> The individual employee would, by contrast, have to consider a variety of factors before deciding whether it was in his interest to cooperate with the government, and he would need counsel able and willing to negotiate the best possible resolution of the matter for him.

In other scenarios, it would be clear that the disinterested lawyer test is easily satisfied. For example, in our same hypothetical investigation of securities law violations, an employee in the corporation's maintenance department who merely overheard comments regarding the need to alter the corporation's financial statements would have no reason for concern about personal liability. Such an employee would have no need for counsel to negotiate independently with the government on his behalf, and a disinterested lawyer would easily conclude that a single lawyer could competently represent the interests of both the corporation and the maintenance worker.

Many situations, however, are likely to be far less clear than the two scenarios described above. What if, for example, instead of working in the corporation's maintenance department, the employee was the head of one of the corporation's accounting divisions, albeit not the one involved in the financial statements under investigation? What if the employee worked in the accounting division under investigation, and had some, but not full, discretion to decide how to account for the transactions giving rise to the investigation? What if the employee had no decision-making authority, but nonetheless participated in booking the transactions? What if the employee is the corporation's CEO, who is not an accountant but who certified the accuracy of the corporation's financial statements?

In all such scenarios, the question of whether multiple representation would pass the disinterested lawyer test is much closer and likely would turn on the specific knowledge possessed by the employee, the specific laws or regulations implicated by the conduct, and the perceived scope of the government's investigation. As a result, in all such scenarios, the lawyer must take particular care to ensure that he has a sufficiently detailed grasp of the relevant facts to be able to make the assessment required by DR 5-105(C).

### **Obtaining the Facts Needed to Apply the Disinterested Lawyer Test**

The need for facts sufficient to apply the disinterested lawyer test raises the issue of what, if any, precautions a lawyer must take in his fact-gathering to avoid potential harm to his existing or prospective clients. In the typical case, an attorney's first encounter with a corporate employee will occur in the context of an interview in which the attorney is representing only the corporation and is engaged in fact-gathering on behalf of the corporation. In such interviews, it is typical for the attorney to advise the employee that: (1) the attorney represents the corporation,

not the employee; (2) any information imparted to the attorney is privileged, but the privilege is held by the corporation, not the employee; and (3) it will be up to the corporation to decide whether to waive the privilege and share any information imparted by the employee with third parties.

In all cases where the interests of the constituent and the interests of the corporation may differ, attorneys are affirmatively required to give at least part of the advice described above. The Code requires an attorney to advise a corporation's employees that she is "the lawyer for the organization and not for any of the constituents" in any situation in which "it appears that the organization's interests may differ from those of the constituents." DR 5-109(A). Given the ease with which the "differing interests" test is satisfied, we believe an attorney should usually advise a corporate employee that she represents the corporation rather than the employee. Furthermore, given the increased solicitude that courts and other authorities have shown for the reasonable expectations of a party in determining whether an attorney-client relationship has been formed,<sup>5</sup> an attorney also acts at the peril of his corporate client if the attorney fails to make clear whom she does and does not represent.

If, in an initial interview, a corporate employee asks the corporation's attorney whether he should consult with counsel, it is typical for the attorney to reiterate that he represents the corporation and therefore cannot advise the employee. Here, too, the Committee regards that practice as a prudent precaution. While DR 7-104(a)(2) allows an attorney to advise an unrepresented party to secure counsel,<sup>6</sup> the attorney also must bear in mind that as corporate counsel, "he owes allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity." EC 5-18. Because affirmatively advising a corporate employee to secure counsel may work against the interests of the corporation, we believe it is appropriate for corporate counsel to be reluctant to render that advice – at least in the absence of the consent of his client to do so.<sup>7</sup>

If a constituent requests, prior to an initial interview by corporate counsel, to be represented by corporate counsel, it is typical for corporate counsel to decline at that point to undertake multiple representation. The Committee regards that practice as a prudent precaution. While it is, in theory, possible that corporate counsel will already have facts sufficient to enable her to apply the disinterested lawyer test prior to an initial interview with the employee, it seems likely that in most instances she will not have sufficient facts. Thus, we regard it as likely to be an exceptional case in which corporate counsel could properly agree to represent one of the corporation's employees prior to an initial interview of that employee.

If an employee who has already been interviewed subsequently requests representation by corporate counsel – a request that typically is triggered by a request from the government to interview or take testimony from the employee – the corporate attorney will then need to determine whether he has sufficient facts to enable him to apply the disinterested lawyer test. If he does not, he must then determine how best to obtain those additional facts.

In this regard, the corporate attorney should take care to avoid proceeding in a manner that could work against the interests of his existing client, the corporation. Thus, for example, if the corporate attorney were simply to agree to meet again with the corporate employee for the purpose of determining whether he could represent the employee, without first discussing

whether the attorney may not be free to share with the corporation any additional information that was imparted, then the attorney may not in fact be able to share that information with the corporation, see, e.g., *United States v. Dennis*, 843 F.2d 652, 656-57 (2d Cir. 1988) (statements made by prospective client are privileged even if attorney ultimately declines the engagement), and might even in some cases be unable to continue to represent the corporation. See Restatement (Third) of the Law Governing Lawyers § 15 (2000) (addressing a lawyer's duty to protect information relating to the representation of a prospective client and how to protect against adverse consequences to an existing client). As a consequence, to protect the interests of the existing client, the corporation, it is important that the lawyer make clear to the employee that information shared in the interview will be disclosed to the corporation and that the corporation will control the decision as to whether to disclose such information further.

### **Consent After Full Disclosure**

If the attorney concludes that the disinterested lawyer test has been satisfied, the lawyer may undertake multiple representation only with the consent of each client after “full disclosure of the implications of the simultaneous representation and the advantages and risks involved.” DR 5-105(C).

“Full disclosure” means the provision of “information reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict . . . .” EC 5-16; cf. *People v. Gomberg*, 38 N.Y.2d 307, 314, 342 N.E.2d 550, 554 (1975) (“Attorneys are under an ethical obligation to disclose to their clients, at the earliest possible time, any conflicting interests that might cloud their representation.”).

Full disclosure also includes “disclosure of any and all defenses and arguments that a client will forgo because of the joint representation, together with the lawyer's fair and reasoned evaluation of such defenses and arguments, and the possible consequences to the client of failing to raise them.” NYCLA Ethics Op. 707 (1995).

This Opinion cannot, and does not attempt to, catalogue all possible advantages and risks attendant to simultaneous representation of a corporation and one or more of its employees. Instead, the Opinion attempts to provide general guidance in this area by noting some of the more common advantages and risks, with the caveat that in each case in which multiple representation is contemplated, the attorney must give careful, fact-specific consideration to the potential risks and advantages of the representation so that there can be full disclosure to the clients within the meaning of DR 5-105(C).

### **Risks and Advantages from the Corporate Client's Perspective**

In the case of a corporate client, the most common (and most readily apparent) advantage to multiple representation is avoiding the expense of separate counsel. Other common advantages include providing employees with the benefit of counsel who has a detailed and broad knowledge of the relevant facts and avoiding the suggestion that there is any division of interest between the corporation and its employees.<sup>8</sup>

With respect to the risks posed to a corporate client from multiple representation, the most serious potential risk will tend to be the possibility that a conflict will arise that will disable

corporate counsel from continuing as corporate counsel. If a matter is time sensitive, or if corporate counsel has invested considerable time in the representation, the prejudice to the corporation from such a development could be quite significant.

In this regard, corporate counsel should ensure that the corporation understands that if the interests of the corporation and the employee become materially adverse, corporate counsel will not be able to continue in the matter on behalf of the corporation unless the employee consents to counsel doing so. See DR 5-108(A) (prohibiting, absent consent after full disclosure, representation that is materially adverse to a former client in the same or a substantially related matter). In addition, if there is any reasonable possibility of a divergence of interests, we believe that corporate counsel should seriously consider advising the corporation to obtain a prospective waiver sufficient to satisfy DR 5-108(A) as a condition of consenting to multiple representation. Indeed, in some cases, the absence of such a waiver might well cause the multiple representation to fail the disinterested lawyer test.

Other common disadvantages, from the corporation's perspective, to multiple representation include potential loss of credibility with the investigating agency, complication of corporate counsel's ability to report facts to the corporation, and complication of the corporation's ability to report facts to the government.

With respect to the first of those possible disadvantages, it may well be the case that a government attorney will regard with greater suspicion the testimony of a corporate employee that is favorable to the corporation if the employee is represented by counsel for the corporation. Indeed, a government attorney may even affirmatively object to the multiple representation. In such cases, it is not uncommon for the corporation or its counsel to decide against multiple representation even if it is believed to be permissible.

Multiple representation may also complicate corporate counsel's ability to report to the corporation because, absent consent, she may not be able to pass on the confidences or secrets of his employee client. See DR 4-101(B)(3); DR 4-101(C)(1) (confidences and secrets of a client cannot be disclosed or used for the advantage of a third party without consent of the client after full disclosure); *Greene v. Greene*, 47 N.Y.2d 447, 453, 391 N.E.2d 1355, 1358 (1979) (prohibition against disclosure of client confidences covers any confidential communication made by the client in the course of the lawyer's representation and continues even after the dissolution of the attorney-client relationship).<sup>9</sup> While such a factor is likely to be less significant in cases in which the prospective employee client has already been extensively debriefed, it nonetheless remains a potential complicating factor that ordinarily should be disclosed prior to seeking consent for multiple representation.

Similarly, corporate counsel should ordinarily consider and discuss with the corporation the possibility that multiple representation could complicate the corporation's ability to cooperate with, and report facts to, the government. As noted above, the current state of the law, and the current state of mind of law enforcement officials, operate to place considerable pressure on corporations to be willing to self-report, to waive the attorney-client privilege and effectively to serve as an investigative arm of the government with respect to the conduct of their employees. Allowing corporate counsel to simultaneously represent a corporate employee may put the corporation or its counsel in the undesirable position of having information that is of interest to



the government but that cannot be shared with the government because the employee client has declined to waive his attorney-client privilege.<sup>10</sup>

### **Risks and Advantages from the Employee's Perspective**

From the employee's perspective, many of the common advantages of multiple representation tend to be similar to the advantages that exist from a corporate client's perspective. Those advantages typically include obtaining counsel who has a detailed and broad knowledge of the relevant facts and avoiding the suggestion that there is any division of interest between the corporation and the employee.<sup>11</sup>

The principal risks posed to the employee client from multiple representation typically tend to be that corporate counsel's larger constituency may render it difficult for him (despite his best intentions) to be as vigilant in his protection of the individual client's interests, or that a divergence of interests will require the attorney to withdraw from representation of the employee client. Any such risks should be discussed with the prospective employee client prior to obtaining his consent to multiple representation. In addition, where the need to withdraw would be likely to work a significant disadvantage to the employee client (because, for example, the matter is time sensitive or especially complex), consideration should be given to the advisability of having co-counsel or shadow counsel.<sup>12</sup>

### **Structuring the Representation to Minimize Potential Adverse Consequences**

As the foregoing discussion indicates, an attorney contemplating multiple representation can, and often should, consider whether the attorney-client relationship can be structured to minimize potential drawbacks to multiple representation. Such structuring may include obtaining prospective waivers of conflict, contractually limiting representation to minimize the possibility of conflicts, having a written understanding with regard to confidential information learned during the representations, and providing for co-counsel or shadow counsel.

### **Prospective Waivers**

There is, as a general matter, no ethical bar to seeking a waiver of future conflicts. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 372 (1993); NYCLA Ethics Op. 724 (1998). In order to best ensure the likelihood that such waivers will be effective, however, it is advisable to put them in writing, see ABA Formal Op. 372, and they should otherwise meet all the requirements for contemporaneous waivers. See *id.*; NYCLA Ethics Op. 724; see also, e.g., *Woolley v. Sweeney*, No. 3:01-CV-1331-BF, 2003 U.S. Dist. LEXIS 8110, at \*22 (N.D. Tex. May 13, 2003) (rejecting client's prospective waiver of conflicts where client "has never had the benefit of full disclosure"). The nature of these requirements depends on the specific conflicts to be waived, which, in turn, depend on the interests of the various clients. NYCLA Ethics Op. 724 (stating that "adequacy of disclosure and consent will depend . . . upon the circumstances of each individual case") (citation omitted).

In seeking to obtain a prospective waiver from clients, it frequently will be difficult for an attorney to make "full disclosure" to the same extent as in connection with a concurrent waiver. This is because it may not be clear to the attorney at the outset of the representation just what conflicts might later arise. To satisfy his obligation of full disclosure, then, the lawyer seeking a

prospective waiver should at least advise the client “of the types of possible future adverse representations that the lawyer envisions, as well as the types of matters that may present such conflicts. The lawyer also should disclose the measures that will be taken to protect the client or prospective client should a conflict arise.” NYCLA Ethics Op. 724. “[I]t would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicted clients would survive scrutiny.” ABA Formal Op. 372. In other words, the more specific the lawyer can be, the more likely the waiver is to be upheld. *Id.*

In the context of governmental investigations, prospective waivers may be useful in dealing with a number of the potential conflicts discussed above. Most commonly, prospective waivers may be sought in such cases from an employee client regarding the ability of corporate counsel to continue representing the corporate client in the event an actual or potential conflict develops. In addition, if there is any realistic likelihood that the governmental investigation might lead to litigation, consideration should be given to obtaining a waiver of the employee client’s right to object to being cross-examined by his former attorney. Such a waiver will satisfy the specificity requirement for advance waivers because the constituent client will understand the nature of the future representation in which the lawyer would cease to represent the individual and continue to represent the entity.<sup>13</sup>

It bears noting that even if the prospective waivers do comport with the requirements for contemporaneous waivers as of the time they are made, the lawyer must still revisit the issues at the time the actual or potential conflicts arise. ABA Formal Op. 372 (stating that securing “‘second’ waiver” from client at time that actual conflict develops “in many cases . . . will be ethically required”); NYCLA Ethics Op. 724 (stating that “[n]otwithstanding” prospective waiver, “the lawyer must reassess the propriety of the adverse concurrent representation . . . when the conflict actually arises”). If the actual or potential conflicts turn out to be “materially different” from those the clients waived, the lawyer will not be permitted to rely on the prospective waivers, and will have to obtain new, contemporaneous waivers. NYCLA Ethics Op. 724. Likewise, courts will not necessarily accept the validity of prospective waivers, and may have to satisfy themselves that such waivers continue to be appropriate in light of the circumstances that actually develop. Cf. *United States v. Alex*, 788 F. Supp. 359, 363 (N.D. Ill. 1992) (rejecting waiver of conflicts by former clients as “by no means binding on this court,” and recognizing “obligation to independently review the former clients’ consents to waive their former counsel’s conflict of interest”). Thus, in seeking such prospective waivers, the lawyer should be as specific as possible, in order to ensure that the lawyer has adequately disclosed the risks, and to maximize the likelihood that a reviewing court will conclude that the waiver was knowledgeably made.<sup>14</sup>

### **Contractual Limits on Representation**

A lawyer may likewise ethically limit by contract his representation of a client, provided that the representation still comports with the requirements of the N.Y. Code of Professional Responsibility. NYSBA Comm. on Prof’l Ethics Op. 604 (1989). In effect, this means that the representation may not be so limited as to be inadequate. Ass’n of the Bar of the City on New York Comm. on Prof’l & Judicial Ethics [hereinafter “ABCNY”] Formal Op. 2001-3 (2001). Stated otherwise, the representation “must be sufficient . . . to render practical service to the client,” and must not “materially impair the client’s rights.” NYSBA Ethics Op. 604. Such a

limitation on representation is, however, subject to many of the same requirements as valid waivers: there must be full disclosure of the terms of the engagement and the client must consent. ABCNY Formal Op. 2001-3. In addition, such a representation should not be proposed if “a client could not reasonably conclude that the proposed arrangement serves its interests.” Id. Finally, any such representation “must cover a discreet matter or a discreet stage of a matter and not terminate before the completion of that stage.” NYSBA Ethics Op. 604.

Accordingly, it may be possible for a lawyer to limit his representation of an employee of the corporation to a discreet stage of an investigation in which a conflict with the corporation is unlikely to arise. For example, the lawyer may attempt to limit his representation of the employee to the investigatory stage of the case, thereby eliminating any risk that he would still represent the employee at the time of trial, should he then need to cross-examine the employee. Alternatively, depending on the facts of the particular case, the lawyer may be able to limit the scope of his representation of the employee even more narrowly, perhaps to just a single interview or a handful of interviews with the government about a narrowly circumscribed topic.

### **Understandings with Respect to Privileged and Confidential Information**

Once it is decided that the lawyer will represent the corporation and the constituent, it is important to have a clear understanding with both clients as to (1) whether and what kind of confidential information will be shared; (2) who will control the privilege with respect to such information; (3) how the attorney-client privilege will operate in the event a dispute arises between the clients concerning the matter; and (4) whether the lawyer will continue to represent the corporation even if a conflict develops between the corporation and the constituent. While the New York Code does not require that such understandings be in writing, we strongly recommend that they be in writing.

### **Co-Counsel or Shadow Counsel**

Another potential middle ground that may be appropriate in some cases is the use of co-counsel or shadow counsel – that is, separate counsel who serves as additional counsel for the corporate employee and thus is available to offer independent advice to the employee and, if necessary, to take over as sole counsel for the employee. While the use of such counsel diminishes one of the advantages of multiple representation – namely, cost-savings – it can also significantly diminish the potential risks of multiple representation. If the co-counsel’s existence is disclosed to the government (as it is in some cases), it can allay any concern on the part of the government that the corporate employee is not receiving independent legal advice. In addition, if the matter is a complex or time-sensitive one, having co-counsel who is kept reasonably well apprised of facts and developments could help prevent prejudice to the employee if it is subsequently determined that corporate counsel cannot continue to represent the employee.

### **Conclusion**

Multiple representations are ethically complex, and the high-stakes nature of a typical governmental investigation only adds to the complexities. Before undertaking simultaneous representation of a corporation and one or more of its employees in the context of a governmental investigation, an attorney must carefully consider whether a disinterested lawyer

would conclude that he can competently represent the interests of each client. The attorney must also take care to ensure that she has sufficient information to apply the disinterested lawyer test, and must give careful, fact-specific consideration to the risks and advantages to multiple representation and discuss those factors fully with each client before seeking their consent to multiple representation. In addition, throughout the representation, the attorney must remain alert to changing circumstances that may render continuation of multiple representation impermissible or inadvisable, and the attorney must discuss any such circumstances with his clients. Finally, the attorney should give consideration to whether there are ways in which the multiple representation can be structured so as to minimize adverse consequences to her clients should a conflict between them arise.

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1. Although we have found one ethics opinion in New York relating to multiple representation in a corporate context, that opinion is limited to the relatively narrow issue of an attorney's duties when perjury is committed by a corporate officer and the attorney represents both the officer and the corporation. NYSBA Comm. On Prof'l Ethics, Op. 674 (1995).

2. The issues that might arise at trial are distinct from those implicated at the investigative stage of a matter. In addition, whether counsel should be disqualified and whether counsel should have accepted or continued in multiple representation are separate questions. Thus, while decisions rendered in the context of litigated actions provide some assistance, they do not define the universe of issues relevant to deciding whether it is ethically permissible to undertake multiple representation of a corporate client and one or more employee clients in the context of a government investigation.

3. The guidelines established in this Opinion apply to situations where a lawyer represents or may represent an organization and also one of its constituents, regardless of whether the constituent is an officer, director, or employee, and we use those terms interchangeably throughout the Opinion. However, as with all circumstances in which disclosure and consent is or may be required, the degree of sophistication of the constituent will play a role in how detailed the discussions of those issues need to be.

4. In recent years, both the Department of Justice and the Securities and Exchange Commission, among other law enforcement agencies, have repeatedly cited the willingness of a corporation to cooperate with governmental investigations (which cooperation is sometimes requested to include waiver of the attorney-client privilege) as an important factor in determining whether to hold a corporation civilly or criminally liable for the actions of its officers or employees. See, e.g., United States Attorneys Manual, Criminal Resource Manual 161 (January 20, 2003 memorandum of Deputy Attorney General Larry D. Thompson announcing a revised set of principles governing federal prosecution of business organizations) ("The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."); SEC Release No. 34-44969, 2001 WL 1301408 (October 23, 2001) (Report on the Relationship of Cooperation to Agency Enforcement Decisions) (describing the nature and extent of a company's cooperation with the SEC as important factors to be taken into account in determining whether an enforcement action will be brought against the company).

5. See, e.g., Restatement (Third) of the Law Governing Lawyers § 14 & cmts. e-f (conditioning attorney-client relationship on client's intent and lawyer's failure to "manifest lack of consent," and stating that failure of corporate counsel to clarify whom he represents "in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer"); Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. Tex. L. Rev. 497, 506 (1998) (noting the inability of many corporate employees to understand the distinction between the lawyer's role as corporate counsel and his role as counsel for the employee in his individual capacity); see also *Rosman v. Shapiro*, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (implying attorney-client relationship between corporate counsel and corporate officer where attorney represented close corporation and officer "reasonably believed that [attorney] was representing him"). But see *Talvy v. Am. Red Cross*, 205 A.D.2d 143, 149-50, 618 N.Y.S.2d 25, 29-30 (1st Dep't 1994) ("Unless parties have expressly agreed otherwise in the circumstances of a particular matter, a lawyer for a corporation represents the corporation, not its employees."), *aff'd mem.*, 87 N.Y.2d 826, 661 N.E.2d 159 (1995).

6. DR 7-104(a)(2) states that "[d]uring the course of the representation of a client a lawyer shall not give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client." However, since the employee will not typically be named in any related action actually being litigated before a tribunal while the governmental investigation is still pending, the employee, properly speaking, may not be a "party" within the meaning of this provision.

7. As noted above, DR 5-109(A) prescribes what corporate counsel must instruct a corporate constituent in cases where the interests of the corporation and the constituent "differ." Where the interests of the entity and the interests of the constituent are actually adverse, however, the New York Code provides no additional guidance and requires nothing more. It nevertheless may be advisable to consider that in situations of actually adverse interests, the ABA Model Rules provide specific guidance not also provided by the New York Code. Comment 10 to ABA M.R. 1.13 states: "There are times when the organization's interest may be or become adverse to those of [the constituent]. In such circumstances the lawyer should advise any constituent . . . that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for the constituent individual, and that discussion between the lawyer for the organization and the individual may not be privileged." Of course, there are many situations in which the entity's and the constituent's interests will or might "differ" within the meaning of the New York Code yet such warnings and separate representation will not be necessary.

8. Less sophisticated corporate clients might also mistakenly believe that multiple representation carries the benefit of ensuring that their employees are represented by attorneys whose first loyalty is to the corporation. In such cases, it is incumbent upon corporate counsel to make clear to the corporation that he will owe a full and equal duty of loyalty to the employee

clients, and that, if she is unable to discharge that duty, she will not be able to continue representing the employee clients.

9. Although there is an exception to the obligations of DR 4-101 “where an attorney acts for two or more clients jointly,” the scope of this exception is not entirely clear. Some authorities suggest that it is limited “only to the evidentiary privilege and applies only in subsequent litigation between the clients.” NYSBA Comm. on Prof’l Ethics Op. 555 (1984). These sources stress that before confidences may be shared between jointly represented clients, “the circumstances must clearly demonstrate that it is fair to conclude that the clients have knowingly consented to the limited non-confidentiality.” *Id.* Courts, however, have appeared more willing to infer such consent from the nature of the relationships in a multiple representation. See *Tekni-Plex*, 89 N.Y.2d at 137, 674 N.E.2d at 670 (“Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other . . . .”); accord *Talvy*, 205 A.D.2d at 149-50, 618 N.Y.S.2d at 29-30. Given these differing approaches, the Committee believes that it will always be advisable, prior to sharing the confidences of one client with another, for the lawyer to obtain the client’s consent, after full disclosure. See DR 4-101(C)(1). This can be done in an engagement letter that sets out the understandings and agreements between the corporate client and the employee client with regard to the sharing and control of confidential information.

10. For an example of one such potential complication, see *infra* note 13.

11. Cost savings will not ordinarily be among the potential advantages to the employee client because the cost of separate counsel would in many, if not most, cases be borne by the corporation. Payment of such costs by the corporation is plainly allowed so long as there is full disclosure and the client consents. See DR 5-107.

12. To determine whether to withdraw from employment in the context of a multiple representation, a lawyer should refer to, *inter alia*, DR 2-110 and EC 5-15.

13. In seeking the prospective waivers and advance permission to reveal confidential information (see discussion *infra* at 13), counsel should also bear in mind any specific reporting requirements to which the corporate client may be subject. For example, certain corporations, such as banks and broker-dealer firms, are subject to federal laws that require them to report suspicious financial transactions by filing suspicious activity reports (“SARs”). See, e.g., 12 C.F.R. pt. 21. If counsel for such a corporation undertakes the simultaneous representation of a corporate employee, counsel may obtain, in the course of representing that employee, otherwise privileged information regarding suspicious transactions that, as an agent of the corporation, counsel may be obligated to disclose to the corporation and that the corporation, in turn, may be obligated to report to the government. As such, counsel for corporations with reporting requirements should consider seeking prospective waivers and advance permission to disclose information from any potential employee client that would permit the filings of such reports. While DR 4-101(C)(2) permits an attorney to reveal client “[c]onfidences or secrets when . . . required by law . . . ,” the precise scope of this provision is unclear. It is thus uncertain whether the attorney, absent consent from the employee client, could report to the government information acquired in the course of representing that employee. Moreover, given that some of

the reporting laws prohibit the filer of a SAR from informing any party that is involved in the underlying transaction, see, e.g., 31 U.S.C. 5318(g)(2)(A)(i), a prospective waiver prior to undertaking the representation may be the only opportunity for counsel to obtain the employee client's consent.

14. In evaluating the validity of prospective waivers, reviewing courts try to ascertain whether the client was reasonably informed about the future matter. See Restatement (Third) of the Law Governing Lawyers § 122 (2000) (defining “informed consent” to a prospective (as well as current) waiver as “requiring that the client or former client have reasonably adequate information about the material risks of such representation”). ABA Formal Op. 372 (“the particular future conflict of interest as to which the waiver is invoked [must have been] reasonably contemplated at the time the waiver was given”); NYCLA Ethics Op. 724 (an advance waiver is valid if “the subsequent conflicts should have been reasonably anticipated by the original client based on the disclosures made and the scope of the consent sought”). Where the attorney specifically identifies the party or parties with whom the client's interests potentially could differ and explains how that divergence could occur, courts have tended to uphold prospective waivers. See *Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, 1345 (9th Cir. 1981) (quoting *In re Boivin*, 533 P.2d 171, 174 (Or. 1975); accord *Fisons Corp. v. Atochem N.A., Inc.*, No. 90 Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284, at \*15 (S.D.N.Y. Nov. 14, 1990); see also *Interstate Props. v. Pyramid Co.*, 547 F. Supp. 178, 181-82 (S.D.N.Y. 1982). In the scenarios being considered in this opinion, the party with whom the client's interests might differ normally will be reasonably clear. Cf. *W.R. Grace & Co. v. Goodyear Tire & Rubber Co.*, No. 1:99-CV-305, 1999 U.S. Dist. LEXIS 22554, at \*12-\*16 (W.D. Mich. 1999) (upholding prospective waiver executed by members of defense group that prohibited members from objecting “to the continued representation by Common Counsel of all or any of the other members [of the group] in connection with any legal services arising out of” the subject of the agreement). Moreover, even in litigation, courts have upheld prospective waivers involving representation of a corporation and its constituents. See *In re Rite Aid Corp. Sec. Litig.*, 139 F.Supp.2d 649 (E.D. Pa. 2001) (permitting a lawyer who represented the corporation and several of its executives to withdraw from representing one of the executives and continue to represent the corporation after a conflict developed, based upon a written engagement letter containing an advance waiver); see also *Zador Corp. v. Kwan*, 37 Cal. Rptr. 2d 754 (Cal. Ct. App. 6th Dist. 1995) (upholding an advance waiver permitting a lawyer who represented a corporation and an individual to continue representing the corporation after a conflict developed between the corporation and individual).

Issued: June, 2004

## **Representing the Company in an Internal Investigation**

### **Substance of Upjohn warning:**

- I am not your lawyer. I represent the company and not you.
- I am not allowed to give you legal advice and you should not take anything I say as legal advice to you.
- The company holds the attorney-client privilege, and the company may decide to waive that privilege as it sees fit and may share what is said in the interview with others outside the company, including enforcement agencies.

.....  
**District of Columbia Opinion 269 (1/15/97)**

### **Obligation of Lawyer for Corporation to Clarify Role in Internal Corporate Investigation**

A lawyer retained by a corporation to conduct an internal investigation represents the corporation only, and not any of its constituents, such as officers or employees. Corporate constituents have no right of confidentiality as regards communications with the lawyer, but the lawyer must advise them of his position as counsel to the corporation in the event of any ambiguity as to his role.

A corporation may hire and pay the fees of a lawyer to represent corporate constituents, so long as there is no interference with, or diminution of, the lawyer's obligations to his constituent client. Where the lawyer proposes to represent the corporation and a constituent, or two or more constituents, the general conflict provisions of Rule 1.7 must be applied to determine the propriety of the dual representation, and appropriate client disclosures must be made and consents received.

### **Applicable Rules**

Rule 1.7 (Conflict of Interest: General Rule)

Rule 1.8(e) (Conflict of Interest: Prohibited Transactions)

Rule 1.13 (Organization as Client)

Rule 4.3 (Dealing With Unrepresented Person)

### **Inquiry**

This inquiry presents several questions concerning the obligations of a lawyer conducting an investigation of possible wrong-doing by a corporate client or its employees. Such investigations are not uncommon today. A corporation may, for example, investigate itself as part of a routine regulatory compliance program, it may do so in response to information received from some source suggesting that a violation of law may have occurred, or it may do so in the course of, or



in anticipation of, a government proceeding. During such an investigation, counsel for the corporation will likely review records and files maintained by various corporate officials and employees, and may interview such persons at various levels of seniority within the corporation.

The inquirer asks whether an attorney-client relationship is created between the corporate counsel performing the investigation and corporate employee-interviewees; what professional obligations, if any, are owed by the lawyer to the employees in such a circumstance; and what is the nature and extent of confidentiality which applies to information acquired by the lawyer from the employees. The inquiry also raises, inferentially, a question about the general obligations of counsel retained by the corporation to represent the interests of its employees.

Although the inquiry poses its questions in the context of outside counsel performing the legal work, in-house counsel may perform similar activities. Our opinion extends to both types of counsel.

## **Discussion**

### **Attorney-Client Relationship**

Under the former Code of Professional Responsibility, the relationship of a lawyer for a corporation to corporate officials was addressed in Ethical Consideration (EC) 5-18, but not in the Code itself. EC 5-18 read, in relevant part, that:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, representative or other person connected with the entity.

That ethical principle was elevated in stature in the Rules of Professional Conduct, where it (and related principles) were incorporated in Rule 1.13.<sup>[1](#)</sup>

Subpart (a) of Rule 1.13 makes clear that, when a lawyer is retained to represent a corporation, the lawyer's client is the corporation *only*, acting through its duly authorized constituents (such as its officers and employees).<sup>[2](#)</sup> The situation was no different under the Code of Professional Responsibility. *See* Opinion No. 159. In this circumstance, then, the lawyer does not have, by reason of the lawyer's representation of the corporation, attorney-client responsibilities to the corporate constituents with whom he may be dealing in the course of his investigation.

Nevertheless, in some settings, a lawyer for the corporation may have an incentive, grounded in the lawyer's desire to further his client's interests, to minimize any perception by the corporate constituent that the corporation and the constituent may have differing interests in the subject matter of the representation, lest such perception affect the willingness of the constituent to be candid and forthcoming with the lawyer. While a lawyer's obligation to represent a client zealously (Rule 1.3(a)) might suggest that the client's need for information from the constituent is the lawyer's only concern, the Rules specifically require that the lawyer be mindful of the interests of the constituent.

Subpart (b) of Rule 1.13 makes clear the obligation of the lawyer to inform corporate constituents of the identity of the lawyer's client when there is a potential for conflict between the position of the corporation and that of the constituent. Such a potential for conflict is a

possibility where, for example, the person being interviewed was more than a passive observer of some act or omission which may be attributable to the corporation, but was instead a person who may have been directly or indirectly responsible for the questioned conduct. Such person's interests may be in conflict with those of the corporation, which may want to discipline or terminate him/her or which may, vis-à-vis a third-party (such as a government agency or a civil litigant), endeavor to distance itself from the person's conduct, such as by acknowledging the conduct but denying responsibility for it, or by characterizing the conduct as that of an employee acting contrary to company policy or direction.

The corporate constituent being interviewed by a lawyer for the corporation, however, may consider the lawyer as also representing the employee's personal interests, absent a warning to the contrary. The employee could understandably conclude that, since he is employed by the corporation and the lawyer has been retained to serve the interests of the corporation, the lawyer would not be pursuing interests adverse to those of the employee. Rule 1.13(b) specifically addresses this potential for misunderstanding by the corporate constituent by requiring the lawyer to explain the identity of the lawyer's client "when it is apparent that the organization's interests may be adverse to those of the constituents with whom the lawyer is dealing."<sup>3</sup> Comment [8] to Rule 1.13 advises the lawyer in such a situation to

advise any constituent . . . of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain separate representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide representation for that constituent individual, and that the discussions between the lawyer for the organization and the individual may not be privileged.

Disclosure is required not just when an actual conflict exists between the interests of the corporation and those of the employee (for example, when the corporation has already confided to the lawyer that it will concede wrong-doing by the employee but will attempt to avoid corporate responsibility for any illegality). Disclosure is also required when there "may be" an adversity between the interests of corporation and employee. There "may be" an adversity when the corporation has not yet irretrievably committed itself to a position in the matter, but where one such position might be adverse to the employee. Such a possible adversity would almost always arise, then, when the corporation is able to take a position adverse to the employee. On the other hand, Rule 1.13(b) applies only when the possible conflict is "apparent," which we interpret to mean actually apparent to the lawyer or apparent to a reasonable lawyer under the circumstances.<sup>4</sup> As so interpreted, the obligation of disclosure would not arise in those situations where the lawyer had no reason to believe that there was any possibility of adversity between corporation and employee when the interview was conducted.<sup>5</sup>

### **Confidentiality**

As Comment [3] to Rule 1.13 notes, communications between the lawyer and the person being interviewed are protected by Rule 1.6 (Confidentiality of Information), but the protection accorded is for the benefit of the client corporation, not the interviewee.<sup>6</sup> See also *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Thus, the interviewee has no right to expect that disclosure or use of the information provided by him or her to the lawyer will be subject to his/her control

under Rule 1.6, as the corporation will have the right to use the information to serve its purposes. In this regard, it makes no difference whether the interviewee is an employee performing routine services, or a corporate director or officer entrusted with more significant responsibilities. Both are persons with interests potentially separate from those of the corporation.

Notwithstanding the law on this subject, a corporate interviewee might reasonably conclude that the information she provides to the investigating lawyer will be treated as confidential by the lawyer, perhaps because she mistakenly believes that the lawyer is representing her also. This, then, is another situation in which Rules 4.3(b) and 1.13(b) may require the lawyer to clarify his role and the status of the information to be provided by the interviewee.

### **Representation of Constituents**

A further question presented in the inquiry concerns the obligations of a lawyer who is retained by a corporation to represent one of its constituents, such as a corporate officer, director or employee. Such retentions, under which the corporation is typically responsible for the lawyer's fees, are not unusual when the representation concerns a matter arising from the constituent's work for the corporation. One aspect of the ethical concerns in such an arrangement is addressed in Rule 1.8(e), which permits a lawyer to accept compensation from someone other than the client (which, in this case, is the corporate employer of his client), but only where the client consents to the arrangement, where the arrangement does not interfere either with the exercise of the lawyer's professional judgment on behalf of his client or with the attorney-client relationship, and where client confidences are protected.

Where such representation is of the constituent alone, that person is the lawyer's sole client, just as the lawyer representing the corporation has that entity as his sole client. The lawyer has no attorney-client relationship with the person paying the lawyer's fees, and the lawyer must take care that his activities on behalf of his client are not influenced by that person. *Id.* And as regards attorney-client confidentiality, that obligation is owed to the constituent-client only, and not to the person paying the lawyer's fees. *Id.*

The lawyer retained by the corporation to represent the employee also may have a conflict of interest concern under Rule 1.7(b)(4), which applies when the lawyer's work on behalf of a client will or reasonably may be affected, not by obligations to another client, but by the lawyer's financial or personal interests. Such interests could include continuing referral or unrelated other work for the corporation, which could be influenced by the manner in which the lawyer represents the employee. For example, it is not unthinkable that a lawyer who is regularly paid by a stock brokerage to represent its brokers individually may have a financial disincentive to represent a broker in a manner which implicates the brokerage in wrong-doing. Where a situation like that will or may arise, the lawyer could represent the individual client only with the client's informed consent to this potential conflict of interest.<sup>7</sup>

### **Multiple Representation**

Finally, where the lawyer is asked to represent in the same matter a constituent and the corporation, or two constituents, the same types of conflicts may arise as in any other situation where a lawyer (or law firm) represents more than one party in the same matter.<sup>8</sup> Where the

potential clients are directly adverse (or become directly adverse after commencement of the dual representation), the dual representation is absolutely prohibited under Rule 1.7(a). But even where the parties are nominally aligned together, there may be a risk that the representation of one will adversely affect the representation of the other. For example, one client may wish to settle a matter in litigation, while the other may not and might perceive his/her litigation position to be prejudiced by a settlement by the other client. In such a situation, the clients represented by the same lawyer are not advancing interests adverse to one another so as to invoke the unqualified prohibition of dual representation under Rule 1.7, but Rules 1.7(b)(2) and (3) are clearly implicated in such a situation, since one client's interests cannot be zealously pursued without likely adverse effect on the interests of the other client. Such dual representation could only be accomplished, then, with the consent of both clients, "after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation. . . ." Rule 1.7(c). The nature and content of the disclosure will obviously be determined by the facts and circumstances of the matter and the lawyer's representation of the potentially adverse clients. Among the subjects of disclosure that may be unique to a lawyer's representation of a corporation and an employee, or two employees of the same corporation, are the lawyer's pre-existing relationship with the two clients, whether one of the clients is an expected source of additional, unrelated legal work for the lawyer, and who will be paying the lawyer's fees (if not the client).

The disclosure should also address the fact and consequences of a possible disqualification of the lawyer from further representation of the client in the event the dually-represented clients later plan to take positions actually adverse to each other in the same matter. One of those consequences could be the inconvenience, expense and possible legal risk associated with the need for the client to retain new counsel.

It would not be impermissible for the lawyer in such a dual representation to seek the consent of one of the clients to continue representation of the other client in the event of an actual adversity under Rule 1.7(a) that requires termination of the dual representation. But such consent must be based on disclosure of the consequences to that client of granting such consent, and disclosure to the client for whom the representation would continue of any limitations on that continued representation. Perhaps the most significant area to be addressed in disclosures to both clients is how the lawyer's confidentiality obligation to the client to be terminated will be protected, and how the representation of the continuing client will be affected by the lawyer's continuing confidentiality obligation to the terminated client. In circumstances where the dual representation cannot be continued, Rule 1.9 (Conflict of Interest: Former Client) may prevent the lawyer from continuing to represent either client unless one of the clients has granted this particular consent.

On the other hand, there may be many dual representations where the interests of the two parties have no reasonable likelihood of becoming adverse, in which case Rules 1.7(b)(2) and (3) would not be applicable, and client consent would not be needed. But the existence of the Rule 1.7(b) criteria may not always be apparent or readily determinable at the outset of a representation, and a lawyer should be careful not to resolve unilaterally close conflict questions against the interests of clients or prospective clients. Comment [7] to Rule 1.7 describes the situation as follows:

The underlying premise [of Rule 1.7(b)] is that disclosure and consent are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide

wholehearted and zealous representation or if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer's assumption of the other representation in question. Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.

Thus, in judging whether one representation is "likely" to affect adversely another representation, the lawyer must look at the proposed dual representation from both an objective perspective and from the perspective of the potentially affected client's reasonable expectation of loyalty. Each case will, obviously, turn on the particular facts and circumstances presented.

Inquiry No. 96-2-3

Adopted: January 15, 1997

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1. District of Columbia Rule 1.13 reads as follows:

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

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

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

2. Such constituents may, however, hire counsel to represent *their* interests in matters concerning the corporation. A plant manager, for example, may obtain personal representation during an investigation of possible illegal waste disposal at a facility under his supervision.

In the event of any ambiguity concerning whether the lawyer is being hired by the constituent to represent the corporation or constituent, the lawyer should clarify the client's identity at the outset of his dealings with the constituent, as any uncertainty is likely to be resolved in favor of a reasonable expectation of the constituent that an attorney-client relationship has been established with it. *Cf. Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978).

A representation of the corporation does not preclude representation of a constituent, and vice versa, even in the same matter. *See* Rule 1.13(c). Such additional representation, discussed later in this Opinion, would be governed by the conflicts provisions of the Rules of Professional Conduct, including Rules 1.7 and 1.9.

3. That disclosure obligation derives, in part, from Rule 4.3, concerning a lawyer's obligations when dealing with unrepresented persons generally. Under that Rule, a

lawyer representing a client shall not give advice to an unrepresented person (other than advice to secure counsel) where the interests of that person may be in conflict with the interests of the lawyer's client, and shall not, even with respect to a person whose interests are not in conflict with those of the lawyer's client, leave the impression that the lawyer is disinterested. Thus, even apart from any special circumstances that might exist when a lawyer for a corporation interviews a corporate employee, Rule 4.3(b) requires the investigating lawyer to clarify his position "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter. . . ."

4. Limiting the disclosure obligation of Rule 1.13(b) to situations where the possible conflict was actually apparent to the lawyer would frustrate the protective purpose of the Rule by allowing a lawyer to be willfully blind to certain circumstances to avoid their "appearance" to him.
5. The only Rule 1.13 Comment relevant to the obligation to make a disclosure to corporate constituents is [9], which is not particularly helpful: "Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case."
6. Where the lawyer, through act or omission, reasonably leaves the constituent with the impression that there is an attorney-client relationship between them, the constituent's communications will be given protection under Rule 1.6. That was the situation in *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), where the lawyers for a trade association gave some individual members of a trade association the impression that they were also representing them when collecting information from the members. When a matter later arose for another client in which the information collected from the members might be used against them, the law firm was required to withdraw from representation because of its conflicting confidentiality obligations to the members.
7. Conflict of interest issues are similarly raised when representation of the corporate constituent is being provided by an in-house lawyer. The in-house lawyer, like outside counsel, has a concern under Rule 1.7(b)(4), in this case whether his representation of the corporate constituent will or reasonably may be affected by his personal employment interests with the corporation. He also has a multiple-client concern under Rules 1.7(b)(2) and (3), because of his continuing service as counsel to the corporation. *See* discussion herein under "Multiple Representation."
8. Rule 1.13(c) specifically authorized the representation of a corporation and one or more constituents, subject to satisfaction of the requirements of Rule 1.7, concerning conflicts of interest generally.

## Summary of SEC Standards of Professional Conduct for Attorneys

### **Introduction**

Pursuant to Section 307 of the Sarbanes-Oxley Act of 2002, the Securities and Exchange Commission (the “SEC” or the “Commission”) has adopted rules establishing standards of professional conduct for attorneys who appear and practice before the Commission on behalf of issuers. The rules, which took effect on August 5, 2003, require these attorneys to report evidence of certain material violations of public company clients “up the ladder” within the organization.<sup>1</sup>

The following is a brief summary of the SEC’s rules. The SEC Release adopting the rules, Release No. 33-8185 (January 29, 2003), contains additional explanation and interpretation. For convenience, the full text of the rules is attached to this summary.

### **Attorneys and Clients Covered by the Rules**

The SEC’s rules apply to attorneys appearing and practicing before the Commission in the representation of an issuer. An attorney is “appearing and practicing before the Commission” if the attorney is:

- transacting any business with the Commission, including communications in any form;
- representing an issuer in an SEC administrative proceeding or in connection with an SEC investigation, inquiry, information request or subpoena;
- providing advice on United States securities laws or the SEC’s rules and regulations regarding any document the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the SEC; or
- advising an issuer as to whether information, or a statement, opinion or other writing is required under United States securities laws or the SEC’s rules and regulations to be filed with the SEC.

The rules are quite broad; they can encompass non-securities specialists in many situations. For example, a non-securities specialist who prepares or reviews a discrete

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<sup>1</sup> The SEC also proposed rules requiring the mandatory withdrawal of an attorney and reporting to the SEC, either by the attorney or the client, in the event a client does not adequately address an attorney’s report of evidence of a material violation. These rules appear at this time unlikely to be adopted.

section of a disclosure document could be “appearing or practicing.” Similarly, a non-securities specialist who prepares an agreement that will be filed as an exhibit with the SEC may be subject to the rules under certain circumstances.

“Issuer” means an issuer whose securities are registered under section 12 of the Securities Exchange Act of 1934, or that is required to file reports under section 15(d) of that Act, or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 and that it has not withdrawn. The term “issuer” also includes any subsidiary controlled by an issuer. Governmental and public authority clients usually will not fall within the term “issuer,” and therefore the rules ordinarily would not apply to attorneys at the Firm in their representation of such clients; nor would the rules apply to attorneys in the representation of private companies that do not have a pending registration statement.

The rules provide that an attorney represents the issuer as an organization and not the issuer’s individual officers or employees whom the attorney regularly interacts with or advises. The rules cover an attorney only to the extent the attorney is providing legal advice to an issuer where there is an attorney-client relationship. Thus, attorneys for third parties who review part of an issuer’s disclosure document or render a legal opinion to an issuer who is not their client are not covered by the rules. There are two situations, however, where an attorney is subject to the rules even though not counsel for the issuer. First, an attorney employed by an investment adviser who prepares material for an investment company knowing it will be filed with the SEC is appearing and practicing before the Commission. Second, because “issuer” is defined to include a person controlled by an issuer, an attorney for a controlled subsidiary can be deemed to be appearing and practicing before the Commission in the representation of the parent.

### **Scope of Issuer Conduct Covered by the Rules**

The rules require reporting by an attorney who is aware of “evidence of a material violation” by the issuer or by any of its officers, directors, employees or agents (which could include an underwriter). It is important to note that once an attorney becomes subject to the rules with respect to an issuer, the material violation that must be reported need not relate to the matter that involved “appearing and practicing before the Commission” for that issuer. Indeed, the evidence need not even be obtained in the course of the representation.

“Evidence of a material violation” means “credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.” This is primarily an objective standard: an attorney who is aware of information must act reasonably in deciding whether there is credible evidence of a material violation. The standard recognizes that there is a range of conclusions an attorney may reach without being unreasonable.

In determining whether an attorney has been reasonable, such factors as the attorney’s professional skills, background, experience and familiarity with the client may be taken into account. The material violation need only be “reasonably likely,” which the



SEC has indicated is less than “more likely than not” but more than remote. Consequently, it is a relatively low triggering level. This is because of the SEC’s view that matters that may involve a material violation should be reported so that they can be considered at the right level in the client organization.

A “material violation” means a material violation of:

- an applicable United States federal or state securities law;
- a material breach of fiduciary duty arising under United States federal or state statutory or common law; or
- a similar material violation of any United States federal or state law.

The Commission did not define “material” in the rules. Instead, the release adopting the rules notes that the term “material” is intended to have the usual meaning that it has under federal securities law as interpreted by the courts. Violations of foreign law are not considered “material violations.”

### **Obligation to Report Up the Ladder**

An attorney subject to the rules who becomes aware of evidence of a material violation must (unless another alternative described below is available) report that evidence “up the ladder,” starting with the issuer’s chief legal officer (“CLO”) or both the CLO and the issuer’s chief executive officer (“CEO”). CLO is not defined but will typically be a company’s General Counsel, if it has one.

Once the CLO receives an attorney’s report of evidence of a material violation, the CLO must cause an inquiry to be conducted into the possible violations described. If the CLO determines that no material violation has occurred, is ongoing or is about to occur, the CLO must notify the reporting attorney and advise the reporting attorney of the basis for that determination. If the CLO cannot reasonably make that determination, the CLO must take all reasonable steps to cause the issuer to adopt an appropriate response.

A reporting attorney who receives what he or she reasonably believes is an appropriate and timely response to a report has satisfied his or her obligations under the rules. If the CLO does not provide an appropriate response within a reasonable time (which would include the time for the issuer to complete an ongoing investigation), the attorney must report the evidence of a material violation to (i) the issuer’s audit committee; or (ii) if the issuer does not have an audit committee, to another committee consisting solely of directors who are not employed, directly or indirectly, by the issuer; or (iii) if the issuer does not have an audit committee or such an independent committee, to the issuer’s board of directors. If the attorney reasonably believes it would be futile to report first to the CLO and the CEO, the report may be made directly to the audit committee, the independent committee or the board of directors, as the case may be.

An “appropriate response” is one that causes the attorney reasonably to believe (i) no material violation has occurred, is ongoing, or is about to occur; (ii) the issuer has adopted appropriate remedial measures; or (iii) the issuer, with board or committee

approval, has retained or directed an attorney to review the reported evidence and has substantially implemented remedial recommendations made by the attorney after a reasonable investigation or has been advised by the attorney that a colorable defense may be asserted, consistent with the attorney's professional obligations, in any investigation or proceeding. In exercising professional judgment as to whether a response was appropriate, the attorney can consider the relevant circumstances, such as the amount and weight of evidence, the severity of the apparent violation, and the scope of the investigation, so long as the attorney's determination is reasonable. An attorney may also rely on factual representations and legal determinations where that reliance is reasonable.

If, after reporting evidence of a material violation to the board of directors or a committee of the board, the issuer has not made an appropriate response within a reasonable time, the attorney must explain his or her reasons for believing there has not been an appropriate response to the CLO, the CEO and the directors to whom the report was made.

If the issuer has set up a qualified legal compliance committee (a "QLCC")<sup>2</sup> as part of its corporate governance structure, an attorney may report to the QLCC as an alternative to the foregoing actions. An attorney who reports evidence of a material violation to a QLCC fulfills his or her obligation to report such evidence and is not required to assess the issuer's response to the report.

If an attorney who was formerly employed or retained by an issuer and who has reported evidence of a material violation reasonably believes he or she has been discharged for making such a report, the attorney may notify the board of directors of the issuer or any committee of the board.

### **Permissive Disclosure of Client Confidences**

An attorney appearing and practicing before the Commission may reveal to the SEC confidential information related to the representation to the extent the attorney reasonably believes necessary to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or to rectify the consequences of such a violation in furtherance of which the attorney's services were used. An attorney also may reveal confidential information to prevent perjury or a fraud on the Commission. As the reporting is permissive, an attorney will have to consider the provisions of applicable state ethics rules that may circumscribe the attorney's ability to disclose client confidential information and, if necessary, decide whether the SEC's effort to override conflicting state rules is effective.

### **Supervisory and Subordinate Attorneys**

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<sup>2</sup> A QLCC is comprised of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more independent members of the issuer's board of directors.

An attorney who supervises or directs another attorney who is appearing and practicing before the Commission must make all reasonable efforts to ensure that the subordinate attorney complies with the rules.

A subordinate attorney who reports evidence of a material violation to a supervisory attorney is deemed to have complied with the up the ladder reporting requirements of the rules. A supervisory attorney who receives such a report from a subordinate attorney is then responsible for reporting the evidence to the issuer in accordance with the rules. A subordinate attorney has an obligation to comply with the rules regardless of whether the subordinate attorney acted at the direction of or under the supervision of another person. Also, a subordinate attorney is permitted under the rules to report to the client if the subordinate attorney reasonably believes that the supervisory attorney to whom the report was made failed to comply with the reporting requirements of the rules.

In some cases, it will be clear who is a supervisory attorney to whom a subordinate attorney may report; in other cases it will not be clear. For example, a non-securities specialist may be able to comply with the rules by reporting to the securities lawyer responsible for the client's matters, although the SEC has yet to confirm this.

### **Penalties for Failure to Comply**

The SEC's rules subject a non-complying attorney to the civil penalties and remedies available to the SEC under federal securities laws. These include civil injunctions, money penalties, and cease and desist orders. An attorney also is subject to discipline and potential suspension under the SEC's rules of practice based on prevailing Commission standards for disciplining attorneys. Attorneys that violate the rules are not subject to criminal liability for that violation. The rules expressly do not create a private right of action against any attorney, law firm or issuer based upon compliance (or noncompliance) with the rules, although there may be other bases for such an action. Authority to enforce the rules is solely with the SEC.

**PART 205—STANDARDS OF PROFESSIONAL CONDUCT FOR  
ATTORNEYS APPEARING AND PRACTICING BEFORE THE COMMISSION  
IN THE REPRESENTATION OF AN ISSUER**

Sec.

- 205.1 Purpose and scope.
- 205.2 Definitions.
- 205.3 Issuer as client.
- 205.4 Responsibilities of supervisory attorneys.
- 205.5 Responsibilities of a subordinate attorney.
- 205.6 Sanctions and discipline.
- 205.7 No private right of action.

AUTHORITY: 15 U.S.C. 77s, 78d-3, 78w, 80a-37, 80a-38, 80b-11, 7202, 7245, and 7262.

SOURCE: 68 FR 6320, Feb. 6, 2003, unless otherwise noted.

EFFECTIVE DATE NOTE: At 68 FR 6320, Feb. 6, 2003, part 205 was added, effective August 5, 2003.

**§ 205.1 Purpose and scope.**

This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

**§ 205.2 Definitions.**

For purposes of this part, the following definitions apply:

(a) *Appearing and practicing* before the Commission:

(1) Means:

(i) Transacting any business with the Commission, including communications in any form;

(ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;

(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or

(iv) Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or

regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission; but

(2) Does not include an attorney who:

(i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(iv) of this section other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or

(ii) Is a non-appearing foreign attorney.

(b) *Appropriate response* means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

(1) That no material violation, as defined in paragraph (i) of this section, has occurred, is ongoing, or is about to occur;

(2) That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or

(3) That the issuer, with the consent of the issuer's board of directors, a committee thereof to whom a report could be made pursuant to §205.3(b)(3), or a qualified legal compliance committee, has retained or directed an attorney to review the reported evidence of a material violation and either:

(i) Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or

(ii) Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation.

(c) *Attorney* means any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.

(d) *Breach of fiduciary duty* refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.

(e) *Evidence of a material violation* means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

(f) *Foreign government issuer* means a foreign issuer as defined in 17 CFR 230.405 eligible to register securities on Schedule B of the Securities Act of 1933 (15 U.S.C. 77a *et seq.*, Schedule B).

(g) *In the representation of an issuer* means providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer.

(h) *Issuer* means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 781), or that is required to file reports under section 15(d) of that Act (15 U.S.C. 780(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs

(a) and (g) of this section, the term “issuer” includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

(i) *Material violation* means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or State law.

(j) *Non-appearing foreign attorney* means an attorney:

(1) Who is admitted to practice law in a jurisdiction outside the United States;

(2) Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and

(3) Who:

(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

(k) *Qualified legal compliance committee* means a committee of an issuer (which also may be an audit or other committee of the issuer) that:

(1) Consists of at least one member of the issuer’s audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more members of the issuer’s board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, “interested persons” as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19));

(2) Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under § 205.3;

(3) Has been duly established by the issuer’s board of directors, with the authority and responsibility:

(i) To inform the issuer’s chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in §205.3(b)(4));

(ii) To determine whether an investigation is necessary regarding any report of evidence of a material violation by the issuer, its officers, directors, employees or agents and, if it determines an investigation is necessary or appropriate, to:

(A) Notify the audit committee or the full board of directors;

(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and

(C) Retain such additional expert personnel as the committee deems necessary; and

(iii) At the conclusion of any such investigation, to:

(A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and

(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and

(4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.

(1) *Reasonable or reasonably* denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.

(m) *Reasonably believes* means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

(n) *Report* means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

### **§ 205.3 Issuer as client.**

(a) *Representing an issuer.* An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

(b) *Duty to report evidence of a material violation.* (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

(2) The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur. If the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.

(3) Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

(i) The audit committee of the issuer's board of directors;

(ii) Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a

registered investment company, “interested persons” as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)) (if the issuer’s board of directors has no audit committee); or

(iii) The issuer’s board of directors (if the issuer’s board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, “interested persons” as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19))).

(4) If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer’s chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such evidence as provided under paragraph (b)(3) of this section.

(5) An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(3), or (b)(4) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve an officer or director of the issuer to whom such evidence has been reported under paragraph (b)(1), (b)(3), or (b)(4) of this section from a duty to respond to the reporting attorney.

(6) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:

(i) The attorney was retained or directed by the issuer’s chief legal officer (or the equivalent thereof) to investigate such evidence of a material violation and:

(A) The attorney reports the results of such investigation to the chief legal officer (or the equivalent thereof); and

(B) Except where the attorney and the chief legal officer (or the equivalent thereof) each reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the chief legal officer (or the equivalent thereof) reports the results of the investigation to the issuer’s board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee; or

(ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer’s officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer’s board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee.

(7) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if such attorney was retained or directed by a qualified legal compliance committee:

(i) To investigate such evidence of a material violation; or

(ii) To assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer’s officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation.

(8) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(3), or



(b)(4) of this section need do nothing more under this section with respect to his or her report.

(9) An attorney who does not reasonably believe that the issuer has made an appropriate response within a reasonable time to the report or reports made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section shall explain his or her reasons therefor to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section.

(10) An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.

(c) *Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee.* (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under §205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c).

(d) *Issuer confidences.* (1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue,

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury. proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

#### **§ 205.4 Responsibilities of supervisory attorneys.**

(a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.

(b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in §205.5(a), that he or she supervises or directs conforms to this part. To the extent a subordinate attorney appears and practices before the Commission in the representation of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.

(c) A supervisory attorney is responsible for complying with the reporting requirements in § 205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.

(d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under § 205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.

#### **§ 205.5 Responsibilities of a subordinate attorney.**

(a) An attorney who appears and practices before the Commission in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney.

(b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.

(c) A subordinate attorney complies with § 205.3 If the subordinate attorney reports to his or her supervising attorney under § 205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.

(d) A subordinate attorney may take the steps permitted or required by § 205.3(b) or (c) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under § 205.3(b) has failed to comply with §205.3.

#### **§ 205.6 Sanctions and discipline.**

(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder.

(b) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission,

regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices. An administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.

(c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

(d) An attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law.

#### **§ 205.7 No private right of action.**

(a) Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions.

(b) Authority to enforce compliance with this part is vested exclusively in the Commission.



**SOCIAL MEDIA ETHICS GUIDELINES**  
**OF THE**  
**COMMERCIAL AND FEDERAL LITIGATION SECTION**  
**OF THE**  
**NEW YORK STATE BAR ASSOCIATION**

UPDATED JUNE 9, 2015

James M. Wicks, Section Chair  
Mark A. Berman, Co-Chair of the Social Media Committee  
Ignatius A. Grande, Co-Chair of the Social Media Committee

*Opinions expressed are those of the Section preparing these Guidelines and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.*

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## **INTRODUCTION**

Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools used by legal professionals and those with whom they communicate. Particularly, in conjunction with the increased use of mobile technologies in the legal profession, social media platforms have transformed the ways in which lawyers communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more sophisticated, so too do the ethical issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association, which authored these social media ethics guidelines in 2014 to assist lawyers in understanding the ethical challenges of social media, is updating them to include new ethics opinions as well as additional guidelines where the Section believes ethical guidance is needed (the “Guidelines”). In particular, these Guidelines add new sections on lawyers’ competence,<sup>1</sup> the retention of social media by lawyers, client confidences, the tracking of client social media, communications by lawyers with judges, and lawyers’ use of LinkedIn.

These Guidelines are guiding principles and are not “best practices.” The world of social media is a nascent area that is rapidly changing and “best practices” will continue to evolve to keep pace with such developments. Moreover, there can be no single set of “best practices” where there are multiple ethics codes throughout the United States that govern lawyers’ conduct. In fact, even where jurisdictions have identical ethics rules, ethics opinions addressing a lawyer’s permitted use of social media may differ due to varying jurisdictions’ different social mores, population bases and historical approaches to their own ethics rules and opinions.

These Guidelines are predicated upon the New York Rules of Professional Conduct (“NYRPC”)<sup>2</sup> and ethics opinions interpreting them. However, illustrative ethics opinions from other jurisdictions may be referenced where, for instance, a New York ethics opinion has not addressed a certain situation or where another jurisdiction’s ethics opinion differs from the interpretation of the NYRPC by New York ethics authorities. In New York State, ethics opinions are issued not just by the New York State Bar Association, but also by local bar associations located throughout the State.<sup>3</sup>

Lawyers need to appreciate that social media communications that reach across multiple jurisdictions may implicate other states’ ethics rules. Lawyers should ensure compliance with the ethical requirements of each jurisdiction in which they practice, which may vary considerably.

One of the best ways for lawyers to investigate and obtain information about a party, witness, or juror, without having to engage in formal discovery, is to review that person’s social

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<sup>1</sup> As of April 2015, fourteen states have included a duty of competence in technology in their ethical codes. <http://www.lawsitesblog.com/2015/03/mass-becomes-14th-state-to-adopt-duty-of-technology-competence.html> (Retrieved on April 26, 2015).

<sup>2</sup> <https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf>

<sup>3</sup> A breach of an ethics rule is not enforced by bar associations, but by the appropriate disciplinary bodies. Ethics opinions are not binding in disciplinary proceedings, but may be used as a defense in certain circumstances.

media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media. For example, when a lawyer conducts research, unintended social media communications or electronic notifications received by the user of a social media account revealing such lawyer's research may have ethical consequences.

Further, because social media communications are often not just directed at a single person but at a large group of people, or even the entire Internet "community," attorney advertising rules and other ethical rules must be considered when a lawyer uses social media. It is not always readily apparent whether a lawyer's social media communications may constitute regulated "attorney advertising." Similarly, privileged or confidential information may be unintentionally divulged beyond the intended recipient when a lawyer communicates to a group using social media. Lawyers also must be cognizant when a social media communication might create an unintended attorney-client relationship. There are also ethical obligations with regard to a lawyer counseling clients about their social media posts and the removal or deletion of them, especially if such posts are subject to litigation or regulatory preservation obligations.

Throughout these Guidelines, the terms "website," "account," "profile," and "post" are referenced in order to highlight sources of electronic data that might be viewed by a lawyer. The definition of these terms no doubt will change and new ones will be created as technology advances. However, such terms for purposes of complying with these Guidelines are functionally interchangeable and a reference to one should be viewed as a reference to each for ethical considerations.

References to the applicable provisions of the NYRPC and references to relevant ethics opinions are noted after each Guideline. Finally, definitions of certain terminology used in the Guidelines are set forth in the Appendix.



## Social Media Ethics Guidelines

### 1. ATTORNEY COMPETENCE

#### Guideline No. 1: Attorneys' Social Media Competence

**A lawyer has a duty to understand the benefits and risks and ethical implications associated with social media, including its use as a mode of communication, an advertising tool and a means to research and investigate matters.**

NYRPC 1.1(a) and (b).

*Comment:* NYRPC 1.1(a) provides “[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

As Guideline No. 1 recognizes – and the Guidelines discuss throughout – a lawyer may choose to use social media for a multitude of reasons. Lawyers, however, need to be conversant with, at a minimum, the basics of each social media network that a lawyer or his or her client may use. This is a serious challenge that lawyers need to appreciate and cannot take lightly. As American Bar Association (“ABA”) Formal Opinion 466 (2014)<sup>4</sup> states:

As indicated by [ABA Rule of Professional Conduct] Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an [electronic social media] network, a lawyer who uses an [electronic social media] network in his practice should review the terms and conditions, including privacy features – which change frequently – prior to using such a network.<sup>5</sup>

A lawyer cannot be competent absent a working knowledge of the benefits and risks associated with the use of social media. “[A lawyer must] understand the functionality of any social media service she intends to use for . . . research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site.”<sup>6</sup>

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<sup>4</sup> American Bar Ass’n Comm. on Ethics & Prof’l Responsibility, Formal Op. 14-466 (2014).

<sup>5</sup> Competence may require understanding the often lengthy and unclear “terms of service” of a social media platform and whether the platform’s features raise ethical issues. It also may require reviewing other materials, such as articles, comments, and blogs posted about how such social media platform actually functions. Ass’n of the Bar of the City of New York Comm. on Prof’l and Jud. Ethics (“NYCBA”), Formal Op. 2012-2 (2012).

<sup>6</sup> Id.

Indeed, the comment to Rule 1.1 of the Model Rules of Professional Conduct of the ABA was amended to provide:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject (emphasis added).<sup>7</sup>

As NYRPC 1.1 (b) requires, “[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.” While a lawyer may not delegate his obligation to be competent, he or she may rely, as appropriate, on professionals in the field of electronic discovery and social media to assist in obtaining such competence.

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<sup>7</sup> ABA Model Rules of Prof. Conduct, Rule 1.1, Comment 8; See N.H. Bar Ass’n, Ethics Corner (June 21, 2013) (lawyers “[have] a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation”).

## 2. ATTORNEY ADVERTISING

### Guideline No. 2.A: Applicability of Advertising Rules

**A lawyer's social media profile that is used only for personal purposes is not subject to attorney advertising and solicitation rules. However, a social media profile, posting or blog a lawyer primarily uses for the purpose of the retention of the lawyer or his law firm is subject to such rules.<sup>8</sup> Hybrid accounts may need to comply with attorney advertising and solicitation rules if used for the primary purpose of the retention of the lawyer or his law firm.<sup>9</sup>**

NYRPC 1.0, 7.1, 7.3.

*Comment:* In the case of a lawyer's profile on a hybrid account that, for instance, is used for business and personal purposes, given the differing views on whether the attorney advertising and solicitation rules would apply, it would be prudent for the lawyer to assume that they do.

The nature of the information posted on a lawyer's LinkedIn profile may require that the profile be deemed "attorney advertising." In general, a profile that contains basic biographical information, such as "only one's education and a list of one's current and past employment" does not constitute attorney advertising.<sup>10</sup> According to NYCLA, Formal Op. 748, a lawyer's LinkedIn profile that "includes subjective statements regarding an attorney's skills, areas of practice, endorsements, or testimonials from clients or colleagues, however, is likely to be considered advertising."<sup>11</sup>

NYCLA, Formal Op. 748 addresses the types of content on LinkedIn that may be considered "attorney advertising" and provides:

[i]f an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "Attorney Advertising" on the lawyer's LinkedIn profile. See RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the

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<sup>8</sup> See also Virginia State Bar, *Quick Facts about Legal Ethics and Social Networking* (last updated Feb. 22, 2011); Cal. State Bar Standing Comm. on Prof'l Resp. and Conduct, Formal Op. No. 2012-186 (2012).

<sup>9</sup> NYRPC 1.0.(a) defines "Advertisement" as "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."

<sup>10</sup> New York County Lawyers' Association ("NYCLA"), Formal Op. 748 (2015).

<sup>11</sup> Id.

lawyer's services with the services of other lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney should also include the disclaimer "Prior results do not guarantee a similar outcome." See RPC 7.1(d) and (e). Because the rules contemplate "testimonials or endorsements," attorneys who allow "Endorsements" from other users and "Recommendations" to appear on one's profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e).<sup>12</sup> An attorney who claims to have certain skills must also include this disclaimer because a description of one's skills—even where those skills are chosen from fields created by LinkedIn—constitutes a statement "characterizing the quality of the lawyer's services" under Rule 7.1(d).<sup>13</sup>

An attorney's ethical obligations apply to all forms of covered communications, including social media. If a post on Twitter (a "tweet") is deemed attorney advertising, the rules require that a lawyer must include disclaimers similar to those described in NYCLA Formal Op. 748.<sup>14</sup>

Utilizing the disclaimer "Attorney Advertising" given the confines of Twitter's 140 character limit (which in practice may be even less than 140 characters when including links, user handles or hashtags) may be impractical or not possible. Yet, such structural limitation does not provide a justification for not complying with the ethical rules governing attorney advertising. Thus, consideration should be given to only posting tweets that would not be categorized as attorney advertising.<sup>15</sup>

Rule 7.1(k) of the NYRPC provides that all advertisements "shall be pre-approved by the lawyer or law firm." It also provides that a copy of an advertisement "shall be retained for a period of not less than three years following its initial dissemination," but specifies an alternate one-year retention period for advertisements contained in a "computer-accessed communication" and specifies another retention scheme for websites.<sup>16</sup> Rule 1.0(c) of the NYRPC defines "computer-accessed communication" as 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

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<sup>12</sup> NYRPC 7.1(e)(3) provides: "[p]rior results do not guarantee a similar outcome".

<sup>13</sup> NYCLA, Formal Op. 748.

<sup>14</sup> New York State Bar Ass'n Comm. on Prof'l Ethics ("NYSBA"), Op. 1009 (2014).

<sup>15</sup> NYSBA, Op. 1009.

<sup>16</sup> Id.

presences, and any attachments or links related thereto.”<sup>17</sup> Thus, social media posts that are deemed “advertisements,” are “computer-accessed communications, and their retention is required only for one year.”<sup>18</sup>

In accordance with NYSBA, Op. 1009, to the extent that a social media post is found to be a “solicitation,” it is subject to filing requirements if directed to recipients in New York. Social media posts, like tweets, may or may not be prohibited “real-time or interactive” communications. That would depend on whether they are broadly distributed and/or whether the communications are more akin to asynchronous email or website postings or in functionality closer to prohibited instant messaging or chat rooms involving “real-time” or “live” responses. Practitioners are advised that both the social media platforms and ethical guidance in this area are evolving and care should be used when using any potentially “live” or real-time tools.

### **Guideline No. 2.B: Prohibited use of the term “Specialists” on Social Media**

Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms “specialist,” unless the lawyer is certified by the appropriate accrediting body in the particular area.<sup>19</sup>

NYRPC 7.1, 7.4.

*Comment:* Although LinkedIn’s headings no longer include the term “Specialties,” lawyers still need to be cognizant of the prohibition on claiming to be a “specialist” when creating a social media profile. To avoid making prohibited statements about a lawyer’s qualifications under a specific heading or otherwise, a lawyer should use objective information and language to convey information about the lawyer’s experience. Examples of such information include the number of years in practice and the number of cases handled in a particular field or area.<sup>20</sup>

A lawyer shall not list information under the ethically prohibited heading of “specialist” in any social media network unless appropriately certified as such. With respect to skills or practice areas on a lawyer’s profile under a heading such as “Experience” or “Skills,” such information does not constitute a claim by a lawyer to be a specialist under NYRPC Rule 7.4.<sup>21</sup> Also, a lawyer may include information about the lawyer’s experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included.

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<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> See NYSBA, Op. 972 (2013).

<sup>20</sup> See also Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2012-8 (2012) (citing Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility, Formal Op. 85-170 (1985)).

<sup>21</sup> NYCLA, Formal Op. 748.

Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under “specialist,” but also under headings including “expert.”

A limited exception to identification as a specialist may exist for lawyers who are certified “by a private organization approved for that purpose by the American Bar Association” or by an “authority having jurisdiction over specialization under the laws of another state or territory.” For example, identification of such traditional titles as “Patent Attorney” or “Proctor in Admiralty” are permitted for lawyers entitled to use them.<sup>22</sup>

**Guideline No. 2.C: Lawyer’s Responsibility to Monitor or Remove Social Media Content by Others on a Lawyer’s Social Media Page**

**A lawyer that maintains social media profiles must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media network, account, blog or profile.<sup>23</sup>**

**A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure that such third-party posts do not violate ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer’s social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer’s control and, if not within the lawyer’s control, she must ask that person to remove it.<sup>24</sup>**

NYRPC 7.1, 7.2, 7.3, 7.4.

*Comment:* While a lawyer is not responsible for a post made by a person who is not an agent of the lawyer, a lawyer’s obligation not to disseminate, use or participate in the dissemination or use of advertisements containing misleading, false or deceptive statements includes a duty to remove information from the lawyer’s social media profile where that information does not comply with applicable ethics rules. If a post cannot be removed, consideration must be given as to whether a curative post needs to be made. Although social media communications tend to be far less formal than typical communications to which ethics rules have historically applied, they apply with the same force and effect to social media postings.

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<sup>22</sup> See NYRPC Rule 7.4.

<sup>23</sup> See also Fl. Bar Standing Comm. on Advertising, *Guidelines for Networking Sites* (revised Apr. 16, 2013).

<sup>24</sup> See NYCLA, Formal Op. 748. See also Phila. Bar Assn. Prof’l Guidance Comm., Op. 2012-8; Virginia State Bar, *Quick Facts about Legal Ethics and Social Networking*

## **Guideline No. 2.D: Attorney Endorsements**

**A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer's social media profile. To that end, a lawyer must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.**

NYRPC 7.1, 7.2, 7.3, 7.4.

*Comment:* Although lawyers are not responsible for content that third-parties and non-agents of the lawyer post on social media, lawyers must, as noted above, monitor and verify that posts about them made to profile(s) the lawyer controls<sup>25</sup> are accurate. “Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists,” as well as to confirm the accuracy of any endorsements or recommendations.<sup>26</sup> A lawyer may not passively allow misleading endorsements as to her skills and expertise to remain on a profile that she controls, as that is tantamount to accepting the endorsement. Rather, a lawyer needs to remain conscientious in avoiding the publication of false or misleading statements about the lawyer and her services.<sup>27</sup> It should be noted that certain social media websites, such as LinkedIn, allow users to approve endorsements, thereby providing lawyers with a mechanism to promptly review, and then reject or approve, endorsements. A lawyer may also hide or delete endorsements, which, under those circumstances, may obviate the ethical obligation to periodically monitor and review such posts.

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<sup>25</sup> Lawyers should also be cognizant of such websites as Yelp, Google and Avvo, where third parties may post public comments about lawyers.

<sup>26</sup> NYCLA, Formal Op. 748.

<sup>27</sup> See NYCLA, Formal Op. 748. See also Pa. Bar Ass’n. Comm. on Legal Ethics and Prof’l Responsibility, Formal Op. 2014-300; North Carolina State Bar Ethics Comm., Formal Op. 8 (2012).

### **3. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA**

#### **Guideline No. 3.A: Provision of General Information**

**A lawyer may provide general answers to legal questions asked on social media. A lawyer, however, cannot provide specific legal advice on a social media network because a lawyer's responsive communications may be found to have created an attorney-client relationship and legal advice also may impermissibly disclose information protected by the attorney-client privilege.**

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

*Comment:* An attorney-client relationship must knowingly be entered into by a client and lawyer, and informal communications over social media could unintentionally result in a client believing that such a relationship exists. If an attorney-client relationship exists, then ethics rules concerning, among other things, the disclosure over social media of information protected by the attorney-client privilege to individuals other than to the client would apply.

#### **Guideline No. 3.B: Public Solicitation is Prohibited through "Live" Communications**

**Due to the "live" nature of real-time or interactive computer-accessed communications,<sup>28</sup> which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not "solicit"<sup>29</sup> business from**

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<sup>28</sup> "Computer-accessed communication" is defined by NYRPC 1.0(c) as "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." Official Comment 9 to NYRPC 7.3 advises: "Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a website that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."

<sup>29</sup> "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 of a prospective client." NYRPC 7.3(b).



the public through such means.<sup>30</sup> If a potential client<sup>31</sup> initiates a specific request seeking to retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential, whether the communication is electronic or in some other format. Emails and attorney communications via a website or over social media platforms, such as Twitter,<sup>32</sup> may not be considered real-time or interactive communications. This Guideline does not apply if the recipient is a close friend, relative, former client, or existing client -- although the ethics rules would otherwise apply to such communications.

NYRPC 1.0, 1.4, 1.6, 1.7, 1.8, 7.1, 7.3.

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<sup>30</sup> See NYSBA, Op. 899 (2011). Ethics opinions in a number of states have addressed chat room communications. See also Ill. State Bar Ass’n, Op. 96-10 (1997); Michigan Standing Comm. on Prof’l and Jud. Ethics, Op. RI-276 (1996); Utah State Bar Ethics Advisory Opinion Comm., Op. 96-10 (1997); Va. Bar Ass’n Standing Comm. on Advertising, Op. A-0110 (1998); W. Va. Lawyer Disciplinary Bd., Legal Ethics Inquiry 98-03 (1998).

The Philadelphia Bar Ass’n, however, has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, solicitation through a chat room is permissible, because it is more akin to targeted direct mail advertisements, which are allowed under Pennsylvania’s ethics rules. See Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2010-6 (2010).

<sup>31</sup> Individuals attempting to defraud a lawyer by posing as potential clients are not owed a duty of confidentiality. See NYCBA, Formal Op. 2015-3 (“An attorney who discovers that he is the target of an Internet-based trust account scam does not have a duty of confidentiality towards the individual attempting to defraud him, and is free to report the individual to law enforcement authorities, because that person does not qualify as a prospective or actual client of the attorney. However, before concluding that an individual is attempting to defraud the attorney and is not owed the duties normally owed to a prospective or actual client, the attorney must exercise reasonable diligence to investigate whether the person is engaged in fraud.”).

<sup>32</sup> Whether a Twitter or Reddit communication is a “real-time or interactive” computer-accessed communication is dependent on whether the communication becomes akin to a prohibited blog or chat room communication. See NYSBA, Op. 1009 and page 7 *supra*.

*Comment:* Answering general questions<sup>33</sup> on the Internet is analogous to writing for any publication on a legal topic.<sup>34</sup> “Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a ‘specific request’ to retain the lawyer.”<sup>35</sup> In responding to questions,<sup>36</sup> a lawyer may not provide answers that appear applicable to all apparently similar individual problems because variations in underlying facts might result in a different answer.<sup>37</sup> A lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information.

A lawyer is permitted to accept employment that results from participating in “activities designed to educate the public to recognize legal problems.”<sup>38</sup> As such, if a potential client initiates a specific request to retain the lawyer resulting from real-time Internet communication, the lawyer may respond to such request as noted above.<sup>39</sup> However, such communications should be sent solely to that

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<sup>33</sup> Where “the inquiring attorney has ‘become aware of a potential case, and wants to find plaintiffs,’ and the message the attorney intends to post will be directed to, or intended to be of interest only to, individuals who have experienced the specified problem. If the post referred to a particular incident, it would constitute a solicitation under the Rules, and the attorney would be required to follow the Rules regarding attorney advertising and solicitation, see Rules 7.1 & 7.3. In addition, depending on the nature of the potential case, the inquirer’s post might be subject to the blackout period (i.e., cooling off period) on solicitations relating to “a specific incident involving potential claims for personal injury or wrongful death,” see Rule 7.3(e).” NYSBA, Op. 1049 (2015).

<sup>34</sup> See NYSBA, Op. 899.

<sup>35</sup> See id.

<sup>36</sup> See NYSBA, Op. 1049 (“We further conclude that a communication that merely discussed the client’s legal problem would not constitute advertising either. However, a communication by the lawyer that went on to describe the services of the lawyer or his or her law firm for the purposes of securing retention would constitute “advertising.” In that case, the lawyer would need to comply with Rule 7.1, including the requirements for labeling as “advertising” on the “first page” of the post or in the subject line, retention for one-year (in the case of a computer-accessed communication) and inclusion of the law office address and phone number. See Rule 7.1(f), (h), (k).”).

<sup>37</sup> Id.

<sup>38</sup> See id.

<sup>39</sup> See NYSBA, Op. 1049 (“When a potential client requests contact by a lawyer, either by contacting a particular lawyer or by broadcasting a more general request to unknown persons who may include lawyers, any ensuing communication by a lawyer that complies with the terms of the invitation was not initiated by the lawyer within the meaning of Rule 7.3(b). Thus, if the potential client invites contact by Twitter or email, the lawyer may respond by Twitter or email. But the

potential client. If, however, the requester does not provide his or her personal contact information when seeking to retain the lawyer or law firm, consideration should be given by the lawyer to respond in two steps: first, ask the requester to contact the lawyer directly, not through a real-time communication, but instead by email, telephone, etc., and second, the lawyer's actual response should not be made through a real time communication.<sup>40</sup>

### **Guideline No. 3.C: Retention of Social Media Communications with Clients**

**If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as she would if the communications were memorialized on paper.**

NYRPC 1.1, 1.15.

*Comment:* A lawyer's file relating to client representation includes both paper and electronic documents. The ABA Model Rules of Professional Conduct defines a "writing" as "a tangible or electronic record of a communication or representation...". Rule 1.0(n), Terminology. The NYRPC "does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation."<sup>41</sup> The only NYRPC provision requiring maintenance of client documents is NYRPC 1.15(i). The NYRPC, however, implicitly imposes on lawyers an obligation to retain documents. For example, NYRPC 1.1 requires that "A lawyer should provide competent representation to a client." NYRPC 1.1(a) requires "skill, thoroughness and preparation."

The lawyer must take affirmative steps to preserve those emails and social media communications, such as chats and instant messages, which the lawyer believes need to be saved.<sup>42</sup> However, due to the ephemeral nature of social media communications, "saving" such communications in electronic form may pose technical issues, especially where, under certain circumstances, the entire social media communication may not be saved, may be deleted automatically or after a period of time, or may be deleted by the counterparty to the communication without

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lawyer could not respond by telephone, since such contact would not have been initiated by the potential client. See N.Y. State 1014 (2014). If the potential client invites contact by telephone or in person, the lawyer's response in the manner invited by the potential client would not constitute 'solicitation.'").

<sup>40</sup> Id.

<sup>41</sup> See NYCBA, Formal Op. 2008-1 (2008).

<sup>42</sup> Id.

the knowledge of the lawyer.<sup>43</sup> Casual communications may be deleted without impacting ethical rules.<sup>44</sup>

NYCBA, Formal Op. 2008-1 sets out certain considerations for preserving electronic materials:

As is the case with paper documents, which e-mails and other electronic documents a lawyer has a duty to retain will depend on the facts and circumstances of each representation. Many e-mails generated during a representation are formal, carefully drafted communications intended to transmit information, or other electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve. These e-mails and other electronic documents should be retained. On the other hand, in many representations a lawyer will send or receive casual e-mails that fall well outside the guidelines in [ABCNY Formal Op. 1986-4]. No ethical rule prevents a lawyer from deleting those e-mails.

We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under [ABCNY Formal Op. 1986-4]. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to protect against a malpractice claim. Such a broad approach to document retention may at times be prudent, but it is not required by the Code.<sup>45</sup>

A lawyer shall not deactivate a social media account, which contains communications with clients, unless those communications have been appropriately preserved.

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<sup>43</sup> Id. See also Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-300 (the Pennsylvania Bar Assn. has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, an attorney “should retain records of those communications containing legal advice.”).

<sup>44</sup> Id.

<sup>45</sup> NYSBA, Op. 623 opines that, with respect to documents belonging to the lawyer, a lawyer may destroy all those documents without consultation or notice to the client, (i) except to the extent that the law may otherwise require, and (ii) in the absence of extraordinary circumstances manifesting a client’s clear and present need for such documents.”

#### **4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA**

##### **Guideline No. 4.A: Viewing a Public Portion of a Social Media Website**

**A lawyer may view the public portion of a person’s social media profile or public posts even if such person is represented by another lawyer. However, the lawyer must be aware that certain social media networks may send an automatic message to the person whose account is being viewed which identifies the person viewing the account as well as other information about such person.**

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

*Comment:* A lawyer is ethically permitted to view the public portion of a person’s social media website, profile or posts, whether represented or not, for the purpose of obtaining information about the person, including impeachment material for use in litigation.<sup>46</sup> “Public” means information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible without authorization to non-members.

However, unintentional communications with a represented party may occur if a social media network automatically notifies that person when someone views her account. In New York, such automatic messages, as noted below, sent to a juror by a lawyer or her agent that notified the juror of the identity of who viewed her profile may constitute an ethical violation.<sup>47</sup> Conversely, the ABA opined that such a “passive review” of a juror’s social media does not constitute an ethical violation.<sup>48</sup> The social media network may also allow the person whose account was viewed to see the entire profile of the viewing lawyer or her agent. Drawing upon the ethical opinions addressing issues concerning social media communications with jurors, when an attorney views the social media site of a represented witness or a represented opposing party, he or she should be aware of which networks<sup>49</sup> might automatically notify the owner of that account of his or her viewing, as this could be viewed an improper communication with someone who is represented by counsel.

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<sup>46</sup> See NYSBA, Op. 843 (2010).

<sup>47</sup> See NYCLA, Formal Op. 743 ; NYCBA, Formal Op. 2012-2.

<sup>48</sup> See American Bar Ass’n Comm. on Ethics & Prof’l Responsibility, Formal Op. 14-466.

<sup>49</sup> One network that sends automatic notifications that someone has viewed one’s profile is LinkedIn.

#### **Guideline No. 4.B: Contacting an Unrepresented Party to View a Restricted Social Media Website**

**A lawyer may request permission to view the restricted portion of an unrepresented person’s social media website or profile.<sup>50</sup> However, the lawyer must use her full name and an accurate profile, and she may not create a different or false profile in order to mask her identity. If the person asks for additional information from the lawyer in response to the request that seeks permission to view her social media profile, the lawyer must accurately provide the information requested by the person or withdraw her request.**

NYRPC 4.1, 4.3, 8.4.

*Comment:* It is permissible for a lawyer to join a social media network to obtain information concerning a witness.<sup>51</sup> The New York City Bar Association has opined, however, that a lawyer shall not “friend” an unrepresented individual using “deception.”<sup>52</sup>

In New York, there is no “deception” when a lawyer utilizes her “real name and profile” to send a “friend” request to obtain information from an unrepresented person’s social media account.<sup>53</sup> In New York, the lawyer is not required to disclose the reasons for making the “friend” request.<sup>54</sup>

The New Hampshire Bar Association, however, requires that a request to a “friend” must “inform the witness of the lawyer’s involvement in the disputed or litigated matter,” the disclosure of the “lawyer by name as a lawyer” and the identification of “the client and the matter in litigation.”<sup>55</sup> In Massachusetts, “it is not permissible for the lawyer who is seeking information about an unrepresented party to access the personal website of X and ask X to “friend” her without disclosing that the requester is the lawyer for a potential plaintiff.”<sup>56</sup> The San Diego Bar requires disclosure of the lawyer’s “affiliation and the purpose for the request.”<sup>57</sup> The Philadelphia Bar Association notes that the failure to disclose that the “intent on obtaining information and sharing it with a lawyer for use in a lawsuit

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<sup>50</sup> For example, this may include: (1) sending a “friend” request on Facebook, 2) requesting to be connected to someone on LinkedIn; or 3) following someone on Instagram.

<sup>51</sup> See also N.H. Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 (2012).

<sup>52</sup> NYCBA, Formal Op. 2010-2 (2010).

<sup>53</sup> Id.

<sup>54</sup> See id.

<sup>55</sup> N.H Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05.

<sup>56</sup> Massachusetts Bar Ass’n. Comm. on Prof Ethics Op. 2014-5 (2014).

<sup>57</sup> San Diego County Bar Ass’n Legal Ethics Comm., Op. 2011-2 (2011).

to impeach the testimony of the witness” constitutes an impermissible omission of a “highly material fact.”<sup>58</sup>

In Oregon, there is an opinion that if the person being sought out on social media “asks for additional information to identify [the ]lawyer, or if [the ]lawyer has some other reason to believe that the person misunderstands her role, [the ]lawyer must provide the additional information or withdraw the request.”<sup>59</sup>

#### **Guideline No. 4.C: Viewing a Represented Party’s Restricted Social Media Website**

**A lawyer shall not contact a represented person to seek to review the restricted portion of the person’s social media profile unless an express authorization has been furnished by the person’s counsel.**

NYRPC 4.1, 4.2.

*Comment:* It is significant to note that, unlike an unrepresented individual, the ethics rules are different when the person being contacted in order to obtain private social media content is “represented” by a lawyer, and such a communication is categorically prohibited.

Whether a person is represented by a lawyer, individually or through corporate counsel, is sometimes not clear under the facts and applicable case law.

The Oregon State Bar Committee has noted that “[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person’s non-public personal information is permissible.”<sup>60</sup>

Caution should be used by a lawyer before deciding to view a potentially private or restricted social media account or profile of a represented person that the lawyer has a “right” to view, such as a professional group where both the lawyer and represented person are members or as a result of being a “friend” of a “friend” of such represented person.

#### **Guideline No. 4.D: Lawyer’s Use of Agents to Contact a Represented Party**

**As it relates to viewing a person’s social media account, a lawyer shall not order or direct an agent to engage in specific conduct, or with knowledge of the specific conduct by such person, ratify it, where such conduct if engaged in by the lawyer would violate any ethics rules.**

NYRPC 5.3, 8.4.

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<sup>58</sup> Phila. Bar Ass’n Prof’l Guidance Comm., Op. Bar 2009-2 (2009).

<sup>59</sup> Oregon State Bar Comm. on Legal Ethics, Formal Op. 2013-189 (2013).

<sup>60</sup> Id. See San Diego County Bar Ass’n Legal Ethics Comm., Op. 2011-2.

*Comment:* This would include, inter alia, a lawyer's investigator, trial preparation staff, legal assistant, secretary, or agent<sup>61</sup> and could, as well, apply to the lawyer's client.<sup>62</sup>

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<sup>61</sup> See NYCBA, Formal Op. 2010-2 (2010).

<sup>62</sup> See also N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.



## 5. COMMUNICATING WITH CLIENTS

### **Guideline No. 5.A: Removing Existing Social Media Information**

**A lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings.<sup>63</sup> A lawyer may also advise a client as to what content may be “taken down” or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information, including legal hold obligations.<sup>64</sup> Unless an appropriate record of the social media information or data is preserved, a party or nonparty, when appropriate, may not delete information from a social media profile that is subject to a duty to preserve.**

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

*Comment:* A lawyer must ensure that potentially relevant information is not destroyed “once a party reasonably anticipates litigation”<sup>65</sup> or in accordance with common law, statute, rule, or regulation. Failure to do so may result in sanctions. “[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence,<sup>66</sup> there is no ethical bar to ‘taking down’ such material from social media publications, or prohibiting a client’s lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user’s computer.”<sup>67</sup> When litigation is not pending or “reasonably anticipated,” a lawyer may more freely advise a client on what to maintain or remove from her social media profile. Nor is there any ethical bar to advising a client to change her privacy or security settings to be more restrictive, whether before or after a litigation has

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<sup>63</sup> Mark A. Berman, “Counseling a Client to Change Her Privacy Settings on Her Social Media Account,” New York Legal Ethics Reporter, Feb. 2015, <http://www.newyorklegalethics.com/counseling-a-client-to-change-her-privacy-settings-on-her-social-media-account/>.

<sup>64</sup> NYCLA, Formal Op. 745 (2013). See Philadelphia Bar Ass’n. Guidance Comm. Op. 2014-5 (2014).

<sup>65</sup> VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep’t 2012).

<sup>66</sup> New York has not opined on a lawyer’s obligation to produce a website link that a client has utilized, but Philadelphia Bar Ass’n. Guidance Comm. Op. 2014-5, noted that, with respect to a website link utilized by a client, if it is appropriately requested in discovery, a lawyer “must make reasonable efforts to obtain a link or other [social media] content if the lawyer knows or reasonably believes it has not been produced by the client.”

<sup>67</sup> NYCLA, Formal Op. 745.

commenced, as long as social media is appropriately preserved in the proper format and such is not a violation of law or a court order.<sup>68</sup>

A lawyer needs to be aware that the act of deleting electronically stored information does not mean that such information cannot be recovered through the use of forensic technology. This similarly is the case if a “live” posting is simply made “unlive.”

#### **Guideline No. 5.B: Adding New Social Media Content**

**A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not “direct or facilitate the client’s publishing of false or misleading information that may be relevant to a claim.”<sup>69</sup>**

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

*Comment:* A lawyer may review what a client plans to publish on a social media website in advance of publication<sup>70</sup> and guide the client appropriately, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the factual context of a post may affect a person’s perception of the post; and how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client to consider the possibility that someone may be able to view a private social media profile through court order,

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<sup>68</sup> North Carolina State Bar 2014 Formal Ethics Op. 5 (2014); Phila. Bar Ass’n Guidance Comm. Op. 2014-5 (2014); Florida Bar Professional Ethics Committee, Proposed Advisory Opinion 14-1 (Jan. 23, 2015)

<sup>69</sup> NYCLA, Formal Op. 745.

<sup>70</sup> As social media-related evidence has increased in use in litigation, a lawyer may consider periodically following or checking her client’s social media communications, especially in matters where posts on social media would be relevant to her client’s claims or defenses. Following a client’s social media use could involve connecting with the client by establishing a LinkedIn connection, “following” the client on Twitter, or “friending” her on Facebook. Whether to follow a client’s postings should be discussed with the client in advance. Monitoring a client’s social media posts could provide the lawyer with the opportunity, among other things, to advise on the impact of the client’s posts on existing or future litigation or on their implication for other issues relating to the lawyer’s representation of the client.

Pennsylvania Bar Ass’n Ethics Comm., Formal Op. 2014-300 notes “tracking a client’s activity on social media may be appropriate for an attorney to remain informed about the developments bearing on the client’s legal dispute” and “an attorney can reasonably expect that opposing counsel will monitor a client’s social media account.”

compulsory process, or unethical conduct. A lawyer may advise a client to refrain from or limit social media postings during the course of a litigation or investigation.

#### **Guideline No. 5.C: False Social Media Statements**

**A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client’s social media posting that a client’s lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion.<sup>71</sup>**

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

*Comment:* A lawyer has an ethical obligation not to “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.”<sup>72</sup> Frivolous conduct includes the knowing assertion of “material factual statements that are false.”<sup>73</sup> See also NYRPC 3.3; 4.1 (“In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.”).

#### **Guideline No. 5.D. A Lawyer’s Use of Client-Provided Social Media Information**

**A lawyer may review the contents of the restricted portion of the social media profile of a represented person that was provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain private information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.**

NYRPC 4.2.

*Comment:* One party may always seek to communicate with another party. Where a “client conceives the idea to communicate with a represented party,” a lawyer is not precluded “from advising the client concerning the substance of the communication” and the “lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient.”<sup>74</sup> New York interprets “overreaching” as prohibiting “the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient.”<sup>75</sup>

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<sup>71</sup> NYCLA, Formal Op. 745.

<sup>72</sup> NYRPC 3.1(a).

<sup>73</sup> NYRPC 3.1(b)(3).

<sup>74</sup> NYCBA, Formal Op. 2002-3 (2002).

<sup>75</sup> Id.

NYRPC Rule 4.2(b) provides that, notwithstanding the prohibition under Rule 4.2(a) that a lawyer shall not “cause another to communicate about the subject of the representation with a party the lawyer knows to be represented,”

a lawyer may cause a client to communicate with a represented person . . . 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.

Thus, lawyers need to use caution when communicating with a client about her connecting to or “friending” a represented person and obtaining private information from that represented person’s social media site.

New Hampshire opines that a lawyer’s client may, for instance, send a “friend” request or request to follow a restricted Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety “depends on the extent to which the lawyer directs the client who is sending the [social media] request,” and whether the lawyer has complied with all other ethical obligations.<sup>76</sup> In addition, the client’s profile needs to “reasonably reveal[] the client’s identity” to the other person.<sup>77</sup>

The American Bar Association opines that a “lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication . . . . [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary.”<sup>78</sup>

#### **Guideline No. 5.E: Maintaining Client Confidences and Confidential Information**

**Subject to the attorney-client privilege rules, a lawyer is prohibited from disclosing client confidences and confidential information relating to the legal representation of a client, unless the client has provided informed consent. Social media communications and communications made on a lawyer’s website or blog must comply with these limitations.<sup>79</sup> This prohibition applies regardless of whether the confidential client information is positive or celebratory, negative or even to something as innocuous as where a client was on a certain day.**

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<sup>76</sup> N.H. Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 (2012).

<sup>77</sup> Id.

<sup>78</sup> ABA, Formal Op. 11-461 (2011).

<sup>79</sup> NYRPC 1.6.

**Where a lawyer learns that a client has posted a review of her services on a website or on social media, if the lawyer chooses to respond to the client’s online review, the lawyer shall not reveal confidential information relating to the representation of the client. This prohibition applies, even if the lawyer is attempting to respond to unflattering comments posted by the client.**

NYRPC 1.6, 1.9(c).

*Comment:* A lawyer is prohibited, absent some recognized exemption, from disclosing client confidences and confidential information of a client. Under NYRPC Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client. There is, however, a “self-defense” exception to the duty of confidentiality set forth in Rule 1.6,<sup>80</sup> which, as to former clients, is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) provides that a lawyer “may reveal or use confidential information to the extent that the lawyer reasonably believes necessary ... to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct.”<sup>81</sup> NYSBA Opinion 1032 applies such self-defense exception to “claims” and “charges” in formal proceedings or a “material threat of a proceeding,” which “typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction” and the self-defense exception does not apply to a “negative web posting.”<sup>82</sup> As such, a lawyer cannot disclose confidential information about a client when responding to a negative post concerning herself on websites such as Avvo, Yelp or Martindale Hubbell.<sup>83</sup>

A lawyer is permitted to respond to online reviews, but such replies must be accurate and truthful and shall not contain confidential information or client

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<sup>80</sup> Comment 17 to NYRPC Rule 1.6 provides:

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

<sup>81</sup> NYSBA Op. 1032 (2014).

<sup>82</sup> NYSBA, Opinion 1032.

<sup>83</sup> See Michmerhuizen, Susan “Client reviews: Your Thumbs Down May Come Back Around.” *Americanbar.org*. Your ABA, September 2014. Web. 3 March 2015.

confidences. Pennsylvania Bar Association Ethics Committee Opinion 2014-300 (2014) opined that “[w]hile there are certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception.”<sup>84</sup> Pennsylvania Bar Association Ethics Committee Opinion 2014-200 (2014) provides a suggested response for a lawyer replying to negative online reviews: “A lawyer’s duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post represents a fair and accurate picture of events.”<sup>85</sup>

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<sup>84</sup> Pennsylvania Bar Association Ethics Committee, Formal Op. 2014-300.

<sup>85</sup> Pennsylvania Bar Association Ethics Committee Opinion 2014-200.

## **6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT**

### **Guideline No. 6.A: Lawyers May Conduct Social Media Research**

**A lawyer may research a prospective or sitting juror’s public social media profile, and posts.**

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* “Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case.”<sup>86</sup>

The ABA issued Formal Opinion 466 noting that “[u]nless limited by law or court order, a lawyer may review a juror’s or potential juror’s Internet presence, which may include postings by the juror or potential juror in advance of and during a trial.”<sup>87</sup> There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice.”<sup>88</sup> However, Opinion 466 does not address “whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors.”<sup>89</sup>

### **Guideline No. 6.B: A Juror’s Social Media Profile May Be Viewed as Long as There Is No Communication with the Juror**

**A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) with the juror.**<sup>90</sup>

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* Lawyers need “always use caution when conducting [jury] research” to ensure that no communication with the prospective or sitting jury takes place.<sup>91</sup>

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<sup>86</sup> See NYCBA Formal Op. 2012-2 (2012).

<sup>87</sup> See American Bar Ass’n Comm. on Ethics & Prof’l Responsibility, Formal Op. 14-466.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See NYCLA, Formal Op. 743 (2011); NYCBA, Formal Op. 2012-2; see also Oregon State Bar Comm. on Legal Ethics, Formal Op. 189 (2013).

<sup>91</sup> Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, 85 N.Y. St. B.A.J. 50 (2013).

Contact by a lawyer with jurors through social media is forbidden. For example, ABA, Formal Op. 466 opines that it would be a prohibited *ex parte* communication for a lawyer, or the lawyer's agent, to send an "access request" to view the private portion of a juror's or potential juror's Internet presence.<sup>92</sup> This type of communication would be "akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."<sup>93</sup>

NYCLA, Formal Op. 743 and NYCBA, Formal Op. 2012-2 have opined that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice generated by a social media network may be considered a technical ethical violation. New York ethics opinions also draw a distinction between public and private juror information.<sup>94</sup> They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing).

In contrast to the above New York opinions, ABA, Formal Op. 466 opined that "[t]he fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation" of the Rules of Professional Conduct (emphasis added).<sup>95</sup> According to ABA, Formal Op. 466, this type of notice is "akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street."<sup>96</sup>

While ABA, Formal Op. 466 noted that an automatic notice<sup>97</sup> sent to a juror, from a lawyer passively viewing a juror's social media network does not constitute an improper communication, a lawyer must: (1) "be aware of these automatic, subscriber-notification procedures" and (2) make sure "that their review is

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<sup>92</sup> See ABA, Formal Op. 14-466.

<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> See ABA Formal Op. 14-466.

<sup>96</sup> Id. See Pennsylvania Bar Ass'n Ethics Comm., Formal Op. 2014-300 ("[t]here is no *ex parte* communications if the social networking website independently notifies users when the page has been viewed.").

<sup>97</sup> For instance, currently, if a lawyer logs into LinkedIn, as it is currently configured, and performs a search and clicks on a link to a LinkedIn profile of a juror, an automatic message may well be sent by LinkedIn to the juror whose profile was viewed advising of the identity of the LinkedIn subscriber who viewed the juror's profile. In order for that reviewer's profile not to be identified through LinkedIn, that person must change her settings so that she is anonymous or, alternatively, to be fully logged out of her LinkedIn account.



purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.”<sup>98</sup> Moreover, ABA, Formal Op. 466 suggests that “judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds,” including a juror’s or potential juror’s social media presence.<sup>99</sup>

The American Bar Association’s view has been criticized on the basis of the possible impact such communication might have on a juror’s state of mind and has been deemed more analogous to the improper communication where, for instance, “[a] lawyer purposefully drives down a juror’s street, observes the juror’s property (and perhaps the juror herself), and has a sign that says he is a lawyer and is engaged in researching the juror for the pending trial knowing that a neighbor will advise the juror of this drive-by and the signage.”<sup>100</sup>

A lawyer must take measures to ensure that a lawyer’s social media research does not come to the attention of the juror or prospective juror. Accordingly, due to the ethics opinions issued in New York on this topic, a lawyer in New York when reviewing social media to perform juror research needs to perform such research in a way that does not leave any “footprint” or notify the juror that the lawyer or her agent has been viewing the juror’s social media profile.<sup>101</sup>

The New York opinions cited above draw a distinction between public and private juror information.<sup>102</sup> They opine that viewing the public portion of a social media profile is ethical as long as there is no notice sent to the account holder indicating that a lawyer or her law firm viewed the juror’s profile and assuming other ethics rules are not implicated. However, such opinions have not taken a definitive position that such unintended automatic contact is subject to discipline.

The American Bar Association and New York opinions, however, have not directly addressed whether a lawyer may non-deceptively view a social media account that from a prospective or sitting juror’s view is putatively private, which the lawyer has a right to view, such as an alumni social network where both the lawyer and juror are members or whether access can be obtained, for instance, by being a “friend” of a “friend” of a juror on Facebook.

**Guideline No. 6.C: Deceit Shall Not Be Used to View a Juror’s Social Media.**

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<sup>98</sup> Id.

<sup>99</sup> Id.

<sup>100</sup> See Mark A. Berman, Ignatius A. Grande, and Ronald J. Hedges, “Why American Bar Association Opinion on Jurors and Social Media Falls Short,” New York Law Journal (May 5, 2014).

<sup>101</sup> See NYCBA, Formal Op. 2012-2 and NYCLA, Formal Op. 743.

<sup>102</sup> See Id.

**A lawyer may not make misrepresentations or engage in deceit in order to be able to view the social media profile of a prospective juror or sitting juror, nor may a lawyer direct others to do so.**

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* An “attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable.”<sup>103</sup>

#### **Guideline No. 6.D: Juror Contact During Trial**

**After a juror has been sworn in and throughout the trial, a lawyer may view or monitor the social media profile and posts of a juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) with the juror.**

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* The concerns and issues identified in the comments to Guideline No. 6.B are also applicable during the evidentiary and deliberative phases of a trial.

A lawyer must exercise extreme caution when “passively” monitoring a sitting juror’s social media presence. The lawyer needs to be aware of how any social media service operates, especially whether that service would notify the juror of such monitoring or the juror could otherwise become aware of such monitoring or viewing by lawyer. Further, the lawyer’s review of the juror’s social media shall not burden or embarrass the juror or burden or delay the proceeding.

These later litigation phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of litigation are greater than during the jury selection process and could result in a mistrial.<sup>104</sup>

[W]hile an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the

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<sup>103</sup> See Id.

<sup>104</sup> Rather than risk inadvertent contact with a juror, a lawyer wanting to monitor juror social media behavior might consider seeking a court order clarifying what social media may be accessed.

attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.<sup>105</sup>

ABA, Formal Op. 466 permits passive review of juror social media postings, in which an automated response is sent to the juror, of a reviewer's Internet "presence," even during trial absent court instructions prohibiting such conduct. In one New York case, the review by a lawyer of a juror's LinkedIn profile during a trial almost led to a mistrial. During the trial, a juror became aware that an attorney from a firm representing one of the parties had looked at the juror's LinkedIn profile. The juror brought this to the attention of the court stating "the defense was checking on me on social media" and also asserted, "I feel intimidated and don't feel I can be objective."<sup>106</sup> This case demonstrates that a lawyer must take caution in conducting social media research of a juror because even inadvertent communications with a juror presents risks.<sup>107</sup>

It might be appropriate for counsel to ask the court to advise both prospective and sitting jurors that their social media activity may be researched by attorneys representing the parties. Such instruction might include a statement that it is not inappropriate for an attorney to view jurors' public social media. As noted in ABA, Formal Op. 466, "[d]iscussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network."<sup>108</sup>

#### **Guideline No. 6.E: Juror Misconduct**

**In the event that a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.<sup>109</sup>**

NYRPC 3.5, 8.4.

*Comments:* An attorney faced with potential juror misconduct is advised to review the ethics opinions issued by her controlling jurisdiction, as the extent of the duty to report juror misconduct varies among jurisdictions. For example, ABA, Formal Op. 466 pertains only to criminal or fraudulent conduct by a juror, rather than the broader concept of improper conduct. Opinion 466 requires a lawyer to take remedial steps, "including, if necessary, informing the tribunal when the lawyer

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<sup>105</sup> See NYCBA, Formal Op. 2012-2.

<sup>106</sup> See Richard Vanderford, "LinkedIn Search Nearly Upends BofA Mortgage Fraud Trial," Law360 (Sept. 27, 2013).

<sup>107</sup> Id.

<sup>108</sup> ABA, Formal Op. 14-466.

<sup>109</sup> See NYCLA, Op. 743; NYCBA, Op. 2012-2.

discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding.”<sup>110</sup>

New York, however, provides that “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 her family of which the lawyer has knowledge.”<sup>111</sup> If a lawyer learns of “juror misconduct” due to social media research, he or she “must” promptly notify the court.<sup>112</sup> “Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror’s improper conduct benefits the attorney.”<sup>113</sup>

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<sup>110</sup> See ABA, Formal Op. 14-466.

<sup>111</sup> NYRPC 3.5(d).

<sup>112</sup> NYCBA, Op. 2012-2.

<sup>113</sup> Id. See Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-300 (“a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.”).

## 7. USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER

**A lawyer shall not communicate with a judicial officer over social media if the lawyer intends to influence the judicial officer in the performance of his or her official duties.**

NYRPC 3.5, 8.2 and 8.4.

*Comment:* There are few New York ethical opinions addressing lawyers' communication with judicial officers over social media, and ethical bodies throughout the country are not consistent when opining on this issue. However, lawyers should not be surprised that any such communication is fraught with peril as the "intent" of such communication by a lawyer will be judged under a subjective standard, including whether retweeting a judge's own tweets would be improper.

A lawyer may communicate with a judicial officer on "social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to ensure that there is no ex parte or other prohibited communication,"<sup>114</sup> which is consistent with NYRPC 3.5(a)(1) which forbids a lawyer from "seek[ing] to or caus[ing] another person to influence a judge, official or employee of a tribunal."<sup>115</sup>

It should be noted that New York Advisory Opinion 08-176 (Jan. 29, 2009) provides that a judge who otherwise complies with the Rules Governing Judicial Conduct "may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."<sup>116</sup> New York Advisory Committee on Judicial Ethics Opinion 08-176 further opines that:

[A] judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in

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<sup>114</sup> Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-300.

<sup>115</sup> NYRPC 3.5(a)(1).

<sup>116</sup> New York Advisory Committee on Judicial Ethics Opinion 08-176.

combination with other facts, rise to the level of a “close social relationship” requiring disclosure and/or recusal.

See New York Advisory Committee on Judicial Ethics Opinion 13-39 (May 28, 2013) (“the mere status of being a ‘Facebook friend,’ without more, is an insufficient basis to require recusal. Nor does the committee believe that a judge’s impartiality may reasonably be questioned (see 22 NYCRR 100.3[E][1]) or that there is an appearance of impropriety (see 22 NYCRR 100.2[A]) based solely on having previously ‘friended’ certain individuals who are now involved in some manner in a pending action.”).

## **APPENDIX**

### **DEFINITIONS**

**Social Media** (also called a social network): An Internet-based service allowing people to share content and respond to postings by others. Popular examples include Facebook, Twitter, YouTube, Google+, LinkedIn, Foursquare, Pinterest, Instagram, Snapchat, Yik Yak and Reddit. Social media may be viewed via websites, mobile or desktop applications, text messaging or other electronic means.

**Restricted**: Information that is not available to a person viewing a social media account because an existing on-line relationship between the account holder and the person seeking to view it is lacking (whether directly, *e.g.*, a direct Facebook “friend,” or indirectly, *e.g.*, a Facebook “friend of a friend”). Note that content intended to be “restricted” may be “public” through user error in seeking to protect such content, through re-posting by another member of that social media network, or as a result of how the content is made available by the social media network or due to technological change.

**Public**: Information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible to non-members.

**Friending**: The process through which the member of a social media network designates another person as a “friend” in response to a request to access Restricted Information. “Friending” may enable a member’s “friends” to view the member’s restricted content. “Friending” may also create a publicly viewable identification of the relationship between the two users. “Friending” is the term used by Facebook, but other social media networks use analogous concepts such as “Circles” on Google+ or “Follower” on Twitter or “Connections” on LinkedIn.

**Posting or Post**: Uploading public or restricted content to a social media network. A post contains information provided by the person, and specific social media networks may use their own term equivalent to a post (*e.g.*, “Tweets” on Twitter).

**Profile**: Accessible information about a specific social media member. Some social media networks restrict access to members while other networks permit a member to restrict, in varying degrees, a person’s ability to view specified aspects of a member’s account or profile. A profile contains, among other things, biographical and personal information about the member. Depending on the social media network, a profile may include information provided by the member, other members of the social media network, the social media network, or third-party databases.

**Lawyers' Manual on Professional Conduct: ABA Ethics Opinions**  
**ABA Formal Ethics Opinions**

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**Formal Opinion 99-415 September 8, 1999**

**Representation Adverse to Organization by Former In-house Lawyer**

*When an in-house lawyer moves to a law firm or another legal department, both he and his new law firm have ethical obligations that limit their ability to handle matters adverse to his former employer. If the former in-house lawyer personally represented his employer in a matter, neither he nor his new firm may undertake a representation adverse to his former employer in the same or a substantially related matter absent the former employer's consent. Even if the former in-house lawyer did not personally represent his former employer in a matter, but obtained protected information concerning that matter while it was being handled by others in his legal department, he will be disqualified and his disqualification will be imputed to his new firm.*

*Having borne supervisory responsibility for a matter without some personal involvement does not necessarily mean that the former in-house lawyer personally represented his former employer with respect to that matter. Similarly, the fact that he was responsible for matters of a particular type will not by itself preclude him from representing a client in a similar matter in which the former employer is an adverse party.*

In this Opinion, the Committee addresses the extent to which, under the ABA Model Rules of Professional Conduct (1999), a lawyer may represent a client in a matter adverse to an organization that previously employed the lawyer as in-house counsel<sup>1</sup> in the absence of the organization's consent.<sup>2</sup> The increased frequency with which lawyers

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<sup>1</sup> Although this Opinion is limited to the lawyer's duties under the Model Rules, the lawyer also is subject to common law duties applicable to all fiduciaries that are not dependent upon his status as a lawyer and that may in turn give rise to a conflict of interest for purposes of Rule 1.7(b). *See Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 254, 602 A.2d 1277, 1283 (Pa. 1992), ("By ignoring the common law principles of fiduciary duty, the Superior Court elevated attorneys above the law and granted to them greater rights and protection than are enjoyed by any other fiduciaries in this Commonwealth. No rule so preferring attorneys can be permitted to stand.").

<sup>2</sup> The term "consent" is used in this Opinion to mean "consent after consultation" as used in the Model Rules. "Consultation" is defined in the Terminology section of the Model Rules as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." The timing and extent of consultation required partly is dependent on the degree of sophistication of the party giving the consent.



employed by an organization<sup>3</sup> are hired by a competitor or by a law firm<sup>4</sup> seeking the expertise gained by the lawyer in his former position has resulted in a greater focus on this issue. Current and prospective employers as well as in-house counsel themselves have reason for concern.

The organization employing the in-house counsel experiences a tension between its need to have free and open communications among its in-house counsel and other employees and its concern that information gained by the in-house counsel be protected from disclosure and not used to its detriment in the future. The prospective employer has concern about the extent to which the conflict of interest rules will limit a newly hired former in-house counsel in his ability to use the skill and knowledge gained during his previous employment. Finally, the in-house counsel reasonably shares that concern, not least because questions about limits on his ability to use skill and knowledge obtained in an in-house counsel role affect his subsequent employment opportunities.

### *Disqualification of the Former In-House Lawyer*

Although certain aspects of in-house lawyers' conduct are addressed by Model Rule 1.13, Organization as Client, their conduct for purposes of former client conflicts of interest is governed, as is that of all other lawyers, by Model Rule 1.9. Thus, when a former in-house lawyer is considering whether to represent a client in a matter that is adverse to his former employer, he must determine whether Rule 1.9 applies.<sup>5</sup> Rule 1.9(a) prohibits a lawyer from representing a person whose interests are materially adverse to those of his former employer if he personally represented the former employer in the same or a substantially related matter. Rule 1.9(b) applies this prohibition in situations in which the former in-house lawyer did not personally represent the organization in the same or a

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<sup>3</sup> An "organization" for purposes of this Opinion includes a corporation, partnership, trust, or other entity. This Opinion does not apply to former government employees. The provisions of Rule 1.11 specifically are applicable when the former employer is a government agency.

<sup>4</sup> "Law firm" includes an organization's legal department. See "Terminology" and Comment, Rule 1.10.

<sup>5</sup> Rule 1.9 states: (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 consents after consultation. (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless the former client consents after consultation. (c) A lawyer who has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

substantially related matter, but other lawyers in the legal department did, and the former in-house lawyer acquired protected information<sup>6</sup> during his employment that is material to the prospective client's matter. In contrast to Rule 1.9(b), which only restricts the lawyer in a new matter in which the interests of the client are materially adverse to the former client and the matters are substantially related, Rule 1.9(c) prohibits the use of a former client's protected information (unless it is generally known) as well as its disclosure, even if the lawyer is not adverse to the former client or the adversity is in a matter which is not substantially related to the prior representation.

A. *Matters in Which the Lawyer Personally Represented His Former Employer*

When in his new employment a former in-house lawyer is sought to be retained by a client for a matter adverse to his former corporate client, the lawyer must ask and answer four questions: (1) whether the lawyer represented his former employer in the matter in question; (2) if so, whether the matter the new client has asked him to undertake is the same matter as, or is substantially related to, the matter in which he represented his former employer; (3) if the matters are either the same or substantially related, whether the interests of his new client are materially adverse to those of his former employer; and (4), if the answers to all of the above questions are yes, whether his former employer has consented to his undertaking the new representation.

1. *Representation Necessary to Disqualify the Lawyer*

Even if the matter involved in the potential conflict was being handled by the legal department of the former employer prior to the in-house lawyer's departure, Rule 1.9(a) does not apply unless the in-house lawyer personally represented the former client. The mere fact that a matter was being dealt with by the legal department while the lawyer was a member of that department does not by itself satisfy the personal representation requirement necessary for Rule 1.9(a) to apply to the subsequent adverse representation. The determination whether a lawyer "represented" his former employer with respect to a matter requires an inquiry into the responsibilities of the lawyer during his former employment.<sup>7</sup> A distinction may be made between a lawyer who has been heavily involved in a matter and one who has been only peripherally involved and has dealt only with issues and not with factual analysis.

Moreover, the fact that in-house counsel has had supervisory or administrative responsibilities with respect to a matter that has been handled by his legal department, as frequently occurs when the lawyer is general counsel or legal department head, does not

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<sup>6</sup> The term "protected information" is used in this Opinion to mean "information relating to the representation of a client" that is protected under Rule 1.6.

<sup>7</sup> Many corporate legal departments do not maintain the detailed time records customarily maintained by private law firms. In light of the factual nature of the determination of whether a lawyer has "represented" the organization, it is desirable for in-house lawyers at least to maintain logs describing those matters on which they work.

necessarily require a finding that he represented the organization as to that matter.<sup>8</sup> Direct involvement in the matter, or a style of supervision that results in access to material information concerning a matter, must be shown in order to establish that the formerly employed lawyer represented the organization in a specific matter. For example, if the legal department were divided into specialized areas of practice such as tax, patent, and securities law, there would be no presumption that the general counsel has knowledge of any specific matter dealt with by any practice area. Similarly, if the name of the general counsel appears on all pleadings filed by the organization as a matter of general policy, the matter is relatively small or routine, and the legal department is large, the general counsel may not have any familiarity with the matter and should not be viewed as having represented the organization in connection with it unless the rules of practice of the jurisdiction require a contrary conclusion. However, if a matter involved significant litigation and the name of the in-house lawyer appeared on the pleadings, it may be presumed that the lawyer represented the organization in that matter.<sup>9</sup>

## 2. *Same or Substantially Related Matters*

The question whether the former and current matters are the same or substantially related<sup>10</sup> inevitably requires a factual inquiry comparing the two matters. The test developed by the Second Circuit and also applied in some other jurisdictions requires a showing that the relationship between the issues in the prior and present representations

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<sup>8</sup> “Representation” for purposes of Rule 1.9(a) is not defined. Although the Rule itself does not articulate a de minimis exception, some courts have applied one in the process of determining whether a former representation requires disqualification. For example, in *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 518 F.2d 751, 756 (2d Cir. 1975), the court noted that “there is reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions.” A de minimis exception also is available to former government lawyers. Rule 1.11, Successive Government and Private Employment, disqualifies them only if the lawyer “participated personally and substantially” in a matter. Rule 1.11 also expressly permits the former government lawyer’s firm to avoid imputed disqualification through a screening procedure in contrast to Rule 1.10, Imputed Disqualification: General Rule, which does not recognize screening as a means to avoid imputed disqualification.

<sup>9</sup> The Committee believes that such a presumption should be rebuttable, however, as for example in jurisdictions where only the individual who personally signs the pleadings is deemed to have made representations concerning them.

<sup>10</sup> “Substantially related matter” is not defined in the Model Rules and its applicability as developed in case law is fact-specific. For a matter to be substantially related to a matter in which the lawyer represented the former client, it is not sufficient for the matters merely to be problems of a similar type. Comment [2] to Rule 1.9 notes: The scope of a “matter” for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer’s involvement in a matter can also be a question of degree...[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

is “patently clear” or that the issues are “identical” or “essentially the same.”<sup>11</sup> Other cases, relying primarily on the Model Code of Professional Responsibility, add to the factual inquiry the question whether it could reasonably be said that during the former representation the lawyer might have acquired information related to the subject matter of the representation.<sup>12</sup> In so doing, these latter cases conflate two separate issues that are not treated at all in the Model Code and are treated separately in Rule 1.9: disqualification because of former representation and substantial risk of disclosure of protected information.<sup>13</sup>

### 3. *Material Adversity*

The Comment to Rule 1.9 indicates that a lawyer must look to Rule 1.7 to determine, upon examination of the specific facts and circumstances of particular representations being handled, whether the interests of the parties are materially adverse.<sup>14</sup> The Comment to Rule 1.7 in turn interprets that Rule to prohibit the representation of interests that are “directly” as opposed to “generally” adverse. The Committee is of the opinion that only direct adversity of interests meets the threshold “material adversity” sufficient to trigger the prohibitions established in Rule 1.9. When an examination of the circumstances of the two conflicting representations reveals direct adversity that is material to the new matter, the lawyer must determine whether it is permissible to seek the consent of one or both clients before he undertakes the new representation.

### 4. *Consent Required*

Both paragraphs (a) and (b) of Rule 1.9 provide for former client consent to a lawyer’s subsequent adverse representation.<sup>15</sup> Thus, the organization that had employed the lawyer as in-house counsel may grant its consent to his subsequent representation of a party whose interests are adverse to the organization. For example, the former employer may determine that giving consent to a conflicting representation by its former in-house

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<sup>11</sup> *Government of India v. Cook Industries, Inc.*, 569 F.2d 737, 739-40 (2d Cir. 1978).

<sup>12</sup> *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 190 (7th Cir. 1979).

<sup>13</sup> Restatement (Third) of the Law Governing Lawyers §213 (Proposed Official Draft 1998), adopts this conflation by defining a matter as “substantially related” if “(1) the current matter involves the work the lawyer performed for the former client; or (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.”

<sup>14</sup> Comment [1] to Model Rule 1.9 provides: “The principles in Rule 1.7 determine whether the interests of the present and former client are adverse.”

<sup>15</sup> Although it may be more difficult to obtain binding consent if it applies to future conflicts, see ABA Formal Opinion 93-372, the Committee believes that the nature of the likely conflicts a former in-house counsel might have in subsequent private practice ordinarily are sufficiently well-defined so that the organization’s consent to future conflicts should be binding upon it.

counsel or his new law firm might be in its best interest where, in the midst of protracted litigation or negotiation, it will avoid the need for substitution of new counsel and its attendant delay by doing so.

Consent by the former employer alone, however, may not be sufficient to permit the subsequent representation. Consent by the new client may be required as well, under Rule 1.7(b), if the former in-house lawyer's obligations to his former employer create a material limitation on his representation of the new client, such as when the former employer insists that protected information obtained earlier that is material to the new representation cannot be used. In such a circumstance, the new client, precluded from knowing the nature of the information that is being withheld and unused, may be unable effectively to grant consent to the representation.

However, despite such inability of a former in-house counsel to disclose the protected information as part of the information communicated in order to obtain consent, the Committee believes that circumstances nevertheless may exist in which the client of the new firm may possess sufficient sophistication to consent. Thus, an organization represented by the former in-house lawyer's new firm should, through its general counsel, be able to give consent knowing only that there is protected information that is not being used in the representation. It might be more difficult to obtain consent of an individual client of the new firm who lacks sophistication or legal training sufficient to appreciate the significance of providing consent without knowledge of the protected information. Even then it may be possible to resolve this problem by having independent counsel advise the individual client with respect to the requested consent.

*B. Matters in Which Others in the Lawyer's Legal Department Represented the Former Employer*

Even if a former in-house lawyer did not represent his former employer in the same or a substantially related matter in which a new client is materially adverse, he still may be disqualified from representing the new client if he acquired protected information that is material to the new matter he wishes to undertake. Depending on the size and structure of the legal department and the extent to which it limits access to confidential information to those lawyers working on a matter, the lawyer may have obtained information as the result of shared confidences, requiring disqualification under Rule 1.9(b).

Courts have, however, diverged on the question of what types of information are protected. Although some courts have continued to consider a general knowledge of the client's organization, practices and strategy to constitute protected information,<sup>16</sup> others

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<sup>16</sup> See, e.g., *Webb v. E.I. DuPont de Nemours & Company, Inc.*, 811 F. Supp. 158, 160-63 (D. Del. 1992) (lawyer who had been responsible for ERISA benefit matters for three years prior to retirement disqualified in suit claiming right to ERISA benefits); *Ullrich v. Hearst Corp.*, 809 F. Supp. 229, 232-36 (S.D.N.Y. 1992) (lawyer who had represented a corporate client in employment discrimination matters for twenty years disqualified from representing plaintiffs in employment discrimination suits because of knowledge gained of personnel data in prior representations). In *Chugach Elec. Ass'n v. U. S. Dist. Court for Dist. of Alaska at Anchorage*, 370 F.2d 441, 443, (9th Cir. 1966), *cert. denied sub nom.*, *Roderick v. Chugach Elec. Ass'n*, 389 U.S. 820 (1967), a former general counsel

have rejected that concept.<sup>17</sup> These two seemingly inconsistent lines of cases emphasize that the decision whether the lawyer has protected information depends on the facts and circumstances of each particular case.

### *Imputed Disqualification of Others in the Lawyer's New Firm*

If the former in-house lawyer is personally disqualified from representing a client in his new firm by virtue of Rule 1.9(a) or (b), the new firm must consider whether the disqualification will be imputed to other lawyers in the firm. Under Rule 1.10(a), disqualification of a personally disqualified lawyer extends to all lawyers in the lawyer's new firm<sup>18</sup> unless the former client, in this case the employer, consents.<sup>19</sup>

### *Conclusion*

A former in-house lawyer may, without obtaining consent from the former client, represent a client in a matter that is materially adverse to the lawyer's former employer unless during the course of the lawyer's employment by the organization either the lawyer personally had represented the employer in the same matter or in a substantially

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was disqualified because his prior position bestowed upon him special "insight" into corporate affairs that gave him the advantage of knowing what questions to ask and of whom. *But see* G.C. Hazard and W.W. Hodes, *The Law of Lawyering* 296.4 (2d ed. Supp. 1998) with respect to this case: "It is also doubtful whether many courts, including the Ninth Circuit, would today take such a broad view of 'relatedness' in the disqualification context."

<sup>17</sup> See, e.g., *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1027-32 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981) (refusal to disqualify lawyer who brought a "churning" case against a firm he previously had defended on similar charges, since what constitutes churning is fact-specific); *Guzewicz v. Eberle*, 953 F. Supp. 108, 111-14 (E.D. Pa. 1997) (former general counsel permitted to represent plaintiffs in a discrimination suit where the claim did not involve matters with which the general counsel directly was involved).

<sup>18</sup> The Committee notes that Comment [10] to Rule 1.9 may be interpreted as supporting the proposition that a lawyer who has represented a client but has not obtained confidential information protected by Rule 1.9(b) may move to a new firm that is adverse to that client in the same matter without the lawyer's new firm being disqualified. Such an interpretation would be inconsistent with Rule 1.10(a), which, in imputing an individual lawyer's personal disqualification to a firm, makes no distinction between disqualification arising under Rule 1.9(a) or (b). To the extent that Comment [10] to Rule 1.9 and Rule 1.10(a) are inconsistent, the Rule governs.

<sup>19</sup> If the basis for the disqualification is that the former in-house lawyer received material confidential information rather than that he personally represented the former employer within the meaning of Rule 1.9(a), in some jurisdictions it nevertheless may be possible to satisfy the requirements of paragraphs (b) and (c) and thereby avoid the prohibition of Rule 1.10 through screening the former in-house lawyer. See Rule 1.10, *Legal Background, Screening To Avoid Disqualification*, in *Annotated Model Rules of Professional Conduct* 173-75 (3d ed. 1996).

related matter or another member of the organization's legal department had done so and the former in-house lawyer had acquired protected information material to the new matter.

The fact that the lawyer had represented his former employer in similar types of matters or that the lawyer had gained a general knowledge of the strategies, policies, or personnel of the former employer is not sufficient by itself to establish a substantial relationship between the current matter and matters in the legal department at the organization for purposes of Rule 1.9(a). Moreover, general supervisory responsibility such as that exercised by the head of a legal department ordinarily is not by itself sufficient to establish that a lawyer represented his former employer in a particular matter even if it is the same as or substantially related to a matter at the new firm.

The Committee nevertheless is of the opinion that an in-house lawyer may, in the course of his employment as in-house counsel, gain such sensitive information concerning matters in which the legal department represented the organization that is material to the subsequent representation as to be disqualified from subsequent representation under Rules 1.9(a) or 1.9(b) or prohibited from disclosing that information under Rule 1.9(c).

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## COMMITTEE REPORT

### Formal Opinion 2008-02: Corporate Legal Departments and Conflicts of Interest Between Represented Corporate Affiliates

February 01, 2008

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## VIEW REPORT

### QUESTIONS

When inside counsel represent corporate affiliates: (a) under what circumstances must they consider the propriety, under DR 5-105 and DR 5-108, of representing or continuing to represent those affiliates? (b) may a conflict between those affiliates be waived? (c) are there steps that can be taken in advance that will enhance the possibility that inside counsel may continue to represent some or all of the affiliates after a conflict arises?

### SUMMARY OF OPINION

Inside counsel representing corporate affiliates must consider possible conflicts between those affiliates under DR 5-105 and DR 5-108.<sup>1</sup> This Opinion describes several steps that inside counsel may take to enhance the possibility that the representation of at least one affiliate, typically the parent corporation, may continue, in the face of a conflict with another corporate affiliate.

### INTRODUCTION

It can scarcely be debated that inside counsel play a critical role in advising their corporate clients. *See, e.g., In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 369 (3rd Cir. 2007) (observing that there has been “‘rapid growth in both importance and size of in-house, or corporate counsel’” and that “the primary advantages of in-house (rather than outside) counsel are the breadth of their knowledge of the corporation and their ability to begin advising senior management on important transactions at the earliest possible stage, often well before anyone would think to hire a law firm”) (citation omitted); Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 Emory L.J. 1201, 1207 (1997) (“This decade [the 1990s] is seeing a markedly different legal profession in which employed counsel are playing the dominant role. They are supplanting retained counsel as the primary legal advisors to management. Law firms, whose role will become increasingly episodic in the services that they provide, will be primarily transaction dependent, providing legal services only on those matters specifically referred to them by the general counsel’s office.”)

In fulfilling this critical role, inside counsel are subject to the same ethical responsibilities as outside counsel. In particular, New York’s Code of Professional Responsibility (the “Code”) defines a law firm to include a corporate legal department. 22 NYCRR Part 1200.<sup>12</sup>



The caselaw has begun to address conflicts arising when inside counsel represent corporate affiliates and has focused on the erosion of a parent's attorney-client privilege when an affiliate is acquired by a hostile third party. *See, e.g., In re Teleglobe Commc'ns Corp.*, 493 F.3d at 373:

It is inevitable that on occasion parents and subsidiaries will see their interests diverge, particularly in spin-off, sale, and insolvency situations. When this happens, it is wise for the parent to secure for the subsidiary outside representation. Maintaining a joint representation for the spin-off transaction too long risks the outcome of *Polycast [Tech. Corp. v. Uniroyal, Inc.]*, 125 F.R.D. [47, 49 (S.D.N.Y. 1989)], and *Medcom [Holding Co. v. Baxter Travenol Lab.]*, 689 F. Supp. [842, 844 (N.D. Ill. 1988)] — both cases in which parent companies were forced to turn over documents to their former subsidiaries in adverse litigation — not to mention the attorneys' potential for running afoul of conflict rules.

This Opinion will address conflicts facing inside counsel more broadly.

## **CONFLICTS AND THE CORPORATE LEGAL DEPARTMENT**

In analyzing the conflicts facing inside counsel that represent corporate affiliates, it is important to divide the discussion into two distinct scenarios. The first is when inside counsel represent a parent corporation and one or more of the parent's wholly owned affiliates.<sup>3</sup> The second is when inside counsel represent (a) a parent and one or more affiliates that the parent controls, but does not wholly own, or (b) several affiliates controlled, but not wholly owned, by a common parent.

In the first scenario, inside counsel's representation is not of entities whose interests may differ because the parent's interests completely preempt those of its wholly owned affiliates. As a matter of corporate law, "in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders." *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1174 (Del. 1988). *See also Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826, 832 (S.D.N.Y. 1996) ("Because the officers and directors of a parent company owe allegiance only to that company and not to a wholly owned subsidiary, it is reasonable to conclude that a parent corporation itself is under no obligation to provide the subsidiary with independent representation .... It would be anomalous to impose a duty upon the corporation, an artificial person, when all the natural persons who are its officers and directors have no such duty, and there is no natural person to take up the duty."), *aff'd*, 110 F.3d 892 (2d Cir. 1997).<sup>4</sup>

The analysis changes in the second scenario. In that scenario, inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (Del. 1983) (when the parent does not wholly own the affiliate, the joint directors of both parent and affiliate, "owe the same duty of good management to both" companies, and "this duty is to be exercised in light of what is best for both companies.") This is so even when the parent "has sufficient ownership or influence to exercise working control of the [affiliate]" *Restatement (Third) of the Law Governing Lawyers*. §131, cmt. d. (2000).

In the second scenario, when inside counsel determine a conflict may exist between the parent and its represented affiliates, or between represented affiliates, inside counsel should consider whether joint representation of some or all of their clients comports with the Code. There are two principal Disciplinary Rules that apply: DR 5-105 and DR 5-108. DR 5-105(A) articulates when a lawyer must decline joint representation, and DR 5-105(B) articulates when a lawyer must discontinue joint representation. DR 5-105(C) sets forth two conditions that, when met, permit the lawyer and the law firm to undertake or continue an otherwise conflicted representation. DR 5-105 (A) – (C) provide:

- A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.241(C)].
- A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24](C).

In the situations covered by DR 5-105 [1200.241(A) and (B)], a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

DR 5-108, which governs “former client” conflicts, applies when a conflict develops between the parent and its represented affiliates, or between represented affiliates, and inside counsel seek to continue representing certain of the clients, while ceasing to represent the others. DR 5-108(A)(1) precludes a lawyer from representing 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.”

Inside counsel should consider carefully these conflict-of-interest rules. Sometimes, a potential conflict will be apparent from the outset of the representation. At other times, the conflict may not become apparent until after the joint representation has begun. To pick just one example, at the outset of a litigation in which a parent and a majority-owned affiliate have been sued, their positions may appear identical and they may choose to be jointly represented by inside counsel. Then discovery may unexpectedly reveal that there is a basis for the parent to offload responsibility onto the affiliate.

## **THE EFFECT OF A CONFLICT OF INTEREST**

Once it has been determined that a conflict of interest exists between represented corporate clients, inside counsel must withdraw from the representation, unless the Code otherwise permits. If the Code does not, the entire corporate legal department is barred from the representation because DR 5-105(D) provides that conflicts are imputed in a law firm:

While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101 [1200.20] (A), DR 5-105 [1200.24] (A) or (B), DR 5-108 [1200.27] (A) or (B), or DR 9-101 [1200.45] (B) except as otherwise provided therein.<sup>5</sup>

### **DR 5-105(C)**

- The Disinterested Lawyer Test

The first test under DR 5-105(C) is whether a “disinterested lawyer” would conclude that all affected clients can be competently represented if the conflicted representation were undertaken or continued. This is an “objective” test. It is not the subjective view of the individual lawyer, but what a “disinterested lawyer” would think. *See, Restatement (Third) of the Law Governing Lawyers* §122(2)(c) (2000). Professor Simon has defined the “disinterested lawyer,” for purposes of DR 5-105(C), as “an imaginary, hypothetical independent lawyer who has no personal or financial interest in continuing the representation of the client — a lawyer whose only aim is to give the client the best advice possible about whether the client should or should not consent to a conflict.” Roy Simon, *Simon’s New York Code of Prof’l Responsibility Annotated* 857 (2007). Furthermore, “[i]f a disinterested lawyer would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client’s consent.” EC 5-16. For an analysis of the considerations involved in the disinterested-lawyer test, see ABCNY Formal Op. 2004-2.

Given the inclination toward joint representation, inside counsel may conclude in some circumstances that they should engage independent counsel to conduct that analysis.

### **Informed Consent**

DR 5-105(C) also requires the informed consent to the representation of the clients whose interests differ.

It is impossible to define fully the elements that make up informed consent. Rule 1.0(e) of the American Bar Association’s Model Rules of Professional Conduct describes informed consent as:

...denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.<sup>6</sup>

The Restatement provides that:

[i]nformed consent requires that each affected client be aware of the material respects in which the representation could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks of the conflicted representation. The client must be aware of information reasonably adequate to make an informed decision.

*Restatement (Third) of the Law Governing Lawyers* §122, cmt. c(i) (2000). In any event, inside counsel must ensure that all affected clients are fully informed of the advantages and risks of joint representation. We have previously underscored that a client's sophistication is an important determinant of the degree of disclosure required to obtain informed consent, and when it comes to the advantages of being jointly represented by inside counsel, their clients will likely need little disclosure.<sup>7</sup> At some corporations, especially large, multi-national corporations, inside counsel may have acquired sufficiently deep and broad relationships with the corporation to allow them to provide advice that considers all the different constituencies and issues that impact a complex organization's decisions on important matters. At the same time, these clients will also likely need little disclosure about at least certain of the risks of joint representation. Included among these are that the centralized legal department regularly represents members of the corporate family and may be motivated in part by a desire to maintain consistent positions across the corporate family, that the department's principal loyalty is to the parent, and that it is likely to take instruction from the parent, even if the parent is not a party to the particular representation. In the final analysis, given the value placed by some corporate clients on inside counsel's advice, those clients may be willing to give informed consent to a joint representation by inside counsel that those clients would reject if proffered by outside counsel.

Given the inclination toward joint representation, inside counsel may conclude in some circumstances that they should engage independent counsel to obtain informed consent.

Who, on behalf of an affiliate, has the degree of independence required to give informed consent under DR 5-105 is a question of corporate law beyond the scope of this Opinion.

## NAVIGATING CONFLICTS

Two useful mechanisms that a corporate legal department may employ in navigating conflicts between represented affiliates are an advance conflict waiver and limiting the joint representation to avoid conflicts.

### **Advance Conflict Waivers**

This Committee discussed advance conflict waivers at length in ABCNY Formal Op. 2006-1 and, in the context of representing corporations and their constituents in governmental investigations, in ABCNY Formal Op. 2004-2.

Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises. In the context of a joint representation of a parent and an affiliate, the advance waiver should:

- Identify for the clients the potential or existing conflicts with as much specificity as possible;

- Make clear to the clients that the confidences and secrets of the affiliate will be shared with the parent; and

- Obtain agreement from the affiliate that if inside counsel can no longer represent both parent and affiliate, inside counsel can continue to represent the parent

irrespective of the confidences and secrets that the affiliate may have shared with counsel and irrespective of what work counsel may have performed for the affiliate.

As we said in ABCNY Formal Op. 2006-1, the validity of an advance waiver must be measured against DR 5-105.

With respect to the disinterested lawyer test, we wrote:

The disinterested lawyer test should be applied both when the advance waiver is given and again when the subsequent adverse matter arises. In the first instance, the lawyer examines the type of representation and prospective client that is anticipated and the potential adversity of interests. In the second instance, the lawyer examines the actual client and matter and the actual adversity that has developed. If the actual conflict is materially different from the conflict envisioned by the waiver, the waiver will be ineffective. If the actual conflict is not materially different, the waiver will also be ineffective if the actual conflict is nonconsentable.

With respect to the informed-consent test, we wrote:

The “adequacy of disclosure and consent” will depend upon the circumstances of each case. We agree with NYCLA Ethics Opinion No. 724 that, in general, “the client or prospective client should be advised of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients or matters that may present such conflicts.”

Some opinions have emphasized the sophistication of the client in judging the degree of required disclosure, and this too is an important consideration. Sophisticated clients need less disclosure of the “implications,” “advantages,” and “risks” of advance waivers before being able to provide informed consent. Similarly, Comment 22 to ABA Model Rule 1.7, with which we also agree, observes that the effectiveness of advance waivers is determined “by the extent to which the client reasonably understands the material risk that the waiver entails,” placing the emphasis, for the sophisticated client, on the client’s understanding of risks rather than detailed disclosure by the lawyer. For the sophisticated clients described above, blanket or open-ended advance waivers that are accompanied by relatively limited disclosure about the prospective conflicting matters should nevertheless be enforceable. (citations omitted)

Consistently with the discussion on pages seven and nine above, in connection with the advance waiver, inside counsel may conclude in some circumstances that they should engage independent counsel to conduct the disinterested lawyer analysis and to obtain informed consent.

It also bears emphasis, as stated above, that the person giving informed consent to the advance waiver on behalf of the affiliate must have the degree of independence from the parent, or from other affected affiliates, required by applicable corporate law.

## Limiting Representation to Avoid Conflicts

Alternatively, inside counsel can limit the representation of one or more affiliates to avoid conflicts. This Committee explored at length the conditions for doing this in ABCNY Formal Op. 2001-3, in which we concluded:

[T]hat a representation may be limited to eliminate adversity and avoid a conflict of interest, as long as the lawyer's continuing representation of the client is not so restricted that it renders her counsel inadequate and the client for whom the lawyer will provide the limited representation consents to the limitation. 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 separate counsel may need to be retained, which could result in additional expense, and delay or complicate the rendition of legal services.

Limiting the representation of an affiliate is at times accompanied by retaining other counsel — for example, outside counsel — to represent the affiliate on those matters in which conflicts preclude joint representation. Separate counsel can protect the affiliate's interests in the conflicted matter, while allowing inside counsel to perform other useful roles for both clients.

## CONCLUSION

In analyzing the conflicts facing inside counsel that represent corporate affiliates, this Opinion describes two distinct scenarios. The first is when inside counsel represent a parent corporation and one or more of the parent's wholly owned affiliates. The second is when inside counsel represent (a) a parent and one or more affiliates that the parent controls, but does not wholly own, or (b) several affiliates controlled, but not wholly owned, by a common parent.

In the first scenario, inside counsel's representation is not of entities whose interests may differ, as a matter of corporate law. In the second scenario, inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests. In the second scenario, when inside counsel determine that a conflict may exist between corporate affiliates that they jointly represent, or intend to jointly represent, inside counsel should consider whether joint representation

comports with the requirements of DR 5-105(C), or whether independent counsel should be engaged to represent at least some of the clients. If inside counsel conclude that joint representation may pass muster, they may also conclude in some circumstances that they should engage independent counsel to help satisfy the "disinterested lawyer" and "informed consent" tests required by DR 5-105(C). In all events, a robust consent process should be employed, emphasizing a full explanation of the advantages and disadvantages of joint representation. The propriety of joint representation should be revisited as circumstances change.

Two potentially useful mechanisms that can help inside counsel navigate conflicts are an advance conflict waiver and limiting their representation to avoid conflicts.

Sensitivity to conflicts between represented affiliates will help forestall judicial criticism and avoid unnecessary curtailment of inside counsel's continued functioning in their expected capacity.

September 2008

<sup>1</sup> As used in this Opinion, "affiliate" has the same meaning as in Rule 405 of the General Rules and Regulations under the Securities Act of 1933. Rule 405, 17 C.F.R. § 230.405, defines "[a]n affiliate of, or person affiliated with, a specified person [as] a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified."

<sup>2</sup> We leave for another day the question whether a corporate legal department should be defined to be a law firm.

<sup>3</sup> This Opinion assumes that inside counsel for the parent provide legal services to the entire corporate "family." But the analysis in this Opinion holds equally true when affiliates within the corporate family have their own legal departments that in turn report to a single lawyer, typically the general counsel of the parent. Under this circumstance, the conflicts of the parent's legal department become those of each affiliate's legal department, and vice versa. *See, e.g.,* ABCNY Formal Op. 2007-2; N.Y. State 793 (2006).

<sup>4</sup> In *Aviall*, the court rejected a claim by a former subsidiary arising out of its former parent having dictated all the terms of the spin-off agreement, having failed to provide the former subsidiary with independent counsel, and having had an officer of the former parent sign the spin-off agreement on behalf of the former subsidiary.

<sup>5</sup> DR 5-101 (personal conflicts between lawyer and client) and DR 9-101(B) (representations by former government lawyers) are irrelevant to this Opinion.

<sup>6</sup> *See* Comments [18] through [22] to Model Rule 1.7 for further amplification.

<sup>7</sup> *See* page 11, below.

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Author(s): Professional Ethics Committee

Subject Area(s): Ethics | Conflict of Interest

Final

**Rhode Island Supreme Court Ethics Advisory Panel  
Opinion No. 2012-03  
Issued February 9, 2012**

**FACTS**

The inquiring attorney is a recently hired in-house attorney for a number of affiliated companies. On his/her first day in the position, the inquiring attorney met with the manager of one of the companies. The manager, an assistant manager, and the company had been subjects of a sexual harassment complaint filed by an employee with the Rhode Island Commission for Human Rights. The Human Rights Commission has ruled that the complainant has ninety days to file a complaint in Superior Court. The Commission matter was handled by the company's general counsel and by another in-house attorney. The in-house attorney who was the inquiring attorney's predecessor, had entered an appearance before the Human Rights Commission to represent all of the respondents, including the manager and the company. The manager and assistant manager no longer work at the company for reasons unrelated to the sexual harassment claim.

The employee who filed the complaint at the Human Rights Commission has filed suit in Superior Court against the company, its former manager, and its former assistant manager. The company's general counsel and the inquiring attorney have determined that having represented the former manager in the matter before the Human Rights Commission, company counsel could not represent the company in the related Superior Court action. The company has hired outside counsel to represent it in the Superior Court matter.

The inquiring attorney states that at his/her meeting with the manager, he did not substantively advise the manager. However, he/she asked questions, and took a single page of handwritten notes. Also, the manager submitted to the inquiry attorney a timeline consisting of several pages. The meeting took place in a conference room with no one else present. The inquiring attorney further states that he/she believes both the company, and the manager, were his/her clients.

The inquiring attorney has given a subset of the legal file on the sexual harassment matter to company management to forward to its outside attorney. However, he/she has not forwarded his/her own handwritten notes from the meeting with the manager, or the timeline the manager had submitted to him/her. The inquiring attorney states that he/she knows that before leaving the company, the manager told company management much of the information that is in the timeline.



### ISSUE PRESENTED

The inquiring attorney asks whether it is permissible for him/her to disclose his/her meeting notes and the manager's timeline relating to the sexual harassment claim to the outside attorney who represents the company in the related Superior Court action.

### OPINION

The manager is the inquiring attorney's former client. Therefore, Rule 1.6 prohibits the inquiring attorney from revealing his/her notes, the manager's timeline, or any information which the inquiring attorney generated or acquired during meetings with his/her former client to the company's outside attorney, or to company management, without the manager's consent.

### REASONING

Rule 1.13 of the Rules of Professional Conduct provides that a lawyer employed or retained by an organization represents the organization. The Rule also provides that such a lawyer may also represent the organization's constituents, including employees. In pertinent part, Rule 1.13 states:

**Rule 1.13. Organization as client.** (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

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

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

This inquiry highlights the importance of an organization's counsel's obligation to clarify his or her role before counsel takes on the representation of both the organization and its constituent in the same matter. Counsel, at the outset, has the obligation to make clear who his or her client is, to determine and explain potential adverse interests between the constituent and the organization, and to advise the constituent that in light of potential

adverse interests, the constituent may wish to obtain independent representation. See Rule 1.13, Comment [10].

In the instant inquiry, general counsel and the inquiring attorney have determined that the manager is a former client. The inquiring attorney has stated that in-house counsel entered his or her appearance in the Human Rights Commission matter on behalf of all respondents, including the manager. General counsel and the inquiring attorney have concluded that having represented the manager in the Human Rights Commission matter, company counsel could not represent the company in the Superior Court action. The manager had good reason to believe that at the time of the meeting with the inquiring attorney, the inquiring attorney was his attorney for the sexual harassment claim. With that belief came a reasonable expectation of loyalty and confidentiality. The inquiring attorney himself/herself has stated that he/she viewed the manager as his/her client.

Rule 1.6 entitled “Confidentiality of information” prohibits a lawyer from revealing information relating to the representation of a client, unless the client consents. The Panel concludes that absent the manager’s consent, the inquiring attorney is prohibited from disclosing his/her notes, the manager’s timeline, or any information which the inquiring attorney generated or acquired during the meetings with his/her former client, the manager, to the company’s outside attorney or to company management.



**Model Rules of Professional Conduct**

*Client-Lawyer Relationship*

**Rule 1.0 Terminology**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Rule 1.0 Terminology - Comment**

### **Confirmed in Writing**

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

## Firm

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

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

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

## Fraud

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

## Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) 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.

[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. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screened

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

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

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

**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED**  
**RHODE ISLAND STATE COURT RULES**  
**ARTICLE V. RULES OF PROFESSIONAL CONDUCT**

Current with amendments received through March 20, 2019

**RULE 1.0. TERMINOLOGY**

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

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

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

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

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

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

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

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

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

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

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



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

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

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

## COMMENT

### Confirmed in Writing

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

### Firm

Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. Further, any two or more lawyers who, by signs, letterhead, or any form of advertising, list their names in succession will likely be regarded as a firm for the purposes of these Rules, notwithstanding disclaimers such as "an association of independent attorneys." The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

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

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

### Fraud

When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not

include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

### **Informed Consent**

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person 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.

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. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

### **Screened**

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

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

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





**Model Rules of Professional Conduct**

*Client-Lawyer Relationship*

**Rule 1.6 Confidentiality Of Information**

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

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

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order or
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the

revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

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

### **Rule 1.6 Confidentiality Of Information - Comments**

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

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

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other

than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

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

#### **Authorized Disclosure**

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

#### **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. 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 threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks

the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

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

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

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

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond

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

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

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is



seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

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

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

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

### **Acting Competently to Preserve Confidentiality**

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

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

#### **Former Client**

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



**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP**

Current with amendments received through March 20, 2019

**RULE 1.6. CONFIDENTIALITY OF INFORMATION**

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

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

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;

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

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

(4) to comply with other law or a court order.

**COMMENT**

**Fundamental Principles**

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

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

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

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

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

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

### **Authorized Disclosure**

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

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.

### **Disclosure Adverse to Client**

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(3) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the

transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

### **Withdrawal**

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

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

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

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

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 1.13(c), 2.3, 3.3 and 4.1. Other law may require that a lawyer

disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.

A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

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

#### **Former Client**

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

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 1.6, RI R S CT ART V RPC Rule 1.6



**Model Rules of Professional Conduct**

*Client-Lawyer Relationship*

**Rule 1.7 Conflict Of Interest: Current Clients**

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

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

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

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

**Rule 1.7 Conflict Of Interest: Current Clients - Comments**

**General Principles**

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding



certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

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

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

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

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the

conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

### **Identifying Conflicts of Interest: Directly Adverse**

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

[7] Directly adverse conflicts can also arise in transactional matters. For example, if 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.

### **Identifying Conflicts of Interest: Material Limitation**

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect

forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

### **Lawyer's Responsibilities to Former Clients and Other Third Persons**

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

### **Personal Interest Conflicts**

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

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

relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

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

### **Interest of Person Paying for a Lawyer's Service**

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

### **Prohibited Representations**

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

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

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer

are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

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

### **Informed Consent**

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

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

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

### **Revoking Consent**

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

### **Consent to Future Conflict**

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the

client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

### **Conflicts in Litigation**

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

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the

affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

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

### **Nonlitigation Conflicts**

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

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

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs,



working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

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

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

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

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each

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

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

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

### **Organizational Clients**

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

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



**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP**

Current with amendments received through March 20, 2019

**RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS**

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

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

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

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

**COMMENT**

**General Principles**

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

Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the

clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

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

If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [28].

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

### **Identifying Conflicts of Interest: Directly Adverse**

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

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

### **Identifying Conflicts of Interest: Material Limitation**

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or

advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

### **Lawyer's Responsibilities to Former Clients and Other Third Persons**

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

### **Personal Interest Conflicts**

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

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

### **Interest of Person Paying for a Lawyer's Service**

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

### **Prohibited Representations**

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

Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of

interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

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

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

### **Informed Consent**

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [29] and [30] (effect of common representation on confidentiality).

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

### **Consent Confirmed in Writing**

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

### **Revoking Consent**

A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature

of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

### **Consent to Future Conflict**

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

### **Conflicts in Litigation**

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

Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

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



### **Nonlitigation Conflicts**

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

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

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

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

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

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

As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that

information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

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

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**

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

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

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 1.7, RI R S CT ART V RPC Rule 1.7



**Model Rules of Professional Conduct**

*Client-Lawyer Relationship*

**Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules**

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
  - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
  - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

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

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

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

(1) the client gives informed consent;

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

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

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

(h) A lawyer shall not:

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

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

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

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

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

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

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

## **Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules - Comments**

### **Business Transactions Between Client and Lawyer**

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

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction

and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

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

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

#### **Use of Information Related to Representation**

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the

client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

### **Gifts to Lawyers**

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

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

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

### **Literary Rights**

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's

fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

### **Financial Assistance**

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

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

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

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



Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

### **Aggregate Settlements**

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

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

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, 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. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

### **Client-Lawyer Sexual Relationships**

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's

disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

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

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

### **Imputation of Prohibitions**

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



**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP**

Current with amendments received through March 20, 2019

**RULE 1.8. CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES**

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

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

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

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

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

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

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

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

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

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

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

(1) the client gives informed consent;

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

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

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

**(h)** A lawyer shall not:

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

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

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

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

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

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

## **COMMENT**

### **Business Transactions Between Client and Lawyer**

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other non-monetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products 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.

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

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

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

### **Use of Information Related to Representation**

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

### **Gifts to Lawyers**

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

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

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

### **Literary Rights**

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

### **Financial Assistance**

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

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

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

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

### **Aggregate Settlements**

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

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

Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. Paragraph (h)(1) does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

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**

Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

### **Imputation of Prohibitions**

Under paragraph (j), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm



Sup.Ct.Rules, Art. V, Rules of Prof.Conduct, Rule 1.8

may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client.

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 1.8, RI R S CT ART V RPC Rule 1.8



**Model Rules of Professional Conduct**

*Client-Lawyer Relationship*

**Rule 1.9 Duties To Former Clients**

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
- (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
- unless the former client gives informed consent, confirmed in writing.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
  - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

**Rule 1.9 Duties To Former Clients - Comments**

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except

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

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

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a

prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information 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.

### **Lawyers Moving Between Firms**

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

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

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

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

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

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



**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP**

Current with amendments received through March 20, 2019

**RULE 1.9. DUTIES TO FORMER CLIENTS**

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

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

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

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

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

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

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

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

**COMMENT**

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

give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

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.

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

### **Lawyers Moving Between Firms**

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

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

Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may

have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

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

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

The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [21] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 1.9, RI R S CT ART V RPC Rule 1.9





**Model Rules of Professional Conduct**

*Client-Lawyer Relationship*

**Rule 1.10 Imputation Of Conflicts Of Interest: General Rule**

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

(1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a), or (b), and

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

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

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

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

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

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

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

### **Comment Definition of "Firm"**

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, 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)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

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

the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

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

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

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

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(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.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

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

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



**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED**  
**RHODE ISLAND STATE COURT RULES**  
**ARTICLE V. RULES OF PROFESSIONAL CONDUCT**  
**CLIENT-LAWYER RELATIONSHIP**

Current with amendments received through March 20, 2019

**RULE 1.10. IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE**

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

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

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

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

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

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

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

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

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

**COMMENT**

**Definition of "Firm"**

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

### **Principles of Imputed Disqualification**

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

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

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 non-lawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

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

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

Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(2) 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.

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

Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed

consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [21]. For a definition of informed consent, see Rule 1.0(e).

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

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

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 1.10, RI R S CT ART V RPC Rule 1.10



**Model Rules of Professional Conduct**

*Client-Lawyer Relationship*

**Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers  
And Employees**

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

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

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

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

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

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

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to



disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

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

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

(2) shall not:

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

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

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

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

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

## Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees - Comments

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

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

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

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

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

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].

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

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

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

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

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



**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP**

Current with amendments received through March 20, 2019

**RULE 1.11. SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT  
OFFICERS AND EMPLOYEES**

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

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

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

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

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

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

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

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

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

(2) shall not:

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

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

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

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

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

#### COMMENT

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

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

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

This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from

particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].

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

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

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

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

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



**Model Rules of Professional Conduct**

*Client-Lawyer Relationship*

**Rule 1.13 Organization As Client**

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

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

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an



officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

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

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

### **Rule 1.13 Organization As Client - Comments**

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

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

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

client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

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

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

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

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

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) 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 violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

### **Government Agency**

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

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

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

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

### **Dual Representation**

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

### **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 a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

**C**

**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP**

Current with amendments received through March 20, 2019

**RULE 1.13. ORGANIZATION AS CLIENT**

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

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

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

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

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

## COMMENT

### The Entity as the Client

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

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

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. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

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

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

### **Relation to Other Rules**

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 Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation. Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) may be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) 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 violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

### **Government Agency**

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

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

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

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



### **Dual Representation**

Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

### **Derivative Actions**

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

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 1.13, RI R S CT ART V RPC Rule 1.13



**Model Rules of Professional Conduct**

*Client-Lawyer Relationship*  
**Rule 1.18 Duties To Prospective Client**

- (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal 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 disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (ii) written notice is promptly given to the prospective client.

## Rule 1.18 Duties To Prospective Client - Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer 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."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

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

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

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

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, 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 1.0(k) (requirements for screening procedures). 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.

[8] Notice, 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.



**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
ADVOCATE**

Current with amendments received through March 20, 2019

**RULE 1.18. Duties to Prospective Client**

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) 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 disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (ii) written notice is promptly given to the prospective 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. See Rules 5.4 and 5.6.

Termination of Practice by the 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 purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice.

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

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

#### Sale of Entire Practice

[5] 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 purchasers are required to undertake all client matters in the practice, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

#### Client Confidences, Consent and Notice

[6] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, the representation of that client may be transferred to the purchaser only upon entry of any order so authorizing by a court having jurisdiction.

[7] 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 or fail to respond to the request for consent. Since clients who cannot be located or who fail to respond to a notice requesting their consent to the proposed transfer cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[8] 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 Purchaser

[9] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

#### Other Applicable Ethical Standards

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

[11] 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 1.17).

#### Applicability of the Rule

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

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

[14] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.



**Model Rules of Professional Conduct**

*Advocate*

**Rule 3.3 Candor Toward The Tribunal**

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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

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



## **Rule 3.3 Candor Toward The Tribunal - Comments**

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

### **Representations by a Lawyer**

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

### **Legal Argument**

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must

recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

### **Offering Evidence**

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to

discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

### **Remedial Measures**

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

## **Preserving Integrity of Adjudicative Process**

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

## **Duration of Obligation**

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

## **Ex Parte Proceedings**

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

## **Withdrawal**

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can

no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.



**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
ADVOCATE**

Current with amendments received through March 20, 2019

**RULE 3.3. CANDOR TOWARD THE TRIBUNAL**

**(a)** A lawyer shall not knowingly:

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

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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

**(b)** A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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

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

**COMMENT**

This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an

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

### **Representations by a Lawyer**

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

### **Legal Argument**

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

### **Offering Evidence**

Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

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.

Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the

lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

### **Remedial Measures**

Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done -- making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

### **Preserving Integrity of Adjudicative Process**

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

### **Duration of Obligation**

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

### **Ex Parte Proceedings**

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



### **Withdrawal**

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

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 3.3, RI R S CT ART V RPC Rule 3.3



**Model Rules of Professional Conduct**

*Transactions With Persons Other Than Clients*

**Rule 4.1 Truthfulness In Statements To Others**

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

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

**Rule 4.1 Truthfulness In Statements To Others - Comments**

**Misrepresentation**

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

**Statements of Fact**

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

should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

### **Crime or Fraud by Client**

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



**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS**

Current with amendments received through March 20, 2019

**RULE 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS**

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

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

**COMMENT**

**Misrepresentation**

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

**Statements of Fact**

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

**Crime or Fraud by Client**

Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a

Sup.Ct.Rules, Art. V, Rules of Prof.Conduct, Rule 4.2

lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 4.1, RI R S CT ART V RPC Rule 4.1



**Model Rules of Professional Conduct**

*Transactions With Persons Other Than Clients*

**Rule 4.2 Communication With Person Represented By Counsel**

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

**Rule 4.2 Communication With Person Represented By Counsel - Comments**

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

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

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

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

lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

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

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

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

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual

knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

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





**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS**

Current with amendments received through March 20, 2019

**RULE 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**

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

**COMMENT**

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

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

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

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

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 of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

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

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

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

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

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 4.2, RI R S CT ART V RPC Rule 4.2



**Model Rules of Professional Conduct**

*Transactions With Persons Other Than Clients*

**Rule 4.4 Respect For Rights Of Third Persons**

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

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

**Rule 4.4 Respect For Rights Of Third Persons - Comments**

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

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information

that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

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



**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS**

Current with amendments received through March 20, 2019

**RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSON**

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

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

**Comment**

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.



**Model Rules of Professional Conduct**

*Law Firms And Associations*

**Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers**

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

**Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers -  
Comments**

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

managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

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

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

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

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

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

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

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

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





**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
LAW FIRMS AND ASSOCIATIONS**

Current with amendments received through March 20, 2019

**RULE 5.1. RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS**

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

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

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

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

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

**COMMENT**

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

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

Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems

directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

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

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

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

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

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

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 5.1, RI R S CT ART V RPC Rule 5.1



**Model Rules of Professional Conduct**

*Law Firms And Associations*

**Rule 5.2 Responsibilities Of A Subordinate Lawyer**

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

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

**Rule 5.2 Responsibilities Of A Subordinate Lawyer - Comments**

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

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



**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
LAW FIRMS AND ASSOCIATIONS**

Current with amendments received through March 20, 2019

**RULE 5.2. RESPONSIBILITIES OF A SUBORDINATE LAWYER**

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

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

**COMMENT**

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

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

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 5.2, RI R S CT ART V RPC Rule 5.2



**Model Rules of Professional Conduct**

*Law Firms And Associations*

**Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
  - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
  - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
  - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

- (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
- (2) are services that the lawyer is authorized to provide by federal law or other law or rule of this jurisdiction.

### **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law - Comments**

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

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

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

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and

continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

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

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

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

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when

the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

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

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

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

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



[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

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

and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

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

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

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

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



**WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
LAW FIRMS AND ASSOCIATIONS**

Current with amendments received through March 20, 2019

**RULE 5.5. UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW**

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

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

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

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

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

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

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

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

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

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

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

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

### COMMENT

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

The 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.

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

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

There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

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

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

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

Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

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

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

Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

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

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

Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

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

If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

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

A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise, is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

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

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

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 5.5, RI R S CT ART V RPC Rule 5.5



**Model Rules of Professional Conduct**

*Maintaining The Integrity Of The Profession*

**Rule 8.2 Judicial And Legal Officials**

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

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

**Rule 8.2 Judicial And Legal Officials - Comments**

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

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

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

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**RULE 8.2. JUDICIAL AND LEGAL OFFICIALS**

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

**(b)** A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

**COMMENT**

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

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

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

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 8.2, RI R S CT ART V RPC Rule 8.2





**Model Rules of Professional Conduct**

*Maintaining The Integrity Of The Profession*

**Rule 8.3 Reporting Professional Misconduct**

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

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

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

**Rule 8.3 Reporting Professional Misconduct - Comments**

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

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

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore,

required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

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

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



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Current with amendments received through March 20, 2019

**RULE 8.3. REPORTING PROFESSIONAL MISCONDUCT**

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

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

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

(d) This rule shall not apply to members of the Confidential Assistance Committee ("the Committee") of the Rhode Island Bar Association ("the Association") regarding information received in their capacity as Committee members, acting in good faith, unless it appears to the members that the attorney in question is failing to desist from the violation or is failing to cooperate with a program of assistance to which the attorney has agreed, or is engaged in the perpetration of fraud or embezzlement, or when disclosure is required to protect the public from substantial harm.

(e) Except as provided by the preceding subsection (d), no information received, gathered or maintained by the Committee, or by an employee of the Association in connection with the work of the Committee, may be disclosed to any person or be subject to discovery or subpoena in any administrative or judicial proceeding, except upon the express written release of the subject attorney, or by order of a court of competent jurisdiction. However, the Committee may refer any attorney to a professional assistance entity, and may, in good faith, communicate information to the entity in connection with the referral. If information obtained by a member of the Committee or an employee of the Association gives rise to reasonable suspicion of a direct threat to the health or safety of the subject attorney or other person, then the obligation of confidentiality set forth in this subsection (e) shall not apply, and the Committee member or Association employee may make such communications as are necessary for the purpose of avoiding or preventing the threat.

(f) Members of the Committee shall be immune from civil liability for actions taken in good faith in the course of performing their duties.

**COMMENT**

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation

with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

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

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the disciplinary counsel unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

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.

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 8.3, RI R S CT ART V RPC Rule 8.3

# American Bar Association

Defending Liberty, Pursuing Justice



## **Model Rules of Professional Conduct**

### *Maintaining The Integrity Of The Profession*

#### **Rule 8.5 Disciplinary Authority; Choice Of Law**

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

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

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

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

#### **Rule 8.5 Disciplinary Authority; Choice Of Law - Comments**

##### **Disciplinary Authority**

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a)

appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

### **Choice of Law**

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

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

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

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

which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

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

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



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**RULE 8.5. DISCIPLINARY AUTHORITY; CHOICE OF LAW**

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

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

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

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

**COMMENT**

**Disciplinary Authority**

It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

**Choice of Law**

A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or



may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

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

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

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

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.

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

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 8.5, RI R S CT ART V RPC Rule 8.5