

FINAL REPORT

of the

Tennessee Bar Association

Committee for the Study of
Standards of Professional Conduct

Proposed Tennessee Rules of Professional Conduct

September 30, 2000

NOTE: This draft of the Proposed Tennessee Rules of Professional Conduct includes after each Proposed Rule, Comment, and Definitional Cross-References, a section entitled Committee Notes. This section, prepared on behalf of the Committee, includes a brief comparison of the Proposed Rule and Comment to existing Tennessee ethics rules, a brief comparison of the Proposed Rule and Comment to the pertinent provisions of the ABA Model Rules of Professional Conduct; and a brief description of any changes made to the Proposed Rule and Comment since the Committee's Preliminary Draft, issued by the Committee for discussion purposes in November 1997.

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PREAMBLE

A lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service and engaging in these pursuits as part of a common calling to promote justice and public good. Essential characteristics of the lawyer are knowledge of the law, skill in applying the applicable law to the factual context, thoroughness of preparation, practical and prudential wisdom, ethical conduct and integrity, and dedication to justice and the public good.

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

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

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

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

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

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

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

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

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

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

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

SCOPE

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide either additional guidance for practicing in compliance with the Rules or make suggestions about good practice which lawyers would be well-advised to heed even though the Rules do not require them to do so.

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

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

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

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline

should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

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

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information when permitted to do so by Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

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

CHAPTER 1
CLIENT-LAWYER RELATIONSHIP

PROPOSED RULE 1.0

DEFINITIONS

- (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) "Consents in Writing" or "Written Consent" denotes either (i) a written consent executed by a client, or (ii) oral consent given by a client which the lawyer confirms in writing in a manner which can be easily understood by the client and which is promptly transmitted to the client.
- (c) "Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.
- (d) "Firm" or "Law Firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation, government agency, or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.
- (e) "Fraud" or "Fraudulent" denotes an intentionally false or misleading statement of material fact, an intentional omission from a statement of fact of such additional information as would be necessary to make the statements made not materially misleading, and such other conduct by a person intended to deceive a person or tribunal with respect to a material issue in a proceeding or other matter.
- (f) "Knowingly," "Known," or "Knows" denotes actual awareness of the fact in question. A person's knowledge may be inferred from circumstances.
- (g) "Material" denotes something which a reasonable person would consider important in assessing or determining how to act in a matter.
- (h) "Partner" denotes a partner in a law firm organized as a partnership or professional limited liability partnership, a shareholder in law firm organized as a professional corporation, a member in a law firm organized as a professional limited liability company, or professional limited liability partnership, or a sole practitioner who employs other lawyers or non-lawyers in connection with his or her practice.
- (i) "Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
- (j) "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.
- (k) "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.

(l) "Substantial" denotes something that is not only material but also of clear and weighty importance.

(m) "Tribunal" denotes a court or other adjudicative body.

COMMENT

[1] In circumstances in which these rules require either consent in writing or written consent, the requirement may be satisfied by an electronic transmission if the transmission can be reduced to writing or permanently retained in electronic format.

PROPOSED RULE 1.1 COMPETENCE

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

COMMENT

Legal Knowledge and Skill

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

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

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

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

Thoroughness and Preparation

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

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in regular continuing study and education which is pertinent to the lawyer's practice and should

conscientiously satisfy all requirements for continuing legal education in all jurisdictions in which the lawyer is licensed to practice law. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

DEFINITIONAL CROSS-REFERENCES

“Reasonably” See Rule 1.0(i)

PROPOSED RULE 1.2
SCOPE OF THE REPRESENTATION AND THE ALLOCATION OF
AUTHORITY BETWEEN THE LAWYER AND CLIENT

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

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

(c) A lawyer may limit the scope of a client's representation if the limitation is **reasonable** under the circumstances and the client gives consent, preferably in writing, after **consultation**.

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

COMMENT

Allocation of Authority Between Client and Lawyer

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Also, the decisions specified in paragraph (a), such as whether to settle a civil matter, must be made by the client. Other decisions may be made by the lawyer pursuant to the lawyer's implied authority to take action necessary to carry out the representation, subject to the lawyer's duty to keep the client reasonably informed about the status of the representation. See Rule 1.4. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, for example, the lawyer normally will assume responsibility for technical and legal tactical issues, but usually will defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

[2] Paragraph (a) recognizes that clients normally defer to the special knowledge and skill of their lawyer. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may instruct the lawyer do so. Although a lawyer, as an agent, normally must abide by the client's instructions with respect to the representation, a lawyer may always refuse to engage in conduct that the lawyer reasonably believes to be unlawful or prohibited by the Rules of Professional Conduct and may take action that the lawyer reasonably believes to be required by law or the Rules of Professional Conduct. Also, if a lawyer has a fundamental disagreement with the client about the client's objectives or the means to be used to accomplish them, the lawyer may withdraw from the representation. See Rule 1.16.

[3] Communication between the lawyer and the client is necessary for the client to effectively participate in decisions relating to client's representation. The lawyer must, therefore, keep the client reasonably informed about the lawyer's actions on behalf of the client. See Rule 1.4.

[4] At the outset of a representation, the client may authorize the lawyer to take action on the client's behalf without further consultation. Ordinarily, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time, and a lawyer may not rely on an advance authorization if there has been such a material change in the circumstances known to the lawyer that the client's prior authorization can no longer be regarded as an adequately informed decision.

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

Independence From Client's Views or Activities

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

Agreements Limiting the Scope of the Representation

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

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

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

Criminal, Fraudulent and Prohibited Transactions

[10] Paragraph (d) prohibits a lawyer from counseling or assisting a client to engage in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses

advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer may be permitted but is not required by Rule 1.6 to reveal the client's wrongdoing. In any case, however, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a).

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

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

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

DEFINITIONAL CROSS-REFERENCES

“**Reasonable**” See Rule 1.0(i)

“**Consultation**” See Rule 1.0(c)

“**Knows**” See Rule 1.0(f)

“**Reasonably Should Know**” See Rule 1.0(k)

“**Fraudulent**” See Rule 1.0(e)

PROPOSED RULE 1.3 DILIGENCE

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

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. Unless instructed by a client to the contrary, a lawyer has professional discretion in determining the means by which a matter should be pursued, and the lawyer is not required to abide by unreasonable client instructions. See Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[2] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

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

DEFINITIONAL CROSS-REFERENCES

“**Reasonable**” See Rule 1.0(i)

PROPOSED RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client **reasonably** informed about the status of a matter and comply with **reasonable** requests for information within a **reasonable** time.

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

COMMENT

Keeping the Client Reasonably Informed

[1] Reasonable communication between the lawyer and the client is necessary for the client to effectively participate in the representation. When a decision about the representation must be made by the client, the lawyer must consult with and secure the client's consent prior to taking action. Thus, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance, unless prior discussions with the client have left it clear that the proposal would be unacceptable. With respect to the decisions for which the client's prior consent is not required by Rule 1.2, the lawyer's responsibility is to keep the client reasonably informed. In some situations -- depending on both the importance of the action under consideration and the feasibility of consulting with the client -- this duty will require consultation prior to taking the action. In other circumstances, such as during a trial when an immediate decision must be made, practical exigency may also require a lawyer to act for a client without prior consultation. In such cases, and in other situations in which the client has impliedly or expressly delegated authority to the lawyer to take action without prior consultation, the lawyer must nonetheless act reasonably to keep the client informed of actions the lawyer has taken on the client's behalf.

Explaining Matters

[2] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party.

[3] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

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

DEFINITIONAL CROSS-REFERENCES

“Reasonable” and “Reasonably” See Rule 1.0(i)

PROPOSED RULE 1.5
FEES

(a) A lawyer's fee and charges for costs shall be **reasonable**. The factors to be considered in determining the **reasonableness** of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a **reasonable** time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and whether there was a recovery, and showing the remittance, if any, to the client and the method of its determination.

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

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or the award of custodial rights, or upon the amount of alimony or support, or the value of a property division or settlement, unless the matter relates solely to the collection of arrearages in alimony or child support or the enforcement of an order dividing the marital estate and the fee arrangement is disclosed to the court; or

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

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

(1) the division is in proportion to the services performed by each lawyer or, by written consent of the client, each lawyer assumes joint responsibility for the representation; and

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

(3) the total fee is **reasonable**.

COMMENT

Basis or Rate of Fee

[1] When the lawyer has regularly represented a client, there ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

[2] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property. If the property belongs to the client, the lawyer will also have to comply with the requirements of Rule 1.8(a).

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

alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

[4] In some circumstances, other law may regulate the fees and expenses charged by lawyers. For example, Tennessee law regulates contingent fees in medical malpractice cases. See, e.g., Tenn. Code Ann. § 29-26-120(1980). In these circumstances, charged unlawful fees or expenses may be considered unreasonable under section (a) of this Rules and may violate Rule 8.4 or other rules. See, e.g., Rule 8.4(d) (prohibiting conduct prejudicial to the administration of justice).

Division of Fee

[4] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Disputes Over Fees

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

DEFINITIONAL CROSS-REFERENCES

“**Firm**” See rule 1.0(d)

“**Reasonable**” and “**Reasonableness**” See Rule 1.0(i)

PROPOSED RULE 1.6 CONFIDENTIALITY

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after **consultation**, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.

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

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

(2) to prevent the client or another person from committing a crime, unless disclosure is prohibited or restricted by Rule 3.3;

(3) to rectify or mitigate **substantial** injury to the financial interests or property of another resulting 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; or

(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.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer **reasonably believes** disclosure is necessary:

(1) to comply with an order of a **tribunal** requiring disclosure but only if ordered to do so by the **tribunal** after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the **tribunal** is protected against disclosure by the attorney-client privilege or other applicable law.

(2) to comply with Rules 3.3, 4.1, or other law.

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.8(b) with respect to the use of such information to the disadvantage of the client. See Rule 1.9(c) with respect to disclosure and adverse use of information relating to the representation of a former client.

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

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

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] The principle of lawyer-client confidentiality is given effect by related bodies of law, including the attorney-client privilege, the work-product doctrine, 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, 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.

[6] 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.

[7] 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 hypotheticals 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

[8] 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.

[9] 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

[10] 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. Substantial bodily harm includes life threatening and debilitating illnesses and the consequences of child sexual abuse. Such injuries are reasonably certain to occur if they will be suffered imminently or if there is a present and substantial threat that a person will suffer such injuries 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.

[11] Paragraph (b)(2) enables the lawyer to reveal information to the extent necessary to prevent the client from committing a crime. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although Paragraph (B)(2) does not require that the lawyer reveal the client's misconduct, the lawyer may not in any way counsel the client to engage, or assist the client, in conduct that the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization's constituents. 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). Rule 3.3, rather than Paragraph (b)(2) governs disclosure of a client's intention to commit perjury or other crimes in connection with an adjudicative proceeding.

[12] Paragraph (b)(3) addresses the situation in which a lawyer services have been used by the client in furtherance of the client's commission of a crime or fraud, but the lawyer does not discover this misuse of the lawyer's services until after the crime or fraud has been consummated and loss has been suffered by the victim. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which a substantial loss suffered by the affected person can be rectified or mitigated. In such situations, the lawyer may disclose information relating to representation to the extent necessary to assist the affected persons recoup their losses.

[13] A lawyer's confidentiality obligations do not preclude a lawyer from securing 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. For the protection of the client, such disclosures may be made only if they will be protected by the attorney-client privilege.

[14] 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 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. 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, 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.

[15] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

[16] Paragraph (b) permits but does not require the disclosure or use of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1)-(5). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b) does not violate this Rule.

Disclosure Otherwise Required or Authorized

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

[18] A lawyer must also comply with lawful orders of a tribunal, an administrative or executive agency, or a legislative body. If a lawyer is called as a witness to give testimony concerning a client, or is otherwise ordered to reveal information relating to the client's representation, the lawyer must, absent authorization from the client to do otherwise, assert on behalf of the client all non-frivolous claims 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 should consult with the client about the possibility of appealing the adverse ruling. See Rule 1.4 and 1.2. Unless an appeal is taken, the lawyer must comply with the order.

Acting Competently to Preserve Confidentiality

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

[20] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer utilize 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.

Former Clients

[21] The duty of confidentiality continues after the client-lawyer relationship has been terminated. See Rule 1.9(c).

DEFINITIONAL CROSS-REFERENCES

- “ **Consultation**” See Rule 1.0(c)
- “ **Fraud**” See Rule 1.0(e)
- “ **Reasonably**” See Rule 1.0(i)
- “ **Reasonably Believes**” See Rule 1.0(j)
- “ **Substantial**” See Rule 1.0(l)
- “ **Tribunal**” See Rule 1.0(m)

PROPOSED RULE 1.7
CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer **reasonably believes** the representation will not adversely affect the relationship with the other client; and
- (2) each client **consents in writing** after **consultation**.

(b) A lawyer shall not represent a client if the representation of that client may be **materially** limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer **reasonably believes** the representation will not be adversely affected; and
- (2) the client **consents in writing** after **consultation**. When representation of multiple clients in a single matter is undertaken, the **consultation** shall include explanation of the implications of the common representation and the advantages and risks involved.

COMMENT

Loyalty to a Client

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The 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 parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see the Comment to Rule 1.3 and the statement in the Preamble about the scope of these Rules.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the

representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

[5] A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

[6] In the absence of other law to the contrary, a government official or entity, like any other client, may waive a conflict of interest under this Rule.

[7] This Rule requires the lawyer either to secure a written consent executed by the client or to memorialize an oral consent given by the client. See Rule 1.0(b) Terminology (defining "Consents in Writing"). If it is not feasible to secure or memorialize the writing either at the time the conflict arises or at the time the client gives consent, then the lawyer must secure or memorialize it within a reasonable time thereafter. 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 by a conflict of interest, as well as the reasonably available alternatives, and to afford the client an opportunity to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision they are being asked to make and to resolve disputes or ambiguities that might later occur by virtue of there being no writing. The writing need not take any particular form; it should, however, include disclosure of the relevant circumstances and reasonably foreseeable risks of the conflict of interest, as well as memorialization of the client's agreement to the representation despite such risks.

Lawyer's Interests

[8] The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

[9] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible 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 is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

[10] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[11] 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 in 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 by the lawyer 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-run 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.

Interest of Person Paying for a Lawyer's Service

[12] A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

[13] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the

duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[14] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them. See Rule 2.2 with respect to a lawyer serving two or more clients as an intermediary.

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

[16] 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.

Conflict Charged by an Opposing Party

[17] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Special Considerations in Joint Representation

[18] In considering whether to represent clients jointly in the same matter, such as representing co-plaintiffs or co-defendant, a lawyer should be mindful that if the joint 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 joint representation fails.

[19] A particularly important factor in determining the appropriateness of joint representation is the effect on lawyer-client confidentiality and the attorney-client privilege. With regard to the evidentiary 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.

[20] As to the duty of confidentiality, joint representation will almost certainly be inadequate if one client attempts to keep something in confidence between the lawyer and that client, which is not to be disclosed to the other client. 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 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 joint 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.

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

Relation to Other Rules

[22] When a lawyer represents a client in a partisan role, whether as an advocate, an advisor, or the author of a legal opinion to be rendered on behalf of the client for use by a third person, this rule provides special protections for the client to assure that the lawyer's loyalty will not be diluted by interests of other clients or interests of the lawyer or third persons. This rule, however, is not applicable, however, to clients the lawyer undertakes to serve as an intermediary. See Rule 2.2. Nor is this rule applicable to parties to a dispute who a lawyer undertakes to serve as a dispute resolution neutral. See Rule 2.4. If, however, the lawyer's representation of clients as an intermediary, or the lawyer's service as a dispute resolution neutral, will be directly adverse to another client or will materially limit the lawyer's representation of another client, the lawyer must afford that client the protections of this Rule at the same time that the lawyer is affording the clients being served as an intermediary the protections of Rule 2.2 or at the same time the lawyer is affording the parties being served as a neutral the protections of Rule 2.4.

DEFINITIONAL CROSS-REFERENCES

- “**Reasonably Believes**” See Rule 1.0(j)
- “**Consents in Writing**” See Rule 1.0(b)
- “**Consultation**” See Rule 1.0(c)
- “**Materially**” See Rule 1.0(g)

PROPOSED RULE 1.8
CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

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

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

(2) the client is given a **reasonable** opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents thereto, in a writing signed by the client.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client, unless the client consents after **consultation**, except as otherwise permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any **substantial** gift from a client, including a testamentary gift, except where the client is related to the donee.

(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 or direction from one other than the client unless:

(1) the client consents after **consultation**;

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

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

(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:

(1) the client is given a **reasonable** opportunity to seek the advice of independent counsel in the transaction; and

(2) each client **consents in writing** after **consultation**, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) enter into an agreement with a prospective, current, or former client to prospectively limit the lawyer's liability to the client for malpractice; and

(2) shall not settle a claim for such liability, unless:

(a) the client is represented in the matter by independent counsel; or

(b) the lawyer fully discloses all the terms of the agreement to the client in a manner which can **reasonably** be understood by the client, advises the client to seek the advice of independent counsel, and affords the client a **reasonable** opportunity to do so.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer **knows** is represented by the other lawyer except upon consent by the client after **consultation** regarding the relationship.

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

(1) acquire a lien granted 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.

COMMENT

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and 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] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

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

Person Paying for Lawyer's Services

[4] Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Limiting Liability

[5] Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

Relationships Between Lawyers

[6] Rule 1.8(i) applies to “related” lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

Acquisition of Interest in Litigation

[7] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (E).

DEFINITIONAL CROSS-REFERENCES

“**Consents in Writing**” See Rule 1.0(b)

“**Consultation**” See Rule 1.0(c)

“Knowingly” and **“Knows”** See Rule 1.0(f)
“Reasonable” and **“Reasonably”** Rule 1.0(i)
“Substantial” See Rule 1.0(l)

PROPOSED RULE 1.9
CONFLICT OF INTEREST: FORMER CLIENT

(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 in writing** after **consultation**.

(b) Unless the former client **consents in writing** after **consultation**, 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 whose interests are **materially** adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is **material** to the matter;

(c) Unless the former client consents after **consultation**, 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 otherwise permit or require with respect to a client, or when the information has become generally **known**; or

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

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule, except that in the case of a government or former government lawyer, Rule 1.11 applies, rather than paragraphs (a) and (b) of this Rule.

[2] The scope of a "matter" for purposes of this Rule will depend on the facts of a particular situation or transaction. The appropriateness of the subsequent representation will depend on the scope of the representation in the former matter, the scope of the proposed representation in the current matter, and its relationship to the former matter.

[3] The current matter is substantially related to the former matter if the current matter involves the work the lawyer performed for the former client or 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.

Changing Sides

[4] Representing one side and then switching to represent the other in the same matter clearly implicates loyalty to the first client and protection of that client's confidences. Similar considerations apply in non-litigation matters. For example, a lawyer negotiating a complex agreement on behalf of a seller could not withdraw and represent the buyer against the interests of the seller in the same transaction. Further, just as a lawyer may not represent both sides

concurrently in the same case, see Rule 1.7(a), the lawyer also may not represent them consecutively.

[5] Beyond switching sides in the same matter, the concept of substantial relationship applies to later developments arising out of the original matter. A matter is substantially related if it involves the work the lawyer performed for the former client. For example, a lawyer may not on behalf of a later client attack the validity of a document that the lawyer drafted if doing so would materially and adversely affect the former client. Similarly, a lawyer may not represent a debtor in bankruptcy in seeking to set aside a security interest of a creditor that is embodied in a document that the lawyer previously drafted for the creditor.

Protecting Confidentiality

[6] The substantial relationship standard is employed most frequently to protect the confidential information of the former client. A subsequent matter is substantially related to an earlier matter if there is a substantial risk that the subsequent representation will involve the use of confidential information of the former client in violation of the restrictions of these Rules and other law place on disclosure. Substantial risk exists where it is reasonable to conclude that it would materially advance the client's position in the subsequent matter to use confidential information obtained in the prior representation.

[7] Inquiries concerning the existence, exchange, and potential for use of such confidential information may themselves raise concerns and difficulties. A concern to protect a former client's confidential information would be self-defeating if, in order to obtain its protection, the former client were required to reveal in a public proceeding the particular communication or other confidential information that could be used in the subsequent representation. On the other hand, closed or in camera proceedings may implicate issues of fairness to other parties. Further, the interests of subsequent clients also militate against extensive inquiry into the precise nature of the lawyer's representation of the subsequent client and the nature of exchanges between them

[8] The substantial relationship test attempts to avoid requiring actual disclosure of confidential information by focusing upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation. The inquiry into the issues involved in the prior representation should be as specific as possible without thereby revealing the confidential client information itself of confidential information concerning the second client. Nevertheless, the subsequent client's interest in selection of counsel of his or her choice requires that the lawyer be permitted, within appropriate limits, to defeat any presumption or inference concerning the lawyer's receipt or exchange of confidential information.

[9] For example, a lawyer who has represented a business person 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 who sought to oppose rezoning of the property, but would not be precluded, on the grounds of a substantial relationship between the two matters, from defending a tenant of the completed shopping center in resisting eviction for non-payment of rent.

[10] Information that might be confidential for some purposes under these Rules (so that, for example, a lawyer would not be free to discuss it publicly) might nonetheless be so general, readily observable, or of little value in the subsequent litigation that it should not by itself result in a substantial relationship being found. Thus, a lawyer may master a particular substantive area of the

law while representing a client, but that does not preclude the lawyer from later representing another client adversely to the first in a matter involving the same legal issues, if the matters factually are not substantially related. A lawyer might also have learned a former client's preferred approach to bargaining in settlement discussions or negotiating business points in a transaction, willingness or unwillingness to be deposed by an adversary, and financial ability to withstand extended litigation or contract negotiations. Only when such information will be directly in issue or of unusual value in the subsequent matter will it be independently relevant in assessing a substantial relationship.

Lawyers Moving Between Firms

[11] 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.

[12] 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(b). 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.

[13] 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 client 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.

[14] 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).

Relation to Other Rules

[15] Except in situations governed by Rule 1.11, Rule 1.9 applies in all circumstances in which a lawyer has previously represented a client as an advocate, advisor, intermediary, or author of a legal opinion to be rendered on behalf of a client for use by a third person. Except as provided in Rule 2.4, Rule 1.9 does not apply to parties being served by a lawyer as a dispute resolution neutral. If, however, the lawyer's service as a neutral will be materially adverse to a former client and

the dispute is substantially related to the former representation, the lawyer must afford the former client the protections of Rule 1.9 while at the same affording the parties to the dispute the protections of Rule 2.4.

DEFINITIONAL CROSS-REFERENCES

- “**Consents in Writing**” See Rule 1.0(b)
- “**Consultation**” See Rule 1.0(c)
- “**Firm**” See Rule 1.0(d)
- “**Knowingly**” and “**Known**” See Rule 1.0(f)
- “**Material**” and “**Materially**” See Rule 1.0(g)
- “**Substantially**” See Rule 1.0(l)

PROPOSED RULE 1.10
IMPUTED DISQUALIFICATION: GENERAL RULE

(a) Except as permitted by paragraphs (b) or (c), a lawyer associated with other lawyers in a **firm** shall not represent a person if any lawyer associated with the **firm** is personally prohibited from representing the person by Rules 1.7, 1.8(c), 1.9(a), 1.9(b), or 2.2.

(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) If a lawyer is personally disqualified from representing a person with interests adverse to a client of a **law firm** with which the lawyer was formerly associated, other lawyers currently associated in a **firm** with the personally disqualified lawyer may nonetheless represent the person if both the personally disqualified lawyer and the lawyers who will represent the person on behalf of the **firm** act **reasonably** to:

(1) identify that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is **material** to the current matter and is protected by Rule 1.9(c); and

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the **firm**; and

(4) advise the former client in writing of the circumstances which warranted the implementation of the screening procedures required by this rule and the actions which have been taken to comply with this Rule.

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

COMMENT

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. See Rule 1.0(d) (defining "Firm" or "Law Firm"). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example,

two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the 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 the other.

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

[3] Similar questions can also arise with respect to lawyers in legal aid. 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.

Principles of Imputed Disqualification

[4] The rule of imputed disqualification stated in paragraph (a) recognizes the community of interest and shared loyalty presumed to exist among lawyers who are associated in law firm. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

Lawyers Moving Between Firms

[5] When a lawyer who is associated in a firm leaves the firm, the question of whether a lawyer should undertake representation adverse to clients of the former firm 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 and that confidential information related to the representation will not be used to the client's disadvantage. Second, the rule should not be cast so broadly 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.

[6] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

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

[8] Paragraphs (a) and (b) govern the vicarious disqualification of a law firm in the situation in which a lawyer leaves the firm and continues or undertakes the representation of a client previously represented by the firm, the firm is no longer representing the client and lawyers who have remained in the firm are asked to undertake a representation materially adverse to the firm's former client. If the new matter is substantially related to a matter in which the firm previously represented the client, the firm, absent the former client's consent, will be precluded by paragraph (a) from undertaking the representation if any lawyer remaining in the firm would be precluded by Rule 1.9(a) from doing so because the lawyer had participated in the client's prior representation. Alternatively, paragraph (b) precludes the firm from undertaking the representation if any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter. If, on the other hand, no remaining lawyer participated in the client's representation or possessed confidential information, the firm is permitted to undertake the representation even though it is materially adverse to the former client in a substantially related matter.

[9] Paragraph (c) addresses the situation in which a lawyer leaves one law firm and joins another firm which is representing a client with interests materially adverse to a client of the new lawyer's former firm. The new lawyer may be personally disqualified from participating in the representation of some of the new firm's clients because of his prior representation of or acquisition of confidential information about clients of his or her former law firm. This personal disqualification will not be imputed to other lawyers in the personally disqualified lawyer's new firm if they act reasonably to protect the confidentiality interests of the person being represented by the personally disqualified lawyer's former firm.

[10] Paragraph (c) sets forth the measures that must be taken in order protect the confidentiality interests of the client being represented by the personally disqualified lawyer's former firm. Whether a firm's screening procedures are effective to prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm is a question of fact. Factors to be considered include: a written affirmation by the personally disqualified lawyer and the lawyers and firm personnel handling the matter in question that they are aware of and will abide by the screening procedures implemented by the firm, the structural organization of the law firm or office, the likelihood of contact between the personally disqualified lawyer and the lawyers handling the matter in question, and the existence of firm rules and a filing system which prevents unauthorized access to files with respect to the matter in question. Although

this Rule does not require that the personally disqualified lawyer be prohibited from sharing in any fee generated by the representation in question, such a prohibition can be considered in determining the effectiveness of the screening procedures employed by the firm. The question to be asked in each case is whether the screening mechanism effectively reduces to an acceptable level the potential for misuse of information related to the representation of the personally disqualified lawyer's former client.

[11] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b). Where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9(c).

DEFINITIONAL CROSS-REFERENCES

- “**Firm**” and “**Law Firm**” See Rule 1.0(d)
- “**Material**” and “**Materially**” See Rule 1.0(g)
- “**Reasonably**” See Rule 1.0(i)
- “**Substantially**” See Rule 1.0(l)

PROPOSED RULE 1.11
SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and **substantially** as a public officer or employee, unless the appropriate government agency **consents in writing after consultation**. No lawyer in a **firm** with which that lawyer is associated may **knowingly** undertake or continue representation in such a matter unless both the personally disqualified lawyer and the lawyers who are representing the client in the matter act **reasonably** to:

(1) ascertain that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the client has acquired any **material** confidential government information relating to the matter; and

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and other lawyers in the **firm**; and

(4) advise the government agency in writing of the circumstances which warranted the have utilization of the screening procedures required by this rule and the actions which been taken to comply with this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer **knows** is confidential government information about a person the lawyer 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. A **firm** with which that lawyer is associated may undertake or continue representation in the matter only if both the personally disqualified lawyer and the lawyers who are representing the client in the matter comply with the requirements set forth in paragraph (A).

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and **substantially** while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and **substantially**, 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).

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

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

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

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

COMMENT

[1] This Rule prevents a lawyer from exploiting public office for the advantage of a private client.

[2] A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

[3] Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, 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. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

[4] When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

[5] Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

[6] Paragraph (b) 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.

[7] Paragraphs (a) and (c) 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.

[8] Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

[9] In the absence of other law to the contrary, a government official or entity, like any other client, may waive a conflict of interest under this Rule.

DEFINITIONAL CROSS-REFERENCES

- “ **Consents in Writing**” See Rule 1.0(b)
- “ **Consultation**” See Rule 1.0(c)
- “ **Firm**” See Rule 1.0(d)
- “ **Knowingly**” and “ **Knows**” See Rule 1.0(f)
- “ **Material**” See Rule 1.0(g)
- “ **Reasonably**” See Rule 1.0(i)
- “ **Substantially**” See Rule 1.0(l)

**PROPOSED RULE 1.12
FORMER JUDGE OR ARBITRATOR**

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and **substantially** as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after **consultation**, in a writing or writings signed by all parties.

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

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a **firm** with which that lawyer is associated may **knowingly** undertake or continue representation in the matter unless both the disqualified lawyer and the lawyers representing the client in the matter have complied with the requirements set forth in Rule 1.11(a)(1), (2) and (3) and advise the appropriate **tribunal** in writing of the circumstances which warranted the utilization of the screening procedures required by this rule and the actions which have been taken to comply with this rule.

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

COMMENT

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

[2] The provisions of Rule 10 of the Rules of the Supreme Court of Tennessee, concerning the Application of the Code of Judicial Conduct, provides that a part-time judge, judge pro tempore or retired judge recalled to active service may not "act as a lawyer in any proceeding in which the judge has served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those rules correspond in meaning.

DEFINITIONAL CROSS-REFERENCES

“ **Consultation** ” See Rule 1.0(c)

“ **Firm** ” See Rule 1.0(d)

“ **Knowingly** ” See Rule 1.0(f)

“ **Substantially** ” See Rule 1.0(l)

“ **Tribunal** ” See Rule 1.0(m)

**PROPOSED RULE 1.13
ORGANIZATIONAL CLIENTS**

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

(1) asking reconsideration of the matter;

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

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

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in **substantial** injury to the organization, the lawyer may resign in accordance with Rule 1.16 and may make such disclosures of information relating to the organization's representation only to the extent permitted to do so by Rules 1.6 and 4.1.

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

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 and 2.2. If the organization's consent to the dual representation is required by Rule 1.7 or 2.2, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.

COMMENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this

Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

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

Relation to Other Rules

[5] The authority and responsibility provided in paragraph (b) 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 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable. The lawyer's right to withdraw from the representation of an organizational client in the circumstances specified in paragraph (c) is in addition to the right to withdraw in the various circumstances specified in Rule 1.16(b).

Government Agency

[6] The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining

confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally 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 government as a whole 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 to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

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

Dual Representation

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

Derivative Actions

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

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

DEFINITIONAL CROSS-REFERENCES

“**Knows**” See Rule 1.0(f)

“**Reasonably**” See Rule 1.0(k)

“**Substantial**” See Rule 1.0(l)

**PROPOSED RULE 1.14
CLIENT UNDER A DISABILITY**

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as **reasonably** possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer **reasonably believes** that the client cannot adequately act in the client's own interest.

COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

[4] If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(D).

Disclosure of the Client's Condition

[5] Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For

example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

Emergency Legal Assistance

[6] In an emergency where the health, safety or financial interest of a person under a disability is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the disabled person or another acting in good faith on the person's behalf has consulted the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the disabled person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[7] A lawyer who acts on behalf of a disabled person in an emergency should keep the confidences of the disabled person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the disabled person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken on behalf of a disabled person.

DEFINITIONAL CROSS-REFERENCES

“**Reasonably**” See Rule 1.0(i)

“**Reasonably Believes**” See Rule 1.0(j)

PROPOSED RULE 1.15 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property and funds of clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property and funds.

(1) Funds belonging to clients or third persons shall be kept in a separate account maintained in an insured depository institution which is located in the state where the lawyer's office is situated (or elsewhere with the consent of the client or third person) and which participates in the overdraft notification program as required by Supreme Court Rule 9.

(i) Except as provided by subparagraph (a)(1)(ii) or paragraph (c), interest earned on accounts in which the funds of clients are deposited less any deduction for service charges, fees of the depository institution, and intangible taxes collected with respect to the deposited funds shall belong to the clients whose funds are deposited and the lawyer shall have no right or claim to such interest.

(ii) A lawyer shall deposit funds of clients and third persons that are nominal in amount or expected to be held for a short period of time in a pooled account that participates in the Interest On Lawyers' Trust Accounts ("IOLTA") program, which provides that all interest earned be paid to the Tennessee Bar Foundation in accordance with the requirements of Supreme Court Rule _____. The determination of whether funds are nominal in amount or are to be held for a short period of time rests in the sound discretion of the lawyer and no charge of ethical impropriety or other breach of professional conduct shall attend an attorney's exercise of good faith judgment in that regard.

the (iii) A lawyer may decline to participate in the IOLTA program by notifying Chief Justice of the Supreme Court and the Board of Professional Responsibility as permitted by Supreme Court Rule _____.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property. If a dispute arises between the client and a third person with respect to their respective interests in the funds or property held by the lawyer, the portion in dispute shall be kept separate and safeguarded by the lawyer until the dispute is resolved.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

COMMENT

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

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

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

lawyer may file an interpleader action concerning funds in dispute between the client and a third party.

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

[5] In certain circumstances, Tennessee law governing abandoned property may apply to monies in lawyer trust accounts or other property left in the hands of lawyers and may govern its disposition. See Tenn. Code Ann. §§ 66-29-101 through 204 (1993 and Supp. 1999) (Uniform Disposition of Unclaimed Property Act).

DEFINITIONAL CROSS-REFERENCES

None.

PROPOSED RULE 1.16
DECLINING AND TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of the client if:

- (1) the representation will result in a violation of the Rules of Professional Conduct or other law; or
- (2) the lawyer's physical or mental condition **materially** impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from the representation of a client if the withdrawal can be accomplished without **material** adverse effect on the interests of the client or if:

- (1) the client persists in a course of action involving the lawyer's services that the lawyer **reasonably believes** is criminal or **fraudulent**; or
- (2) the client has used the lawyer's services to perpetrate a crime or **fraud**; or
- (3) a client insists upon pursuing an objective or taking action that the lawyer considers repugnant or imprudent; or
- (4) the client fails **substantially** to fulfill an obligation to the lawyer regarding the lawyer's services and has been given **reasonable** warning that the lawyer will withdraw unless the obligation is fulfilled; or
- (5) the representation will result in an unanticipated and **substantial** financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (6) other good cause for withdrawal exists; or
- (7) after **consultation** with the lawyer, the client **consents in writing** to the withdrawal of the lawyer.

(c) When ordered to do so by a **tribunal**, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of the representation of a client, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, including

- (1) giving **reasonable** notice to the client as will allow time for the employment of other counsel, and
- (2) promptly surrendering papers and property of the client and any work product prepared by the lawyer for the client and for which the lawyer has been compensated; and
- (3) promptly surrendering any other work product prepared by the lawyer for the client, provided, however, that the lawyer may retain such work product to the extent permitted by

other law but only if the retention of the work product will not have a **materially** adverse affect on the client with respect to the subject matter of the representation; and

(4) promptly refunding to the client any advance payment for expenses which have not been incurred by the lawyer; and

(5) promptly refunding any advance payment for fees that have not been earned.

COMMENT

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

Mandatory Withdrawal

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

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

Discharge

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

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to proceed without assistance of counsel.

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

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably

believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective or action.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation. The lawyer must, however, give the client reasonable notice of the lawyer's intention to withdraw.

Assisting the Client Upon Withdrawal

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

[10] Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

DEFINITIONAL CROSS-REFERENCES

- “ **Consents in Writing**” See Rule 1.0(b)
- “ **Consultation**” See Rule 1.0(c)
- “ **Fraud**” and “ **Fraudulent**” See Rule 1.0(e)
- “ **Material**” and “ **Materially**” See Rule 1.0(g)
- “ **Reasonable**” See Rule 1.0(i)
- “ **Reasonably Believes**” See Rule 1.0(j)
- “ **Substantial**” See Rule 1.0(l)
- “ **Substantially**” See Rule 1.0(l)
- “ **Tribunal**” See Rule 1.0(m)

**PROPOSED RULE 1.17
SALE OF A LAW PRACTICE**

A lawyer or a **law firm** may sell or purchase a law practice, including good will, if the following conditions are satisfied:

- (a) The seller ceases to engage in the private practice of law in the geographic area in which the practice has been conducted; and
- (b) The practice is sold as an entirety to another lawyer or **law firm** and the seller provides the buyer with written notice of the fee agreement with each of the seller's clients and any other agreements relating to each client's representation; and
- (c) Written notice is given to each of the seller's clients regarding the proposed sale, the client's right to retain other counsel or to take possession of the file, and the fact that the client's consent to representation by the purchaser will be presumed if the client does not take any action or does not otherwise object within thirty (30) days of receipt of the notice.
- (d) If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction or by the presiding judge in the judicial district in which the seller resides. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.
- (e) Unless the client **consents in writing** after **consultation**, the fees and expenses charged a client shall not be increased by reason of the sale, and the purchasing lawyer shall abide by any agreements between the selling lawyer and the client with respect to the representation as are permitted by these rules and of which the purchasing lawyer was given notice prior to the transfer of the representation.

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

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 purchaser. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office.

[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 which provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state. Tennessee is sufficiently large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, the Rule permits the sale of the practice when the lawyer leaves the geographic area in which he or she is practicing as well as when the lawyer leaves the state.

Single Purchaser

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

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 Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 30 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[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. Since these clients 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 the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[9] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents after consultation.

Other Applicable Ethical Standards

[10] Lawyers participating in the sale of a law practice are 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 client consent after consultation for those conflicts which can be agreed to (see Rule 1.7); 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 attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[12] This Rule applies to the sale of a law practice by representatives 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 the requirements 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.

DEFINITIONAL CROSS-REFERENCES

“ **Consents in Writing**” See Rule 1.0(b)

“ **Consultation**” See Rule 1.0(c)

“ **Law Firm**” See Rule 1.0(d)

CHAPTER 2
THE LAWYER AS COUNSELOR, INTERMEDIATOR, AND DISPUTE RESOLUTION
NEUTRAL

PROPOSED RULE 2.1
ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT

Scope of Advice

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

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

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

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

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

DEFINITIONAL CROSS-REFERENCES

None.

PROPOSED RULE 2.2
LAWYER SERVING AS INTERMEDIARY BETWEEN CLIENTS

(a) A lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.

(b) A lawyer may represent two or more clients as an intermediary in a matter if:

(1) as between the clients, the lawyer **reasonably believes** that the matter can be resolved on terms compatible with each of the clients' best interests, that each client will be able to make adequately informed decisions in the matter, that there is little risk of **material** prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful, and that the intermediation can be undertaken impartially; and

(2) the lawyer's representation of each of the clients, or the lawyer's relationship with each, will not be adversely affected by the lawyer's responsibilities to other clients or third persons, or by the lawyer's own interests; and

(3) the lawyer **consults** with each client about:

(i) the lawyer's responsibilities as an intermediary; and

(ii) the implications of the intermediation (including the advantages and risks involved and the effect on the attorney-client privilege and any other obligation of confidentiality the lawyer may have); and

(iii) any circumstances that will **materially** affect the lawyer's impartiality between the clients;

(iv) the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients; and any interests of the lawyer, the lawyer's other clients, or third persons that will **materially** limit the lawyer's representation of one of the clients; and

(4) each client **consents in writing** to the lawyer's representation and each client authorizes the lawyer to disclose to each of the other clients being represented in the matter any information relating to the representation the disclosure of which the lawyer **reasonably believes** is required by Rule 1.4.

(c) While representing clients as an intermediary, the lawyer shall:

(1) act impartially to assist the clients in accomplishing their common objective; and

(2) as between the clients, treat information relating to the intermediation as information protected by Rule 1.6 that the lawyer has been authorized by each client to disclose to the other clients to the extent the lawyer **reasonably believes** necessary for the lawyer to comply with Rule 1.4; and

(3) shall consult with each client concerning the decisions to be made with respect to the intermediation and considerations relevant in making them, so that each client can make adequately informed decisions.

(d) A lawyer shall withdraw from service as an intermediary if:

(1) any of the clients so requests; or

(2) any of the clients revokes the lawyer's authority to disclose to the other clients any information that the lawyer would be required by Rule 1.4 to reveal to them; or

(3) any of the other conditions stated in paragraph (b) are no longer satisfied.

(e) If the lawyer's withdrawal is required by paragraph (d)(2) the lawyer shall so advise each client of the withdrawal, but shall do so without any further disclosure of information protected by Rule 1.6.

COMMENT

[1] A lawyer acts as an intermediary under this Rule when the lawyer represents two or more clients who are cooperatively trying to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them. The hallmarks of an intermediation include the impartiality of the lawyer who serves as intermediary, the open, candid, and non-adversarial nature of the clients' pursuit of a common objective, and the limited subject matters in which a lawyer may serve multiple clients as an intermediary (*i.e.*, the adjustment of a consensual legal relationship among or between the clients). Given the special dangers associated with joint representation of parties whose interests may potentially be in conflict, the Rule provides a number of safeguards designed to limit its applicability and to protect the interests of the several clients.

[2] Paragraph (b) specifies the circumstances in which a lawyer may serve multiple clients as an intermediary. With respect to the clients being served as an intermediary, this Rule, and not Rule 1.7, applies. Rule 1.7 remains applicable, however, to protect other clients the lawyer may be representing or may wish to represent in other matters. For example, if the lawyer's representation of two clients as an intermediary in a matter will materially limit the lawyer's representation of another client the lawyer is representing as an advocate, the lawyer must afford that client the protections of Rule 1.7, while affording the clients the lawyer is serving as an intermediary the protections of this rule. Similarly, if the lawyer's representation of two clients as an intermediary would be materially adverse to one of the lawyer's former clients, and the matters are substantially related, the lawyer must afford the former client the protection of Rule 1.9.

[3] Rule 2.2 does not apply to a lawyer acting as a dispute resolution neutral, such as an arbitrator or a mediator, as the parties to a dispute resolution proceeding are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. Other rules of conduct govern a lawyer's service as a dispute resolution neutral. See Rule 2.4 and Tennessee Supreme Court Rule 31.

[4] A lawyer may act as an intermediary in seeking to establish or adjust a consensual legal relationship among or 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. As part of the work of an intermediary, the lawyer may seek to achieve the clients' common objective or to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative may be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complications, or even litigation. Given these and other relevant factors, each client may prefer to have one lawyer act as an intermediary for all rather than hiring a separate lawyer to serve as his or her partisan.

[5] In considering whether to act as intermediary between clients, a lawyer should be mindful that, if the intermediation fails, the result can be additional cost, embarrassment, and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible or imprudent for the lawyer or the clients. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations, as is often the case when dissolution of a marriage is involved. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

[6] The appropriateness of intermediation can depend on its form. Forms of intermediation range from an informal "facilitation" in which the lawyer's responsibilities are limited to presenting alternatives from which the clients will choose to a full-blown representation in which the lawyer provides all legal services needed in connection with the proposed transaction. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

[7] A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Com-plying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper.

[8] Paragraph (b)(4) and (c)(2) makes clear that the obligations of attorney-client confidentiality apply to clients being served by a lawyer as an intermediary, but that, as between the clients being so served, confidentiality is inappropriate and must be waived by each of the clients. Thus, while the lawyer must maintain confidentiality as against strangers to the relationship, the lawyer has no such duty to keep information provided to the lawyer by one client confidential from the other clients. Moreover, the lawyer may well, depending on the circumstances, have an affirmative obligation to disclose such information obtained from one client to other clients. Obviously, this important implication of the lawyer's responsibilities as an intermediary must be disclosed and explained to the clients.

[9] Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

[10] In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances. This consent must be in writing.

[11] Paragraph (c)(3) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

[12] Common representation does not diminish the rights of each client in the client-lawyer relationship. Each client has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

[13] Because of the obligations of a lawyer serving as an intermediary to the intermediation clients, the lawyer must withdraw from the representation if any of the intermediation clients so requests; if one or more of the clients denies the lawyer the authority to disclose certain information to any of the remaining clients, thereby preventing the lawyer from being able to discharge the lawyer's duties to the remaining clients to communicate with them and disclose information to them; or if any of the various predicate requirements for intermediation can no longer be satisfied.

[14] Upon withdrawal from the role of intermediary or completion of an intermediation, the lawyer must afford all of the clients formerly served as an intermediary the protections of Rules 1.9 and 1.10.

DEFINITIONAL CROSS-REFERENCES

"**Consents in Writing**" See Rule 1.0(b)

"**Consults**" See Rule 1.0(c)

"**Material**" and "**Materially**" See Rule 1.0(g)

"**Reasonably Believes**" See Rule 1.0(j)

**PROPOSED RULE 2.3
EVALUATION FOR USE BY THIRD PERSONS**

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

- (1) the lawyer **reasonably believes** that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
- (2) the client consents after **consultation**.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

COMMENT

Definition

[1] An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

[3] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

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

client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

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

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

DEFINITIONAL CROSS-REFERENCES

“**Consultation**” See Rule 1.0(c)

“**Reasonably Believes**” See Rule 1.0(j)

PROPOSED RULE 2.4 LAWYER AS DISPUTE RESOLUTION NEUTRAL

(a) A lawyer serves as a dispute resolution neutral when the lawyer impartially assists two or more persons who are not clients of the lawyer to reach a resolution of disputes that have arisen between them. Service as a dispute resolution neutral may include service as a mediator, an arbitrator whose decision does not bind the parties, a case evaluator, or a judge or juror in a mini-trial or summary jury trial as described in Supreme Court Rule 31, or in such other capacity as will enable the lawyer to impartially assist the parties resolve their dispute.

(b) A lawyer may serve as a dispute resolution neutral in a matter if:

- (1) the lawyer is competent to handle the matter; and
- (2) the lawyer can handle the matter without undue delay; and
- (3) the lawyer **reasonably believes** he or she can be impartial as between the parties; and

(4) none of the parties to the dispute is being represented by the lawyer in other matters; and

(5) the lawyer's service as a dispute resolution neutral in the matter will not be adversely affected by the representation of clients with interests directly adverse to any of the parties to the dispute, or by the lawyer's responsibilities to a client or a third person, or by the lawyer's own interests; and

(6) the lawyer **consults** with each of the parties to the dispute, or their attorneys, about the lawyer's qualifications and experience as a dispute resolution neutral, the rules and procedures which will be followed in the proceeding, and the lawyer's responsibilities as a dispute resolution neutral, provided, however, that any party to the dispute who is represented by a lawyer may waive his or her right to all or part of the **consultation** required by this paragraph; and

(7) the lawyer **consults** with each of the parties, or their lawyers, about any interests of the lawyer, the lawyer's clients, the clients of other lawyers with whom the lawyer is associated in a **firm**, or third persons which may **materially** affect the lawyer's impartiality in the matter; and

(8) unless the service is pursuant to Supreme Court Rule 31, each of the parties, or their attorneys, **consents in writing** to the lawyer's service as a dispute resolution neutral in the matter; and

(9) if the service is pursuant to Supreme Court Rule 31, the lawyer is qualified to serve in accordance with the requirements of that Rule.

(c) While serving as a dispute resolution neutral, a lawyer shall:

(1) act **reasonably** to assure that the parties understand the rules and procedures which will be followed in the proceeding and the lawyer's responsibilities as a dispute resolution neutral; and

(2) act impartially, competently and expeditiously to assist the parties resolve the matters in dispute; and

(3) promote mutual respect among the parties for the dispute resolution process; and

(4) as between the parties to the dispute and third persons, treat all information related to the dispute as if it were information protected by Rules 1.6, 1.8 (b), and 1.9(b); and

(5) as between the parties to the dispute, treat all information obtained in an individual caucus with a party or a party's lawyer as if it were information related to the representation of a client protected by Rules 1.6, 1.8(b) and 1.9(b); and

(6) render no legal advice to any party to the dispute, but, if the lawyer believes that an unrepresented party does not understand how a proposed agreement might adversely affect his or her legal rights or obligations, the lawyer shall advise that party to seek the advice of independent counsel; and

(7) accept nothing of value, other than fully disclosed **reasonable** compensation for services rendered as the dispute resolution neutral, from a party, a party's lawyer, or any other person involved or interested in the dispute resolution process; and

(8) not seek to coerce or unfairly influence a party to accept a proposal for resolution of a matter in dispute and shall not make any substantive decisions on behalf of a party; and

(9) if the service is pursuant to Supreme Court Rule 31, comply with all other duties of a dispute resolution neutral as set forth in the Rule.

(d) A lawyer shall withdraw from service as a dispute resolution neutral or, if appointed by a court, shall seek the court's permission to withdraw from service as a dispute resolution neutral if:

(1) any of the parties so requests; or

(2) the lawyer **reasonably believes** that further dispute resolution services will not lead to an agreement resolving the matter in dispute or that any of the parties is unwilling or unable to cooperate with the lawyer's dispute resolution initiatives; or

(3) any of the conditions stated in paragraph (b) are no longer satisfied.

(e) Upon termination of a lawyer's service as a dispute resolution neutral, the lawyer:

(1) may, with the consent of all the parties to the dispute, draft a settlement agreement that results from the dispute resolution process, but shall not otherwise represent any or all of parties in connection with the matter, and

(2) shall afford each party to the dispute the protections afforded a client by Rules 1.6, 1.8(b), and 1.9.

COMMENT

[1] Mediation, arbitration, and other forms of alternative dispute resolution have been in use for many years, but increasing demands in recent years for more prompt and efficient means of resolving disputes of all kinds have led to an increase in the demand for the services of dispute resolution neutrals skilled in the analysis of disputes and in conflict resolution. Lawyers are often particularly well-suited to perform this role and should be encouraged to do so.

[2] Although service as a dispute resolution neutral is considered a law-related service governed generally by these Rules (see Rule 5.7), the unique nature of a lawyer's role when serving as a dispute resolution neutral demands separate, more specific, treatment in this Rule for the guidance of the profession and the public.

[3] This Rule provides that a lawyer may serve as a dispute resolution neutral, whether as a mediator, non-binding arbitrator, a case evaluator, or judge or juror in a mini-trial or summary jury trial. The scope of a lawyer's possible service as a neutral is intended to be generally the same as that adopted in Tennessee Supreme Court Rule 31 governing court-annexed alternative dispute resolution. While Rule 31 covers only court-annexed alternative dispute resolution, however, this Rule covers services as a dispute resolution neutral whether rendered in connection with court-annexed dispute resolution proceedings or in another, perhaps wholly private context not covered by Rule 31.

[4] This Rule does not cover the rendering by a lawyer of services related to alternative dispute resolution that are not neutral in nature, but are more judicial in nature, such as service as an arbitrator in a binding arbitration. Although Rule 5.7 may address a lawyer's obligations in such a context, this Rule does not purport to address them.

[5] Although a lawyer who serves as a dispute resolution neutral is subject to the Rules of Professional Conduct (see Rule 5.7), many of the Rules do not directly apply to such service because the participants in a dispute resolution proceeding are not the lawyer's clients. Other Rules do apply, however, and this Rule further provides specific applications of certain rules that must apply differently in this context (including, for example, the application of rules governing conflicts of interest).

[6] Although the requirements of this Rule are generally intended to be consistent with those imposed on dispute resolution neutrals under Rule 31, there are duties additional to those set out in Rule 31 that are imposed on lawyers who serve in this role. See also Standards of Professional Conduct for Rule 31 Mediators. Even though non-lawyers certified by the Supreme Court under Rule 31 as dispute resolution neutrals may not be subject to these Rules and the parties to the dispute are not deemed to be the clients of the lawyer serving as their dispute resolution neutral, the parties are properly entitled to assume that lawyers serving in this capacity are largely subject to the same broad standards of conduct as are applicable to lawyers when they are providing legal services to clients.

[7] The Court has set forth in Rule 31 rules and standards of professional conduct applicable to all Rule 31 neutrals, including both lawyers and non-lawyers. Thus, paragraph (b) contemplates that a lawyer may serve as a Rule 31 neutral if the lawyer complies with these requirements. Paragraph (b)(9) requires that a lawyer serving as a dispute resolution neutral pursuant to Supreme Court Rule 31 must comply fully with the requirements of that Rule.

[8] Paragraph (b) specifies the circumstances in which a lawyer may serve parties to a dispute as a dispute resolution neutral. With respect to the parties to the dispute, Rule 1.7 is inapplicable because there is no attorney-client relationship between the neutral and the parties to the dispute. Rule 1.7 remains applicable, however, to protect a client, as distinct from parties the lawyer is serving as a neutral, if the lawyer's service as a neutral will materially limit the lawyer's representation of the client. Similarly, if the lawyer's service as a neutral would be materially adverse to one of the lawyer's former clients, and the matters are substantially related, the lawyer must afford the former client the protection of Rule 1.9.

[9] Conflicts of interest for lawyers serving as dispute resolution neutrals are specifically addressed, given the fact that, although parties to a dispute resolution proceeding are not the clients of the dispute resolution neutral, the lawyer serving as neutral must be impartial, must fully disclose any pertinent relationships to the parties to the proceeding, and must obtain their consent to the lawyer's service based on these disclosures. Note that, although paragraph (b)(4) does not provide for mandatory vicarious disqualification based on a lawyer's current or prospective service as a dispute resolution neutral, the fact that, for example, a lawyer asked to serve as a neutral has a partner who currently represents one of the parties to the dispute in other matters would obviously have to disclose this fact to the parties under (b)(7) and obtain consent to service as a neutral. Of course, this lawyer would also have to have a reasonable belief that impartiality was possible despite this and other such pertinent relationships.

[10] Paragraph (c) further provides various standards of conduct particular to service by a lawyer as a dispute resolution neutral. Again, these rules of conduct are intended to be consistent with Rule 31 and to address the particular situation of a neutral, who occupies a significantly different relationship to participants in a dispute resolution proceeding than a lawyer does with clients. Paragraphs (c)(4) and (c)(5) treat the confidentiality of all information related to the dispute (including that obtained in individual caucuses with the parties) by analogy to the Rules concerning the confidentiality of client information. Thus, for example, any question concerning the potential disclosure of fraud by a participant in a dispute resolution proceeding would be addressed under Rules 1.6, 3.3 or 4.1 as though the participant were, in fact, a client of the lawyer. Other portions of paragraph (c), such as the ban on undisclosed compensation by one of the participants in paragraph (c)(7), the prohibition on coercion or decision making on behalf of parties in paragraph (c)(8), and the ban on giving legal advice to the participants in paragraph (c)(6), impose restrictions needed to insure and reinforce the necessary impartiality of the lawyer serving as a dispute resolution neutral.

[11] Paragraph (d) requires that a lawyer serving as a dispute resolution neutral withdraw or seek an appointing court's permission to withdraw in certain specified circumstances, such as a request by a party to do so or the lawyer's reasonable belief that the lawyer's service will not be fruitful.

[12] Paragraph (e) establishes a lawyer's duties toward participants in a dispute resolution proceeding upon the termination of the lawyer's service as a neutral for any reason, whether because a settlement is achieved or because a party requests the lawyer's withdrawal. Given the impartial role of a dispute resolution neutral, it is inappropriate for a lawyer who had served as a dispute resolution neutral to later represent any of the parties to the dispute in connection with the subject matter of that dispute resolution proceeding, unless the representation is limited to drafting a settlement agreement that results from the dispute resolution process. This Rule does not, however, extend this disqualification to other lawyers associated in a law firm with the dispute resolution neutral. Further, paragraph (e)(2) provides that, even though the participants to a concluded dispute resolution proceeding were not the clients of the lawyer who served as a dispute resolution neutral in that proceeding, these participants are nevertheless entitled to the protections relating to confidentiality and conflicts of interest afforded to former clients by Rules 1.6, 1.8(b), and 1.9.

DEFINITIONAL CROSS-REFERENCES

- “**Consents in Writing**” See Rule 1.0(b)
- “**Consultation**” and “**Consults**” See Rule 1.0(c)
- “**Firm**” See Rule 1.0(d)
- “**Materially**” See Rule 1.0(g)
- “**Reasonable**” and “**Reasonably**” See Rule 1.0(i)
- “**Reasonably Believes**” See Rule 1.0(j)

CHAPTER 3 ADVOCATE

PROPOSED RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend, or continue with the prosecution or defense of a proceeding, or assert or controvert, or continue to assert or controvert an issue therein unless, after **reasonable** inquiry, the lawyer has a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant

in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT

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

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they act reasonably to inform themselves about the facts of their client's case and the law applicable to the case and then act reasonably in determining that they can make non-frivolous arguments in support of their client's position. Such an action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a non-frivolous argument on the merits of the action taken or to support the action taken by a non-frivolous argument for an extension, modification or reversal of existing law.

[3] Although this Rule does not preclude a lawyer for a defendant in a criminal matter from defending the proceeding so as to require that every element of the case be established, the defense attorney must not file frivolous motions and must give notice to the prosecution if the lawyer decides to abandon an affirmative defense that the lawyer had previously indicated would be presented in the case.

[4] Prior to filing a complaint in a civil matter, a lawyer should act reasonably to promote settlement of the matter in dispute, including consultation with the client about the use of mediation or other alternative means of dispute resolution.

DEFINITIONAL CROSS-REFERENCES

“**Reasonable**” See Rule 1.0(i)

PROPOSED RULE 3.2 EXPEDITING LITIGATION

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

COMMENT

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

[2] Even if a lawyer is justified in seeking to delay a proceeding, the lawyer may not do so by means otherwise prohibited by these rules. See, e.g., Rules 3.1 and 3.4.

DEFINITIONAL CROSS-REFERENCES

“**Reasonable**” See Rule 1.0(i)

**PROPOSED 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

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

(b) A lawyer shall not **knowingly** offer or use false evidence and may refuse to offer or use evidence, other than the testimony of a client who is a defendant in a criminal matter, that the lawyer **reasonably believes** is false, misleading, **fraudulent** or illegally obtained. Permitting a client to testify pursuant to paragraph (c)(2) does not violate this Rule.

(c) A lawyer who **knows** that the lawyer's client intends to commit perjury, perpetrate a **fraud** upon the **tribunal** or persons participating in the proceeding, or otherwise commit an offense against the administration of justice in connection with the proceeding shall promptly advise the client to refrain from engaging in the wrongful conduct, shall **consult** with the client about the consequences of the client's engaging in such conduct, and if after such **consultation**, the lawyer **knows** that the client still intends to engage in the wrongful conduct,

(1) the lawyer shall seek permission of the **tribunal** to withdraw from the representation of the client and shall inform the **tribunal**, without further disclosure of information protected by Rule 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct; and

(2) if permission to withdraw is not granted, the lawyer shall proceed with the representation of the client, but shall take no action that will assist the client to engage in the intended misconduct other than permitting a client who is a defendant in a criminal proceeding to testify by way of an undirected narrative or taking such other action as is necessary to honor the defendant's constitutional rights in connection with the proceeding.

(d) A lawyer who, prior to the conclusion of the proceeding, comes to know that the lawyer's client has, during the course of the lawyer's representation, testified perjurally, perpetrated a **fraud** upon the **tribunal** or persons participating in the proceeding, or otherwise committed an offense against the administration of justice in connection with proceeding, shall:

(1) promptly advise the client with sufficient specificity to permit the client to rectify the offense or **fraud**, or report the offense to the **tribunal** if the client refuses or is unable to do so; and

(2) if the client refuses or is unable to rectify the perjured testimony or **fraud**, or report the offense, the lawyer shall:

(i) request permission of the **tribunal** to withdraw from the representation of the client; and

(ii) shall inform the **tribunal**, without further disclosure of information protected by Rule 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct; and

(e) A lawyer who, prior to the conclusion of the proceeding, comes to know that a person other than the client has testified perjuriously, perpetrated a **fraud** upon the **tribunal** or a person participating in the proceeding, or otherwise committed an offense against the administration of justice in connection with the proceeding and in which the lawyer's client was not implicated, shall:

(1) promptly seek the client's consent to disclosure of the perjury, **fraud**, or offense to the **tribunal** and shall **consult** with the client about the consequences of a failure to so consent; and

(2) if the client refuses or is unable to consent to the disclosure of the perjury, **fraud**, or offense, the lawyer shall promptly report the improper conduct to the **tribunal**, even if so doing requires the disclosure of information otherwise protected by Rule 1.6.

(f) A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the **tribunal**, even if so doing requires the disclosure of information otherwise protected by Rule 1.6.

(g) If, in response to a lawyer's request to withdraw from the representation of the client or the lawyer's report of a perjury, **fraud**, or offense against the administration of justice by a person other than the lawyer's client, a **tribunal** requests additional information which the lawyer can only provide by disclosing information protected by Rule 1.6 or 1.9(C), the lawyer shall comply with the request, but only if finally ordered to do so by the **tribunal** after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the **tribunal** is protected by the attorney-client privilege.

(h) If a lawyer who has sought permission to withdraw from the representation of a client in accordance with paragraphs (c) or (d) is not permitted to withdraw from the representation of the client, the lawyer shall continue with the representation of the client but shall not during the current or any subsequent stage of the proceeding make any reference to or otherwise affirm the validity of evidence or statements the lawyer **knows** to be false or misleading.

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in connection with the proceedings of a tribunal, such as a court or an administrative agency acting in an adjudicative capacity. It applies not only when the lawyer appears before the tribunal, but also when the lawyer participates in activities conducted pursuant to the tribunal's authority, such as pre-trial discovery in a civil matter.

[2] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty to refrain from assisting a client to perpetrate a fraud upon the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[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).

Misleading 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 which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Refusing to Offer Evidence

[5] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. The lawyer must similarly refuse to offer a client's testimony that the lawyer knows to be false, except that paragraph (b) permits the lawyer to allow a criminal defendant to testify by way of narrative if the lawyer's request to withdraw is denied. See paragraph (c)(2).

[6] Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. 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 because the lawyer reasonably believes the testimony will be false. Unless the lawyer knows the testimony will be false the lawyer must honor the client's decision to testify.

***Ex Parte* Proceedings**

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

Wrongdoing in Adjudicative Proceedings by Clients and Others

[8] A lawyer who is representing a client in an adjudicative proceeding and comes to know prior to the completion of the proceeding that the client has perpetrated a fraud or committed perjury, or intends to do so before the end of the proceeding, is in a difficult position in which the lawyer must strike a professionally responsible balance between the lawyer's duties of loyalty and confidentiality owed to the client and the equally important duty of the lawyer to avoid assisting the client with the consummation of the fraud or perjury. In all such cases the lawyer must advise the client to desist from or to rectify the fraud and inform the client of the consequences of a failure to do so. The hard questions come in those rare cases in which the client refuses to reveal the misconduct and prohibits the lawyer from doing so.

[9] In cases in which the lawyer learns of the client's misconduct after the termination of the proceeding in which the misconduct occurred, the lawyer is prohibited from reporting the client's misconduct to the tribunal. Even though the lawyer may have innocently assisted the client to perpetrate the offense, the lawyer should treat this information as the lawyer would treat information with respect to any past crime a client might have committed. The client's offense will be deemed completed as of the conclusion of the proceeding. An offense which occurs at an earlier stage in the proceeding will be deemed an ongoing offense until the final stage of the proceeding is completed. 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 an appeal has passed.

[10] Because jury tampering undermines the institutional mechanism our adversary system of justice uses to determine the truth or falsity of testimony or evidence, paragraph (f) requires a lawyer who learns prior to the completion of the proceeding that there has been misconduct by or directed toward a juror or prospective juror must reveal the misconduct and the identity of the perpetrator to the tribunal, even if so doing requires disclosure of information protected by Rule 1.6. Paragraph (f) does not mandate that the lawyer seek permission to withdraw from the further representation of the client in the proceeding, but in cases in which the client is implicated in the jury tampering, the lawyer's continued representation of the client may violate Rule 1.7. Rule 1.16(a)(1) would then require the lawyer to seek permission to withdraw from the case.

[11] Paragraph (e) only applies if the lawyer comes to know that a person other than the client has engaged in misconduct in connection with the proceeding. If the lawyer knows that such a person intends to testify perjurally, the lawyer may not reveal that intent to the tribunal unless the client consents. The lawyer could not, however, call the witness to testify on behalf of the client. See Rule 3.3(b). Upon learning prior to the completion of the proceeding that such misconduct has occurred, however, the lawyer is required by paragraph (e) to promptly reveal the offense to the tribunal. The client's interest in protecting the wrongdoer is not sufficiently important as to override the lawyer's duty of candor to the court and to take affirmative steps to prevent the administration of justice from being tainted by perjury, fraud or other improper conduct.

[12] Paragraphs (c) and (d) set forth the lawyer's responsibilities in situations in which the lawyer's client is implicated in the misconduct and in whose misconduct the lawyer will be implicated if the lawyer continues to represent the client without disclosing the misconduct. In these situations, the Rules do not permit the lawyer to report the client's offense. Confidentiality under Rule 1.6 prevails over the lawyer's duty of candor to the tribunal.

[13] Although the lawyer may not reveal the client's misconduct, the lawyer must not voluntarily continue to represent the client, for that would assist the client to consummate the offense. The Rule, therefore, requires the lawyer to seek permission of the tribunal to withdraw from the representation of the client. To increase the likelihood that the tribunal will permit the lawyer to withdraw, the lawyer is also required to inform the court that the request for permission to

withdraw is required by the Rules of Professional Conduct. This statement also serves to advise the tribunal that something is amiss without providing the tribunal with any of the information related to the representation that is protected by Rule 1.6. These Rules, therefore, are intended to preserve confidentiality while requiring the lawyer to act so as not to assist the client with the consummation of the fraud. This reflects a judgment that the legal system will be best served by rules that encourage clients to confide in their lawyers who will advise them to rectify the fraud. Many, if not most, clients will abide by their lawyer's advice, particularly if the lawyer spells out the consequences of failing to do so. At the same time, our legal system and profession cannot permit lawyers to assist clients who refuse to follow their advice and insist on consummating an ongoing fraud.

[14] Once the lawyer has made a request for permission to withdraw, the tribunal may grant or deny the request to withdraw without further inquiry or may seek more information from the lawyers about the reasons for the lawyer's request. If the judge seeks more information, the lawyer must resist disclosure of information protected by Rule 1.6, but only to the extent that the lawyer may do so in compliance with Rule 3.1. If the lawyer cannot make a non-frivolous argument that the information sought by the tribunal is protected by the attorney-client privilege, the lawyer must respond truthfully to the inquiry. If, however, there is a non-frivolous argument that the information sought is privileged, paragraph (H) requires the lawyer to invoke the privilege. Whether to seek an interlocutory appeal from an adverse decision with respect to the claim of privilege is governed by Rule 1.2 and 3.1.

[15] If a lawyer is required to seek permission from a tribunal to withdraw from the representation of a client in either a civil or criminal proceeding because the client has refused to rectify a perjury or fraud, it is ultimately the responsibility of the tribunal to determine whether the lawyer will be permitted to withdraw from the representation. In a criminal proceeding, however, a decision to permit the lawyer's withdrawal may implicate the constitutional rights of the accused and may even have the effect of precluding further prosecution of the client. Notwithstanding this possibility, the lawyer must seek permission to withdraw, leaving it to the prosecutor to object to the request and to the tribunal to ultimately determine whether withdrawal is permitted. If permission to withdraw is not granted, the lawyer must continue to represent the client but cannot assist the client in consummating the fraud or perjury by directly or indirectly using the perjured testimony or false evidence during the current or any subsequent stage of the proceeding. A defense attorney who complies with these rules is acting professionally without regard to the effect of the lawyer's compliance on the outcome of the proceeding.

Constitutional Requirements

[16] These Rules apply to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. The obligation of the advocate under these Rules is subordinate to any such constitutional requirement.

DEFINITIONAL CROSS-REFERENCES

“**Consult**” and “**Consultation**” See Rule 1.0(c)
“**Fraud**” and “**Fraudulent**” See Rule 1.0(e)
“**Knowingly**” and “**Known**” and “**Knows**” See Rule 1.0(f)
“**Material**” See Rule 1.0(g)

“Reasonably Believes” See Rule 1.0(j)
“Tribunal” See Rule 1.0(m)

**PROPOSED RULE 3.4
FAIRNESS TO OPPOSING PARTY AND COUNSEL**

A lawyer shall not:

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

(b) falsify evidence, counsel or assist a witness to offer false or misleading testimony; or

(c) **knowingly** disobey an obligation under the rules of a **tribunal** except for an open refusal based on an assertion that no valid obligation exists; or

(d) in pretrial procedure, make a frivolous discovery request or fail to make a **reasonably** diligent effort to comply with a legally proper discovery request by an opposing party; or

(e) in trial,

(1) allude to any matter that the lawyer does not **reasonably** believe is relevant or that will not be supported by admissible evidence; or

(2) assert personal knowledge of facts in issue except when testifying as a witness; or

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request or assist any person to take action that will render the person unavailable to appear as a witness by way of deposition or at trial or request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

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

(2) the lawyer **reasonably believes** that the person's interests will not be adversely affected by refraining from giving such information.”

(g) offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. A lawyer may advance, guarantee or acquiesce in the payment of:

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

(2) **reasonable** compensation to a witness for his loss of time in attending or testifying; or

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

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is

secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or a proceeding the commencement of which can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

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

[4] Although paragraph (f) broadly prohibits lawyers from taking extrajudicial action to impede informal fact-gathering, it does permit the lawyer to request that the lawyer's client, and relatives or employees or agents of the client, refrain from voluntarily giving information to another party. This is because such relatives and employees will normally identify their interests with those of the client. See also Rule 4.2.

DEFINITIONAL CROSS-REFERENCES

- “**Knowingly**” See Rule 1.0(f)
- “**Material**” See Rule 1.0(g)
- “**Reasonable**” and “**Reasonably**” See Rule 1.0(i)
- “**Reasonably Believes**” See Rule 1.0(j)
- “**Tribunal**” See Rule 1.0(m)

PROPOSED RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (a) seek to influence a judge, juror, a member of the jury pool, or other official by means prohibited by law; or
- (b) communicate ex parte with a judge, juror, or a member of the jury pool, prior to or during a proceeding, except as permitted by law; or
- (c) communicate with a juror after completion of the juror's term of service if the communication is prohibited by law or is **reasonably** likely to harass or embarrass the juror or influence the juror's actions in future jury service; or

- (d) conduct a vexatious or harassing investigation of a juror or a member of the jury pool; or
- (e) engage in conduct intended to disrupt a proceeding before or conducted pursuant to the authority of a **tribunal**.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law or state or local rules of procedure. Others are specified in the Tennessee Code of Judicial Conduct, with which an advocate should be familiar. For example, a lawyer shall not give or lend anything of value to a judge, judicial officer or employee of a tribunal, except as permitted by Section (C)(4) of Canon 5 of the Code of Judicial Conduct. A lawyer, however, may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section (B)(2) of Canon 7 of the Code of Judicial Conduct.

[2] Paragraph (b) does not prohibit communicating with a judge on the merits of the cause in writing if the lawyer promptly delivers a copy of the writing to opposing counsel and to parties who are not represented by counsel. Oral communication is permitted upon adequate notice to opposing counsel and parties who are not represented by counsel.

[3] A communication with or an investigation of the spouse, child, parent or sibling of a juror or a member of the jury pool will be deemed a communication with or an investigation of the juror.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] Paragraph (e) prohibits a lawyer from engaging in conduct intended to disrupt a deposition as well as a trial.

DEFINITIONAL CROSS-REFERENCES

“**Reasonably**” See Rule 1.0(i)

“**Tribunal**” See Rule 1.0(m)

PROPOSED RULE 3.6 TRIAL PUBLICITY

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

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

- (1) the claim, offense or defense involved, and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of **substantial** harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

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

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

COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly

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

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

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

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

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

- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or
- (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial.

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

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

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

DEFINITIONAL CROSS-REFERENCES

“**Firm**” See Rule 1.0(d)

“**Knows**” See Rule 1.0(f)

“**Materially**” See Rule 1.0(g)

“**Reasonably Should Know**” See Rule 1.0(k)

“**Reasonable**” See Rule 1.0(i)

“**Substantial**” See Rule 1.0(l)

PROPOSED RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work **substantial** hardship on the client.

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

COMMENT

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

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It

may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

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

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

[5] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

DEFINITIONAL CROSS-REFERENCES

“**Firm**” See Rule 1.0(d)

“**Substantial**” See Rule 1.0(l)

PROPOSED RULE 3.8
SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal matter:

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

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

(c) shall not advise an unrepresented accused to waive important pretrial rights; and

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

(e) shall:

(1) exercise **reasonable** care to prevent employees of the prosecutor's office from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6; and

(2) discourage investigators, law enforcement personnel, and other persons assisting or associated with the prosecutor in a criminal matter from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6; and

(f) shall not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a client or former client unless the prosecutor **reasonably believes**:

(1) the information sought is not protected from disclosure by any applicable privilege; and

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information; and

(4) the prosecutor obtains prior judicial approval; and

(g) shall, except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, shall refrain from making extrajudicial comments that have a **substantial** likelihood of heightening public condemnation of the accused.

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded

procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See also Rule 3.3 (a)(3), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

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

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

[4] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The prosecutor is required to obtain court approval for the issuance of the subpoena after an opportunity for an adversarial hearing is afforded in order to assure an independent determination that the applicable standards are met.

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

DEFINITIONAL CROSS-REFERENCES

“**Known**” and “**Knows**” See Rule 1.0(f)

“**Reasonable**” See Rule 1.0(i)

“**Reasonably Believes**” See Rule 1.0(j)

“**Substantial**” See Rule 1.0(l)

“**Tribunal**” See Rule 1.0(m)

PROPOSED RULE 3.9
ADVOCATE IN NON-ADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) and (b), 3.4(a) through (c), 3.5(a), (b) and (e), and 4.1.

COMMENT

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

[2] Lawyers have no exclusive right to appear before non-adjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, except for the fact that lawyers need not secure the permission of a legislative body or administrative agency to withdraw from the representation of a client in a non-adjudicative matter and that certain of the rules governing the conduct of lawyers in adjudicative matters are not pertinent to non-adjudicative matters, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

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

[4] See Rule 4.1 for the duties of a lawyer who comes to know that the lawyer's client or a witness whose testimony is presented by the lawyer has testified falsely or otherwise presented false evidence in a non-adjudicative proceeding conducted by a legislative body or administrative agency.

DEFINITIONAL CROSS-REFERENCES

None.

**CHAPTER 4
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS**

**PROPOSED RULE 4.1
TRUTHFULNESS AND CANDOR IN STATEMENTS TO OTHERS**

(a) In the course of representing a client, a lawyer shall not **knowingly** make a false statement of **material** fact or law to a third person.

(b) If a lawyer who is representing a client in a nonadjudicative matter **knows** that his or her client intends to perpetrate a crime or **fraud**, the lawyer shall promptly advise the client to refrain from engaging in the criminal or **fraudulent** conduct, **consult** with the client about the consequences of the client's engaging in such conduct; and if, after such **consultation**, the lawyer **knows** that the client still intends to engage in the wrongful conduct, the lawyer shall:

(1) withdraw from the representation of the client in the matter; and

(2) shall give notice of the withdrawal to any person who the lawyer **knows** is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or **fraudulent** conduct.

(c) If a lawyer who is representing or has represented a client in a nonadjudicative matter comes to know, prior to the conclusion of the matter, that the client has, during the course of the lawyer's representation of the client in the matter, perpetrated a crime or **fraud** that the lawyer **reasonably believes** will cause harm to the financial or property interests of another person, the lawyer shall promptly advise the client to rectify the crime or **fraud**, shall **consult** with the client about the consequences of the client's failure to rectify the crime or **fraud**, and if the client refuses or is unable to rectify the **fraud**, the lawyer shall:

(1) if currently representing the client in the matter, withdraw from the representation and give notice of the withdrawal to any person who the lawyer **knows** is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or **fraudulent** conduct; and

(2) give notice to such person of the lawyer's disaffirmance of any written statements, opinions or other **material** prepared by the lawyer on behalf of the client and which the lawyer **reasonably believes** may be used by the client in furtherance of the crime or **fraud**.

COMMENT

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts or law. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

[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 in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Crime or Fraud by Client

[3] Paragraphs (b) and (c) provide guidance for lawyers who find themselves in the uncomfortable situation in which they discover that a client intends to or is engaging in criminal or fraudulent conduct and in some cases may even have used the lawyer's services to assist them commit the crime or fraud in the crime or fraud. To avoid assisting the client with the crime or fraud, of course, the lawyer must advise the client to refrain from or to rectify the consequences of the criminal or fraudulent act and, if the client refuses or is unable to do so, the lawyer must withdraw from the representation of the client in the matter. Additionally, this Rule mandates limited disclosures -- notice of withdrawal or disaffirmance of written work product -- in certain circumstances in which such disclosure is necessary for the lawyer to prevent the client from using the lawyer's services to assist the client commit a crime or fraud. To this limited extent, then, this Rule overrides the lawyer's duties in Rules 1.6, 1.8(b) and 1.9(c) prohibiting disclosure or use to the disadvantage of the client of information relating to the representation of the client.

[4] If a lawyer learns that a client intends to commit a crime or fraud under circumstances in which the lawyer will not assist the offense by remaining silent, paragraph (b) requires remonstrance with the client against the crime or fraud, and requires withdrawal if the client does not desist from the course of conduct in question. Although the lawyer is not permitted to reveal the client's intended or ongoing fraud, the lawyer is required to communicate the fact that he or she has withdrawn from the representation of the client to any person who the lawyer reasonably believes knows of the lawyer's involvement in the matter and whose financial or property interests are likely to be damaged by the client's intended or ongoing misconduct. This communication is necessary to fully distance the lawyer from the client's misconduct. If the client's intended conduct is a crime, full disclosure of the crime is permitted by Rule 1.6(b) but is not required by paragraph (b) of this Rule.

[5] In some cases, a lawyer will learn about a client's crime or fraud after he or she has innocently prepared and submitted statements, opinions or other materials to third parties who will be adversely affected if the client persists with his or her misconduct. If the lawyer was misled by his or her client, some of these statements, opinions or materials may be false or misleading. Even though accurate, they may be necessary for the accomplishment of the client's crime or fraud. This presents the lawyer with a dilemma. Without the consent of the client, the lawyer may not correct the statements, opinions or materials. That would violate the prohibition against revealing information related to the representation of the client. Yet to do nothing would allow the client to use the lawyer's work in the client's ongoing effort to consummate the fraud. To resolve this dilemma, paragraph (c)(2) does not require disclosure of the crime or fraud but only requires that the lawyer effectively disengage from the crime or fraud by giving notice to affected persons of the lawyer's disaffirmance of the lawyer's work product that the lawyer reasonably believes may be used by the client in furtherance of the client's crime or fraud. See Rule 1.6(b) for the circumstances in which the lawyer may be permitted to more fully reveal information for the purposes of preventing or rectifying the client's crime or fraud.

[6] If, after the conclusion of a matter in which a lawyer has represented a client, the lawyer learns that the client has perpetrated a crime or fraud during the course of the lawyer representation, the lawyer may not reveal the crime or fraud unless permitted to do so by Rule 1.6(b)(3).

DEFINITIONAL CROSS-REFERENCES

- “**Knowingly**” and “**Knows**” See Rule 1.0(f)
- “**Material**” See Rule 1.0(g)
- “**Fraud**” and “**Fraudulent**” See Rule 1.0(e)
- “**Consult**” and “**Consultation**” See Rule 1.0(c)
- “**Reasonably Believes**” See Rule 1.0(j)

PROPOSED 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 by law to do so.

COMMENT

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

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

[3] In the case of a represented organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with a member of the governing board, an officer or managerial agent or employee, or an agent or employee who supervises or directs the organization's lawyer concerning the matter, has authority to contractually obligate the organization with respect to the matter, or otherwise participates substantially in the determination of the organization's position in the matter.

[4] If an agent or employee of an organization is represented in the matter by his or her own counsel, consent by that counsel will be sufficient for purposes of this Rule. Nor is consent of the organization's lawyer required for communication with a former agent or employee. See Rule 4.4 regarding the lawyer's duty not to violate the organization's legal rights by inquiring about information protected by the organization's attorney-client privilege or as work-product of the organization's lawyer. In communicating with a current or former agent or employee of an organization, a lawyer shall not solicit or assist in the breach of any duty of confidentiality owed by the agent to the organization. See Rule 4.4.

[5] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the subject matter of the representation. For example, the existence of a controversy between a government agency and a private party, or between two private parties, does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter, such as additional or different unlawful conduct. Nor does this Rule preclude a lawyer from communicating with a person who seeks a second opinion about a matter in which the person is represented by another lawyer. Also, parties to a matter may communicate directly with each other.

[6] Communications with represented persons may be authorized by specific constitutional or statutory provisions, by rules governing the conduct of proceedings, or by applicable judicial precedent. Communications authorized by law, for example, may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official having the power to redress the client's grievances.

[7] By virtue of its exemption of communications authorized by law, this Rule permits a prosecutor or a government lawyer engaged in a criminal or civil law enforcement investigation to communicate with or direct investigative agents to communicate with a represented person prior to the commencement of a criminal or civil law enforcement proceeding against the represented person. A civil law enforcement investigation is one conducted under the government's police or regulatory power to enforce the law. Once a represented person has been arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding, however, prosecutors and government lawyers must comply with this Rule. A represented person's waiver of the constitutional right to counsel does not exempt the prosecutor from the duty to comply with this Rule.

[8] 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.

DEFINITIONAL CROSS-REFERENCES

“**Knows**” See Rule 1.0(f)

PROPOSED RULE 4.3
DEALING WITH UNREPRESENTED PERSON

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

COMMENT

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. The lawyer is not allowed to cultivate such an assumption and has an affirmative duty to act reasonably to assure that there is no misunderstanding about his or her partisan role. Even if the unrepresented party understands the lawyer's role, it is improper for the lawyer to render advice to the unrepresented party even if requested by the unrepresented party to do so. The lawyer must refuse the request for advice, but may advise the unrepresented person to consult another lawyer.

DEFINITIONAL CROSS-REFERENCES

“**Knows**” See Rule 1.0(f)

“**Reasonable**” See Rule 1.0(i)

“**Reasonably Should Know**” See Rule 1.0(k)

PROPOSED RULE 4.4
RESPECT FOR RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not:

(a) use means that have no **substantial** purpose other than to embarrass, delay, or burden a third person or **knowingly** use methods of obtaining evidence that violate the legal rights of such a person; or

(b) threaten to present a criminal charge, or to offer or to agree to refrain from filing such a charge, for the purpose of obtaining an advantage in a civil matter.

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.

DEFINITIONAL CROSS-REFERENCES

“**Knowingly**” See Rule 1.0(f)

“**Substantial**” See Rule 1.0(l)

CHAPTER 5
LAW FIRMS, LEGAL DEPARTMENTS, AND LEGAL
SERVICE ORGANIZATIONS

PROPOSED RULE 5.1
RESPONSIBILITIES OF A PARTNER, MANAGING LAWYER OR SUPERVISORY
LAWYER

(a) Each **partner** in a **law firm** and any lawyer who possesses managerial authority in a **law firm**, legal department, or other legal service organization, or a division thereof, shall make **reasonable** efforts to ensure that the **law firm**, legal department, or legal service organization, or the division for which the lawyer is responsible, has in effect measures giving **reasonable** assurance that all lawyers in the **firm**, department, organization, or division 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 in a matter, if:

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

(2) the lawyer:

(a) is a **partner** in the **law firm** in which the other lawyer practices, has direct supervisory authority over the other lawyer, is serving as co-counsel with the other lawyer in the matter, or is sharing fees from the matter with the other lawyer; and

(b) **knows** of the conduct at a time when its consequences can be avoided or mitigated but fails to take **reasonable** remedial action.

COMMENT

[1] Paragraph (a) refers to lawyers who have supervisory authority over the professional work of a law firm, a legal department of an organizational client, a legal service agency, the legal department of government agency, or any division or unit of one of these organizations. The reference to a legal service organization is intended to embrace any organization of lawyers who are engaged in the practice of law -- *e.g.*, a prosecutor's office, a public defender's office, and a legal aid society, as well as a law department of a business firm, a non-profit organization, or an administrative agency. Each partner in a law partnership, or their counterparts in firms organized as professional corporations, professional limited liability companies, or professional limited liability partnerships will be deemed to possess managerial authority for all aspects of the firm's practice. A law firm or other organization of lawyers described in this Rule may, however, agree that the managerial authority for the conduct of the firm or organization will be centralized in some but not all of the partners or managing lawyers. In such a case, only the partners or managing lawyers possessing such managerial authority will be subject to the duty imposed by paragraph (a). On the other hand, however, paragraph (a) may be applicable when a lawyer in a firm or other organization of lawyers described in this Rule, whether or not a partner or a managing lawyer, is assigned intermediate-level managerial responsibilities for a department or an office within the firm. Because many lawyers do not practice in traditional law firms, but rather practice law in legal departments of

business firms, legal services organizations, or in legal departments of governmental agencies, this rule also applies to lawyers possessing managerial authority in such organizations.

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

[3] Paragraph (b) applies to lawyers, without regard to their status in a firm or other organization of lawyers described in this Rule, who assume direct supervisory responsibility for the oversight of the work of another lawyer in a matter for which the supervisory lawyer is primarily responsible.

[4] Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) specifies the circumstances in which one lawyer will be held accountable for the professional misconduct of another lawyer because he or she knows the other lawyer has engaged in professional misconduct and fails to take reasonable action to prevent or mitigate the harm caused by the professional misconduct. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. If, for example, a partner in a law firm knows that another lawyer in the firm misrepresented a matter to an opposing party in a negotiation, the partner as well as the subordinate has a duty to correct the resulting misapprehension. Such would also be the case if a lawyer who was associated with another lawyer as a direct supervisor, co-counsel, or as a party to a fee-sharing agreement learned that the other lawyer had engaged in misconduct in connection with the representation. This duty is in addition to the lawyer's Rule 8.3(a) duty to report professional misconduct to the Office of Disciplinary Counsel. The obligation to take reasonable remedial action, however, does not require the lawyer to take any action which would violate these rules, *e.g.*, disclosing information related to the representation of a client in violation of Rule 1.6. Nor does the duty to mitigate harm require the lawyer to compensate a person for losses suffered by virtue of the misconduct the lawyer knows has occurred.

[6] Professional misconduct by a lawyer in a firm or other organization of lawyers described in this Rule, or a lawyer who is working under the direct supervision of another lawyer could reveal a violation of paragraph (a) or (b) on the part of the partner or the supervisory lawyer even though it does not entail a violation of paragraph (c) by the partner, the managing lawyer, or supervisory lawyer 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 another lawyer with whom the lawyer is associated in connection with the representation of a client. Whether a lawyer may be held civilly or criminally liable for another lawyer's conduct is a question of law beyond the scope of these Rules. This Rule is only intended to provide a basis for professional discipline and is not intended to alter the legal rights and responsibilities of partners, supervisory lawyers, co-counsel, or parties to fee-sharing agreements with respect to the conduct of other lawyers with whom they are associated.

DEFINITIONAL CROSS-REFERENCES

“**Firm**” and “**Law Firm**” See Rule 1.0(d)

“**Knows**” See Rule 1.0(f)

“**Partner**” See Rule 1.0(h)

“**Reasonable**” See Rule 1.0(i)

PROPOSED RULE 5.2
RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's **reasonable** resolution of an arguable question of professional duty.

COMMENT

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

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the subordinate lawyer's supervisor, another lawyer who has primary responsibility for the representation, or a lawyer who has authority to resolve such matters on behalf of the firm, 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.

DEFINITIONAL CROSS-REFERENCES

“**Reasonable**” See Rule 1.0(i)

PROPOSED RULE 5.3
RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer, **law firm**, legal department, or other legal service organization:

(a) each **partner** in a **law firm** and any lawyer who possesses managerial authority in a **law firm**, legal department, or other legal service organization, or a division thereof, shall make **reasonable** efforts to ensure that the **firm**, department, organization, or division has in effect measures giving **reasonable** assurance that the nonlawyer's conduct is compatible with these Rules;

(b) a lawyer having direct supervisory authority over a nonlawyer shall make **reasonable** efforts to ensure that the person's conduct is compatible with these Rules; and

(c) A lawyer shall be responsible for the conduct of a non-lawyer if the conduct would be a violation of these Rules if engaged in by a lawyer and if:

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

(2) the lawyer:

(i) is a **partner** in the **law firm**; or

(ii) possesses managerial authority in a **law firm**, legal department, or other legal service organization, or a division thereof, for whose benefit the non-lawyer is acting; or

(iii) has direct supervisory authority over the non-lawyer; and

(iv) **knows** of the non-lawyer's conduct at a time when its consequences can be avoided or mitigated but fails to take **reasonable** remedial action.

COMMENT

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

DEFINITIONAL CROSS-REFERENCES

“**Firm**” and “**Law Firm**” See Rule 1.0(d)

“**Knows**” See Rule 1.0(f)

“**Partner**” See Rule 1.0(h)

“**Reasonable**” See Rule 1.0(i)

PROPOSED RULE 5.4
PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or **law firm** shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's **firm, partner**, or associate may provide for the payment of money, over a **reasonable** period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons; and

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and

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

which (4) a lawyer may share a court-awarded fee with a client represented in the matter for the fee was awarded or with a non-profit organization which employed or retained the lawyer in the matter for which the fee was awarded; and

(5) a lawyer who is a full-time employee of a client may share a legal fee with the client to the extent necessary to reimburse the client for the actual cost to the client of permitting the lawyer to represent another client while continuing in the full-time employ of the client with whom the fee will be shared; and

(6) a lawyer may pay to a registered non-profit intermediary organization a referral fee calculated by reference to a **reasonable** percentage of the fee paid to the lawyer by the client referred to the lawyer by the intermediary organization.

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

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

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

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

(2) a nonlawyer is a member of the governing board or an officer thereof; or

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

COMMENT

[1] The provisions of this Rule largely express the traditional limitations on sharing fees and the co-ownership of law practices by non-lawyers. These limitations are to protect the lawyer's professional independence of judgment. The rule recognizes several exceptions to the general prohibition against fee splitting with non-lawyers. These are situations in which there is little risk of harm resulting from lay attempts to interfere with the independent professional judgment of the lawyer.

[2] Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements must not interfere with the lawyer's professional judgment.

DEFINITIONAL CROSS-REFERENCES

“**Firm**” and “**Law Firm**” See Rule 1.0(d)

“**Partner**” See Rule 1.0(h)

“**Reasonable**” See Rule 1.0(i)

**PROPOSED RULE 5.5
UNAUTHORIZED PRACTICE OF LAW**

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person in the performance of activity that constitutes the unauthorized practice of law. A lawyer may, however, be employed, retained or paid by, or otherwise cooperate with
 - (1) a qualified non-profit intermediary organization as provided in Rule 7.6; or
 - (2) a liability insurer to provide legal services to an insured with respect to a matter for which the insurer bears ultimate liability.

COMMENT

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

[2] Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to non-lawyers whose employment requires knowledge of law, such as claims adjusters, employees of financial or commercial institutions, social workers, accountants, or persons employed in government agencies. In addition, a lawyer may counsel non-lawyers who wish to proceed pro se.

[3] A lawyer does not assist the unauthorized practice of law if he or she advises a client with respect to whether an activity constitutes the unauthorized practice of law, accepts an unsolicited referral of a client from a person whose prior involvement in the matter constituted the unauthorized practice of law, or defends a person against charges that he or she has engaged in the unauthorized practice of law.

[4] Paragraphs (b)(1) and (2) identify two situations in which a lawyer employed, retained, or paid by an organization controlled by non-lawyers may properly provide legal services to the organization's employees, members, beneficiaries, or customers. See Rule 7.6.

DEFINITIONAL CROSS-REFERENCES

None.

**PROPOSED RULE 5.6
RESTRICTIONS ON RIGHT TO PRACTICE**

A lawyer shall not participate in offering or making:

- (a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

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

COMMENT

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

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

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

DEFINITIONAL CROSS-REFERENCES

None.

PROPOSED RULE 5.7
RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take **reasonable** measures to assure that a person obtaining the law-related services **knows** that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might **reasonably** be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

COMMENT

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7(a)(1).

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity which the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(b) and 1.8(a),(b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

DEFINITIONAL CROSS-REFERENCES

“**Knows**” See Rule 1.0(f)

“**Reasonably**” and “**Reasonable**” See Rule 1.0(i)

**CHAPTER 6
PUBLIC SERVICE
PROPOSED RULE 6.1
PRO BONO PUBLICO REPRESENTATION**

A lawyer should render pro bono publico legal services. In fulfilling this responsibility, the lawyer should:

(a) provide a **substantial** portion of such services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or **substantially** reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a **substantially** reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

(c) In addition to providing pro bono legal services, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

COMMENT

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The actual amount of pro bono legal service a lawyer provides is left to the sound professional judgment of each lawyer, but every lawyer should render a reasonable amount of pro bono legal service each year. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeals.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these

activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorney's fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means. In some cases, a fee paid by the government to an appointed lawyer will be so low relative to what would have been a reasonable fee -- as in post-conviction death penalty cases -- that the lawyer should be credited for the purpose of this rule as having rendered the services without fee.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing services the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono attorney to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which attorneys agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

DEFINITIONAL CROSS-REFERENCES

“**Substantially**” and “**Substantial**” See Rule 1.0(1)

PROPOSED RULE 6.2 ACCEPTING COURT APPOINTMENTS

A lawyer shall not seek to avoid appointment by a **tribunal** to represent a person except for good cause, such as:

- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- (b) representing the client is likely to result in an **unreasonable** financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

COMMENT

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing *pro bono publico* service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

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

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

DEFINITIONAL CROSS-REFERENCES

“**Tribunal**” See Rule 1.0(m)

“**Unreasonable**” See Rule 1.0(i)

PROPOSED RULE 6.3
MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the **law firm** in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not **knowingly** participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a **material** adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT

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

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

DEFINITIONAL CROSS-REFERENCES

“**Knowingly**” See Rule 1.0(f)

“**Law Firm**” See Rule 1.0(d)

“**Material**” See Rule 1.0(g)

PROPOSED RULE 6.4
LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

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

COMMENT

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

DEFINITIONAL CROSS-REFERENCES

“**Knows**” See Rule 1.0(f)

“**Materially**” See Rule 1.0(g)

**CHAPTER 7
INFORMATION ABOUT LEGAL SERVICES**

**PROPOSED RULE 7.1
COMMUNICATIONS CONCERNING A LAWYER'S SERVICES**

A lawyer shall not make a false or misleading communication about the lawyer, the lawyer's services, the lawyer's charges for fees or costs, or the law as relates to the services the lawyer will provide. A communication is false or misleading if it:

- (a) contains a **material** misrepresentation of fact or law, omits a fact necessary to make the statement considered as a whole not **materially** misleading; or
- (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
- (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or
- (d) with respect to the lawyer's fees
 - (1) compares the lawyer's fees with the fees of other lawyers, unless the comparison can be factually substantiated; or
 - (2) states or implies that there will be no charge for an initial **consultation** unless a lawyer will without charge **consult** with all prospective clients for a **reasonable** period of time; or
 - (3) specifies a fixed, variable or contingent fee, or a range of fees the lawyer will charge, or states or implies that no fee will be owed by the client unless the lawyer secures a favorable result for the client, unless the communication includes the statement "FEE AND EXPENSE ARRANGEMENTS VARY AND SHOULD BE FULLY DISCUSSED WITH YOUR LAWYER."

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2 and solicitations directed to specific recipients permitted by Rule 7.3. Whatever means are used to make known a lawyer's services, statements about them should be truthful and opinions rendered by a lawyer should be reasonably justified. The prohibition in paragraph (b) of statements that may create an "unjustified expectation" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances. Paragraph (d) recognizes that statements about fees may be particularly confusing to prospective clients who are unfamiliar with the market for legal services.

DEFINITIONAL CROSS-REFERENCES

“Consult” and **“Consultation”** See Rule 1.0(c)
“Material” and **“Materially”** See Rule 1.0(g)
“Reasonable” See Rule 1.0(i)

PROPOSED RULE 7.2
ADVERTISING AND OTHER COMMUNICATIONS NOT DIRECTED TO
SPECIFICALLY IDENTIFIED RECIPIENTS

(a) Subject to the requirements of paragraphs (b) through (e) below and Rules 7.1, 7.4, and 7.5, a lawyer may advertise professional services or seek referrals through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, world wide web site, or other forms of communication not directed to specifically identified recipients.

(b) Within three days after the publication, distribution, or dispatch of an advertisement or a communication not directed to a specifically identified recipient, the lawyer shall file a copy of the advertisement or communication with the Board of Professional Responsibility, provided, however, that such filing is not required for any communication that only includes the name, address and profession of the lawyer or has been exempted from the filing requirement by the Board of Professional Responsibility.

(1) If communications which are similar in all **material** respects are published or displayed more than once or distributed to more than one person, the lawyer may comply with this requirement by filing a single copy of the communication.

(2) If a communication which has previously been filed with the Board is changed in any **material** respect, notice of the changes shall be filed with the Board within three days after its publication, distribution, or dispatch.

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

(1) pay the **reasonable** costs of advertisements or other communications permitted by this Rule, Rule 7.3 or 7.5;

(2) pay the usual charges of a registered intermediary organization as permitted by Rule 7.6;

(3) pay a sponsorship fee or make a contribution to a charitable or other non-profit organization in return for which the lawyer will be given publicity as a lawyer;

(4) pay for a law practice in accordance with Rule 1.17.

(d) Except for communications by qualified intermediary organizations, any communication subject to this Rule or Rule 7.3(b) shall include the name and office address of at least one lawyer or **law firm** assuming responsibility for the communication.

COMMENT

[1] This Rule governs general advertising through public media and other communications that are not directed to specifically identified individuals. The Rule encompasses all possible media through which such communications may be directed, including print, broadcasting, and computer-driven technology. Communications that are directed to specifically identified recipients are governed by Rule 7.3.

[2] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

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

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

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

Record of Advertising

[6] Paragraph (b) requires that a lawyer file a copy of any advertisement or other communication governed by this Rule with the Board of Professional Responsibility within three days after publication, distribution, or dispatch. A lawyer may comply with the filing requirement of paragraph (b) by complying with guidelines that may be adopted by the Board of Professional Responsibility concerning appropriate methods by which a lawyer may provide the Board with notice of communications made by way of web sites, e-mail, or other electronic forms of communication or of changes to such communications. This Rule does not require that communications be subject to review prior to dissemination, although a lawyer is free to request such a review from the Board. This Rule provides the Board an opportunity to monitor lawyer communications to the public while not placing any sort of prior restraint on publication.

Paying Others to Recommend a Lawyer

[7] A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying

regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

DEFINITIONAL CROSS-REFERENCES

- “**Law Firm**” See Rule 1.0(d)
- “**Material**” See Rule 1.0(g)
- “**Reasonable**” See Rule 1.0(i)

PROPOSED RULE 7.3
SOLICITATION AND OTHER COMMUNICATIONS DIRECTED TO
SPECIFICALLY IDENTIFIED RECIPIENTS

(a) If a significant motive for the solicitation is the lawyer's pecuniary gain, a lawyer shall not solicit professional employment by in-person or live telephone contact from a prospective client who has not initiated the contact with the lawyer and with whom the lawyer has no family or prior professional relationship.

(b) A lawyer shall not solicit professional employment by a writing, recording, telegram, facsimile, computer transmission or other mode of communication directed to a specifically identified recipient who has not initiated the contact with the lawyer if:

(1) the person solicited has made **known** to the lawyer a desire not to be contacted by the lawyer; or

(2) the communication constitutes overreaching, coercion, duress, harassment, undue influence, intimidation, or **fraud**; or

(3) a significant motive for the solicitation is the lawyer's pecuniary gain and the communication concerns an action for personal injury, worker's compensation or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a member of that person's family, unless the accident or disaster occurred more than 30 days prior to the mailing or transmission of the communication or the lawyer has a family or prior professional relationship with the person solicited.

(c) If a significant motive for the solicitation is the lawyer's pecuniary gain, a lawyer shall not send or dispatch a communication soliciting professional employment from a specifically identified recipient who has not initiated a contact with the lawyer and with whom the lawyer has no family or prior professional relationship unless the communication complies with the following requirements:

(1) Each communication, including envelopes and self-mailing brochures or pamphlets, shall include the words "THIS IS AN ADVERTISEMENT" as follows:

(a) in written communications sent by mail, telegraph, facsimile, or computer transmission, the required wording shall appear in conspicuous print size on the outside envelope, if any, and at the beginning and end of the written **material**. If the written communication is a self-mailing brochure or pamphlet, the required wording shall appear on the address panel of the brochure or pamphlet.

(b) In video communications the required wording shall appear conspicuously in the communication for at least five seconds at the beginning and five seconds at the end of the communication and the required wording of the audio portion of the video communication shall be presented as required in subsection (c) below.

(c) In audio communications, the required wording shall be presented at both the beginning and end of the communication in a tone, volume, clarity and speed of delivery at least equivalent to the clearest quality tone, volume, clarity and speed used elsewhere in the communication.

(2) A lawyer shall not state or imply that a communication otherwise permitted by these rules has been approved by the Tennessee Supreme Court or its Board of Professional Responsibility.

(3) If a contract for representation is mailed with the communication, the top of each page of the contract shall be marked "SAMPLE" and the words "DO NOT SIGN" shall appear on the client signature line.

(4) Written communications shall not be in the form of or include legal pleadings or other formal legal documents.

(5) Communications delivered to prospective clients shall be sent only by regular U.S. mail and not by registered, certified, or other forms of restricted delivery, express delivery or courier.

(6) Any communication seeking employment by a specific prospective client in a specific matter shall comply with the following additional requirements:

(i) The communication shall disclose how the lawyer obtained the information prompting the communication; and

(ii) The subject matter of the proposed representation shall not be disclosed on the outside of the envelope (or self-mailing brochure) in which the communication is delivered; and

(iii) The first sentence of the communication shall state "IF YOU HAVE ALREADY HIRED OR RETAINED A LAWYER IN THIS MATTER, PLEASE DISREGARD THIS MESSAGE."

(7) A copy of each written, audio, video or electronically transmitted communication sent to a specific recipient shall be filed with the Board of Professional Responsibility within three days after the dispatch of the communication. At the same time, the lawyer dispatching the communication shall also file the name of the person contacted and the person's address, telephone, or telecommunication address to which the communication was sent. If communications identical in content are sent to two or more persons, the lawyer may comply with this requirement by filing a single copy of the communication together with a list of the names and addresses of the persons to whom the communication was sent. If the lawyer periodically sends the identical communication to additional persons, lists of the additional names and addresses shall be filed with the Board of Professional Responsibility no less frequently than monthly.

(d) Unless the subject matter of the communication is restricted to matters of general legal interest or an announcement of an association or affiliation with another lawyer which complies with the requirements of Rule 7.5, a lawyer who sends newsletters, brochures and other similar communications to persons who have not requested the communication or with whom the lawyer has no family or prior professional relationship shall comply with the requirements of paragraph (c) above.

COMMENT

[1] There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a

lawyer and a specifically targeted recipient subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

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

[3] The use of written and recorded communications to transmit information from lawyer to a specifically identified recipient, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of communications permitted under this Rule are permanently recorded and filed with the Board of Professional Responsibility. The contents of direct in-person or live telephone conversations between a lawyer to a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the prohibitions in Rule 7.3(a) and (b)(1) are not applicable in those situations.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(3), which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(2), or which occurs within 30 days after an accident of disaster involving the individual of a member of the individual's family, is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b). Communications directed to specifically identified recipients must be identified as advertisements, may need to be marked with other disclaimers, and cannot be formatted or delivered in such a manner as to mislead the recipient about the nature of the communication.

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties if the lawyer's purpose is to inform such entities of the lawyer's willingness to cooperate with the plan in compliance with Rule 7.6. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information

transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

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

[8] Rule 7.3 is not intended to apply to communications such as general interest newsletters or announcements of association or affiliation that comply with Rule 7.5. Other types of newsletters, brochures and similar communications sent to specifically identified recipients must comply with Rule 7.3.

DEFINITIONAL CROSS-REFERENCES

“**Fraud**” See Rule 1.0(e)

“**Known**” See Rule 1.0(f)

“**Material**” See Rule 1.0(g)

PROPOSED RULE 7.4
COMMUNICATION OF FIELDS OF PRACTICE

Subject to the requirements of Rule 7.1, 7.2, and 7.3,

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) Except as permitted by paragraphs (c) and (d), a lawyer shall not state that the lawyer is a specialist, specializes or is certified or recognized as a specialist in a particular field of law.

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

(d) A lawyer who has been certified as a specialist in a field of law by the Tennessee Supreme Court or its Commission on Continuing Legal Education and Specialization may state that the lawyer "is certified as a specialist in [field of law] by the Tennessee Supreme Court." A lawyer so certified may also state that the lawyer is certified as a specialist in that field of law by an organization recognized or accredited by the Tennessee Supreme Court or its Commission on Continuing Legal Education and Specialization as complying with its requirements, provided the statement is made in the following format: "[Lawyer] is certified as a specialist in [field of law] by [organization]."

COMMENT

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters in a specified field or fields, the lawyer is permitted to so indicate.

[2] However, a lawyer may not communicate that the lawyer is a "specialist," practices a "speciality," "specializes in" a particular field, or that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule. Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office, as reflected in paragraph (c).

[3] Paragraph (d) permits a lawyer to communicate that he or she is a specialist or has been certified or recognized as a specialist only when the lawyer has been so certified or recognized by the Supreme Court or its Commission on Continuing Legal Education. The certification procedures are designed to require that the lawyer demonstrate that he or she has a higher degree of specialized ability and experience than is suggested by general licensure to practice law.

DEFINITIONAL CROSS-REFERENCES

“**Substantially**” See Rule 1.0(1)

PROPOSED RULE 7.5 FIRM NAMES AND LETTERHEADS

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

(b) A **law firm** with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the **firm** shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a **law firm**, or in communications on its behalf, during any **substantial** period in which the lawyer is not actively and regularly practicing with the **firm**.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENT

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

[2] Paragraph (c) does not require a change in a law firm's name or letterhead when a member of the firm interrupts his or her practice to serve as an elected member of the Tennessee General Assembly so long as the lawyer reasonably expects to resume active and regular practice with the firm at the end of the legislative session. Such a hiatus from practice is not for a substantial period of time. If, however, a lawyer were to curtail his or her practice and enter public service for a longer period of time, or for an indefinite period of time, the lawyer's firm would have to alter its name and letterhead.

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

DEFINITIONAL CROSS-REFERENCES

“**Firm**” and “**Law Firm**” See Rule 1.0(d)

“**Substantial**” See Rule 1.0(l)

**PROPOSED RULE 7.6
INTERMEDIARY ORGANIZATIONS**

(a) An intermediary organization is an lawyer-advertising cooperative, lawyer referral service, prepaid legal insurance provider or a similar organization the business or activities of which includes the referral of its customers, members, or beneficiaries to lawyers or the payment for or provision of legal services to the organization's customers, members or beneficiaries in matters for which the organization does not bear ultimate responsibility.

(b) A lawyer shall not seek or accept a referral of a client, or compensation for representing a client, from an intermediary organization if the lawyer **knows** or **reasonably should know** that

(1) the organization

(i) is owned or controlled by the lawyer, a **law firm** with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a **firm**; or

(ii) the organization is engaged in the unauthorized practice of law; or

(iii) the organization engages in marketing activities prohibited by Rules 7.1, 7.3(b), or 7.3(c); or

(iv) the organization has not registered with the Board of Professional Responsibility and complied with all reporting requirements imposed by the Board; or

(2) the lawyer will be unable to represent the client in compliance with these Rules.

COMMENT

[1] For there to be equal access to justice, there must be equal access to lawyers. For there to be equal access to lawyers, potential clients must be able to find lawyers and have the economic resources needed to pay the lawyers a reasonable fee for their services. In effort to assist prospective clients to find and be able to retain competent lawyers, lawyers and non-lawyers alike have formed a variety of organizations designed to bring clients and lawyers together and to provide a vehicle through which the lawyers can be fairly compensated and the clients can afford the services they need. Some of these intermediary organizations operate as charities. Others operate as businesses. Because they ultimately bear the liability of their insureds, liability insurance companies which pay for or otherwise provide lawyers to defend their insureds are not intermediary organizations within the meaning of this Rule.

[2] The requirements set forth in paragraph (b) are intended to protect the clients who are represented by lawyers to whom they have been referred or assigned by an intermediary organization. It is the responsibility of each lawyer who would participate in the activities of an intermediary organization to act reasonably to ascertain that the organization meets the stated requirement standards set forth in paragraph (b). Normally it will be sufficient for the lawyer to ascertain that the organization has registered with the Board of Professional Responsibility and to review the materials the organization has filed with the Board in compliance with the Board's reporting requirements. If, however, by virtue of his or her participation in the activities of an intermediary organization, a lawyer comes to know that the organization does not meet the

standards set forth in paragraph (b), the lawyer shall terminate his or her participation in the activities of the organization and should so advise the Board of Professional Responsibility.

DEFINITIONAL CROSS-REFERENCES

“**Firm**” and “**Law Firm**” See Rule 1.0(d)

“**Knows**” See Rule 1.0(f)

“**Reasonably Should Know**” See Rule 1.0(k)

**CHAPTER 8
MAINTAINING THE INTEGRITY OF THE PROFESSION**

**PROPOSED RULE 8.1
BAR ADMISSION AND DISCIPLINARY MATTERS**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

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

COMMENT

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

[2] This Rule is subject to the provisions of the Fifth Amendment to the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of non-disclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

DEFINITIONAL CROSS-REFERENCES

“**Knowingly**” or “**Known**” See Rule 1.0(f)
“**Material**” See Rule 1.0(g)

**PROPOSED 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

[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 and to responsibly speak out when necessary to prevent or rectify injustice or to promote needed improvements in the judicial system.

DEFINITIONAL CROSS-REFERENCES

“**Knows**” See Rule 1.0(f)

PROPOSED RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a **substantial** question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Disciplinary Counsel of the Board of Professional Responsibility.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a **substantial** question as to the judge's fitness for office shall inform the Disciplinary Counsel of the Court of the Judiciary.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of a lawyer assistance program approved by the Supreme Court of Tennessee or by the Board of Professional Responsibility to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

COMMENT

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

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

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the 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 the confidentiality of such information encourages lawyers and judges to seek treatment through such program. Conversely, without such confidentiality, 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. The Rule therefore exempts the lawyer from the reporting requirements of

paragraphs (a) and (b) with respect to information that would be privileged if the relationship between the impaired lawyer or judge and the recipient of the information were that of a client and a lawyer. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, the conversion of client funds to his or her use.

DEFINITIONAL CROSS-REFERENCES

“**Substantial**” See Rule 1.0(l)

PROPOSED RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, **knowingly** assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, **fraud**, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) attempt to, or state or imply an ability to influence a **tribunal** or a governmental agency or official on grounds unrelated to the merits of, or the procedures governing, the matter under consideration; or
- (f) **knowingly** assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
- (g) **knowingly** fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply with the order or is seeking in good faith to determine the validity, scope, meaning or application of the law upon which the order is based.

COMMENT

[1] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty or breach of trust, or serious interference with the administration of justice are in that category. Although under certain circumstances a single offense reflecting adversely on a lawyer's fitness to practice - such as a minor assault - may not be sufficiently serious to warrant discipline, a pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status, may violate paragraph (d) if such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

[3] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith

challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

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

[5] In both their professional and personal activities, lawyers have special obligations to demonstrate respect for the law and legal institutions. Normally, a lawyer who knowingly fails to obey a court order demonstrates a disrespect for the law that is prejudicial to the administration of justice. Failure to comply with a court order is not a disciplinary offense, however, when it does not evidence disrespect for the law either because the lawyer is unable to comply with the order or the lawyer is seeking in good faith to determine the validity, scope, meaning or application of the law upon which the order is based.

DEFINITIONAL CROSS-REFERENCES

“**Fraud**” See Rule 1.0(e)

“**Knowingly**” See Rule 1.0(f)

“**Tribunal**” See Rule 1.0(m)

PROPOSED 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 who engages in misconduct may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted to practice for the same conduct.

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

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction; and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

COMMENT
Disciplinary Authority

[1] Paragraph (a) restates longstanding law.

Choice of Law

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

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

[4] Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court before which the lawyer is admitted to practice (either generally or pro hac vice), the lawyer shall be subject only to the rules of professional conduct of that court. As to all other conduct, paragraph

(b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

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

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

DEFINITIONAL CROSS-REFERENCES

None.

**PROPOSED TRANSITION RULE
GOVERNING IMPLEMENTATION OF
TENNESSEE RULES OF PROFESSIONAL CONDUCT**

The foregoing Rules shall become effective as of the date of the entry of this Order, except that:

- (a) Rule 1.5(c) (governing contingent fee agreements) shall apply only to contingent fee agreements entered into or amended on or after the effective date of these Rules.
- (b) The requirement of a writing contained in Rules 1.7, 1.9, and 1.12 shall apply only to conflicts of interest that arise on or after the effective date of these Rules.
- (c) Rule 1.8(a) shall apply only to transactions entered into or amended on or after the effective date of these Rules.

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