This Discussion Draft has been authorized to be circulated for comment but has not been adopted or approved by the House of Delegates and does not represent policy of the American Bar Association.

The text remains under study by the Commission and is open for further revision. Comments and suggestions for revision are invited and should be submitted to the Commission’s Reporter, Professor Geoffrey C. Hazard, Jr., Yale University Law School, New Haven, Connecticut, 06520.

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The decade past has witnessed an extraordinary concern with professional responsibility. Barely ten years ago, the American Bar Association adopted its Model Code of Professional Responsibility, the product of a committee chaired by Edward L. Wright. The momentum that began with the work of the Wright Committee and the publication of the Model Code has not abated; it has grown, and grown dramatically. One could cite decisions of the Supreme Court, statutory enactments and governmental regulations, opinions of our Association’s Standing Committee on Ethics and Professional Responsibility, and any number of reports and articles by or about lawyers—in every sphere one finds searching inquiry into the meaning of professionally responsible conduct.

That inquiry has led to reconsideration of the Model Code, the creation of the Commission on Evaluation of Professional Standards, and, finally, the development of this document—the Discussion Draft of the Model Rules of Professional Conduct.

In reconsidering the concepts of professional standards, the Commission soon realized that more than a series of amendments or a general restatement of the Model Code of Professional Responsibility was in order. The Commission determined that a comprehensive reformulation was required. We have built on the Code’s foundation, but we make no apology for having pushed beyond it. In many respects, we have been taken beyond the Model Code by events, particularly the continuing evolution in ethical thought that has characterized much of the professional debate of the 1970’s.

The Commission did more than monitor this debate. Much of its work has been in the form of dialogue with practitioners and academicians who, like the Commission members themselves, represent widely differing perspectives on the practice of law. In addition, earlier working drafts of the Commission benefited from extensive written comment by individuals and organizations with expertise in specific areas of concern.

What follows, then, is the distillation of two and one-half years of rethinking the fundamental tenets of ethics and self-regulation in the legal profession. That process has resulted in what we believe is a fundamental clarification of the ethical judgments lawyers must daily make in the practice of law.

An important part of that clarification, and an assumption underlying the Draft, is that there are limits to what a legislative statement of self-regulation can effectively address. Consequently, in the words of the Preamble, the Model Rules do not attempt to “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 legal framework for the ethical practice of law.”

It has well been said that the printed word is not the last word. It is now time to subject the Discussion Draft to the broadest and most thoughtful consideration of the profession and the public. Inescapably, there are controversial issues to be considered. While we hope the Draft has struck a broadly acceptable balance on these issues, the record remains open. We anticipate and invite response and further directions.
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A lawyer is an officer of the legal system, a representative of clients, and a public citizen having special responsibility for the quality of justice.

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 in general. 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 representative of clients, a lawyer performs various functions. As adviser, a lawyer should provide a client with an informed understanding of the client’s legal rights and their practical implications. A lawyer’s advice should include consideration of the client’s legal obligations and the interests of other persons who may be affected in the circumstances. A lawyer should seek to dissuade clients from conduct wrongful to others and should not lend assistance to such purposes.

As advocate, a lawyer should diligently assert the client’s position while being honest with the tribunal and showing proper respect for the interests of opposing parties and other concerned persons.

As negotiator, a lawyer should seek a result advantageous to the client but consistent with requirements of fair dealing with others. A lawyer should safeguard the client’s interest and may ordinarily assume that opposing parties in a transaction are adequately represented or adequately represent themselves. However, when an opposing party is manifestly incapable of protecting his or her own interests, on account of ignorance, adversity of circumstance, or other reason, a lawyer should moderate a client’s demands so as to avoid a legally unconscionable result.

A lawyer may serve as intermediary between clients by seeking to reconcile their divergent interests. As intermediary, a lawyer is an advisor and, to a limited extent, spokesman for each client, promoting accommodation between them.

A lawyer acts as evaluator by examining a client’s legal affairs and reporting about them to the client or to others. If the evaluation is to be relied on by others, the lawyer assumes a professional duty not only to the client but also to third persons.

In all professional relationships a lawyer should act competently, promptly, and diligently. A lawyer should keep confidential all information relating to clients except so far as disclosure is appropriate in the service of a client or is required or permitted by law or these Rules of Professional Conduct.

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 seeking these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer’s professional responsibilities are legal duties and are prescribed in the Rules of Professional Conduct. However, a lawyer also has professional obligations regulated by personal conscience and the approbation of professional peers. These include practicing at a lawyer’s highest level of skill, devoting effort to improving the law and the legal profession, and striving to exemplify the legal profession’s ideals of public service.

A lawyer’s responsibilities as an officer of the court, a representative of clients, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a vigorous 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 they can do so in private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict in a lawyer’s responsibilities, including responsibilities to clients, to the legal system, to the general public, 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 these conflicts. Nevertheless, many of the difficult choices call for exercise of sensitive professional and moral judgment in which lawyers must be guided by the basic principles underlying the Rules of Professional Conduct.
SCOPE AND DEFINITIONS

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 directly prescribe or limit the lawyer’s conduct in performing professional functions. Others, generally cast in the term "may," define areas in which the lawyer acts according to professional discretion. Other Rules define the nature of relationships between the lawyer and others.

The Rules presuppose a larger legal context that includes court rules and other laws regulating the profession (such as admission to practice), laws defining specific obligations of lawyers (such as the attorney-client privilege) and substantive and procedural law in general, all of which shape the lawyer’s role. It is assumed that compliance with the Rules, as with all law in an open society, is achieved primarily through understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, by enforcement through disciplinary proceedings. The Rules, however, do not 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 legal framework for the ethical practice of law.

The purpose of the Rules is to govern the relationships to which they refer, chiefly the relationships between a client and a lawyer and between a lawyer and third persons, including courts. Violation of the Rules is a basis for imposing professional sanctions. However, whether discipline should be imposed for a violation depends on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations—all matters involving enforcement discretion.

Violation of the Rules should not necessarily result in civil liability. Many of the Rules are designed to prevent harm rather than to define harm; the uncritical use of preventive norms as norms of liability distorts the purpose of regulation. Furthermore, the purpose of the Rules can be subverted when used 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.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The References following each Comment are to counterparts in the ABA Model Code of Professional Responsibility (adopted 1969, as amended) and to other important sources. A volume of annotations providing additional background and interpretive material is in preparation.
DEFINITIONS

ADEQUATE DISCLOSURE: Communication of information sufficient to permit the person to whom the disclosure is made to appreciate the significance of the matter in question and to act in a reasonably prudent manner.

FRAUD: Conduct accompanied by a deliberate purpose to deceive and not merely negligent failure to apprise another of relevant information.

LAW FIRM: A lawyer practicing with the assistance of other persons in the service of a client, including partners, associates, lawyers “of counsel” to a firm, and employees of a firm, and lawyers employed in the legal department of a corporation or other organization, in the legal department of a government agency, or in a legal services organization.

WRONGFUL ACT: An act violating a civil or penal legal standard in which knowledge of the circumstances is an element of the violation, including willfulness and reckless disregard of circumstances, but excluding negligence.
MODEL RULES OF PROFESSIONAL CONDUCT

A. THE PRACTICE OF LAW

1. CLIENT-LAWYER RELATIONSHIP

Introduction: A client usually seeks legal assistance to deal with unfamiliar circumstances and relationships. The client’s position is ordinarily one of need and frequently one of adversity; the client’s problem may involve significant personal and property interests, individual freedom and responsibility, or even life itself. To obtain effective advice and assistance in such matters, the client must place trust in the lawyer. To provide such advice and assistance the lawyer must be skillful, diligent, and trustworthy. At the same time, the lawyer must be faithful to the requirements of law and the Rules of Professional Conduct and respectful of the interests of third persons.

These responsibilities commence when a lawyer is asked to assist a client. They continue in all the functions that a lawyer may perform on behalf of a client. Rules 1.1 through 1.16 apply generally in the lawyer’s practice of law, and are augmented by Rules 2.1 through 7.5 with respect to particular functions the lawyer may undertake.

1.1 COMPETENCE

A LAWYER SHALL UNDERTAKE REPRESENTATION ONLY IN MATTERS IN WHICH THE LAWYER CAN ACT WITH ADEQUATE COMPETENCE. ADEQUATE COMPETENCE INCLUDES THE SPECIFIC LEGAL KNOWLEDGE, SKILL, EFFICIENCY, THOROUGHNESS, AND PREPARATION EMPLOYED IN ACCEPTABLE PRACTICE BY LAWYERS UNDERTAKING SIMILAR MATTERS.

COMMENT:

Since no lawyer can be adequately proficient in all areas of the law, a lawyer should undertake only matters within his or her domain of professional skill. Within that domain the lawyer should act in a particular matter with adequate attention, preparation, and thoroughness to discharge the matter properly.

Necessary knowledge and skill

In many instances, the required proficiency is that of a general practitioner, that is, a lawyer skilled in the range of business, contract, and other matters that nonspecialist lawyers conventionally handle. In other instances, the skill of a specialist may be required. Although formal designation of fields of specialization is permitted in some states, specialization is primarily the product of convenience and efficiency. Many general practitioners have mastered a cluster of connected specialties, such as those included in corporate and business practice. General practitioners are often specialists in the practices of the courts and public agencies in their localities. When a matter properly should be handled by a specialist in one of the foregoing senses of the term, a lawyer ordinarily should accept the matter only if he or she can act with the knowledge and skill possessed by such specialists or can gain the necessary knowledge and skill without undue expense to the client.
A lawyer need not necessarily have special training or experience to handle legal problems of a type with which the lawyer is unfamiliar. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. Moreover, even an inexperienced lawyer can become oriented in a wholly novel field through intensive study.

A lawyer’s competence to handle a particular matter is partly determined by whether the lawyer has effectively handled similar matters on previous occasions. A lawyer should undertake a matter in an unfamiliar field only with caution and upon disclosure to the client of the lawyer’s degree of experience. It may be sufficient to consult with a lawyer of established competence in that field.

Another important factor is the relative complexity of the particular problem. There are both complex and relatively simple tax problems, estate planning problems, contract negotiations, lawsuits, and so on. A lawyer may be qualified to handle a relatively routine matter of a kind in which he or she has had no specific training or prior experience, but problems of great complexity may require a lawyer with extensive experience in the specific field involved.

Thus, no precise formula prescribes the knowledge and skill required in any particular matter. The proper standard is the skill and knowledge possessed by lawyers who ordinarily handle such matters.

Under unusual circumstances a lawyer may give advice or assistance in a matter in which the lawyer does not have established skill; for example in an emergency where referral to another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary pending a referral, for ill-considered action under emergency conditions can jeopardize the client’s interest.

Complying with the provisions of this Rule can require law offices serving persons unable to afford legal services to limit the matters in which they provide representation. The alternative is to accept substandard professional competence in legal assistance for people of limited means. Similarly, a lawyer should decline an appointment as counsel unless he or she can perform competently. However, particularly where the client might otherwise go unrepresented, a lawyer who can achieve the requisite level of competence by special preparation may have an obligation to accept the representation. See Rule 1.15.

Thoroughness and Preparation

Competent handling of a particular matter includes thorough analysis of the problem, careful inquiry into its factual and legal elements, and use of methods and procedures meeting the standards of practitioners of established competence. Perhaps most important, it 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 minor consequence.

A lawyer’s failure to act competently in a particular matter can be a matter for disciplinary inquiry even if the failure is an apparently isolated incident. Competence in practice is a continuous undertaking to be assessed on the basis of specific instances. At the same time, the fact that a lawyer has failed to act with sufficient care and competence on a particular occasion ordinarily may not warrant disciplinary sanction except possibly a warning.

Maintaining and improving Competence

A lawyer should maintain knowledge and skill through continuing self-study and continuing legal education. If a system of peer review has been established, the lawyer should make use of it in appropriate circumstances.


1.2 PROMPTNESS

A LAWYER SHALL ATTEND PROMPTLY TO MATTERS UNDERTAKEN FOR A CLIENT AND GIVE THEM ADEQUATE ATTENTION UNTIL COMPLETED OR UNTIL THE LAWYER HAS PROPERLY WITHDRAWN FROM REPRESENTING THE CLIENT.

COMMENT:

Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests 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, delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.


1.3 CLIENT AUTONOMY
(a) A LAWYER SHALL ACCEPT A CLIENT’S DECISIONS CONCERNING THE
OBJECTIVES OF THE REPRESENTATION AND THE MEANS BY WHICH
THEY ARE TO BE PURSUED EXCEPT AS STATED IN PARAGRAPHS (b) AND
(c).

(b) A LAWYER SHALL NOT PURSUE A COURSE OF ACTION ON BEHALF OF A
CLIENT IN VIOLATION OF LAW OR THE RULES OF PROFESSIONAL
CONDUCT.

(c) THE LAWYER MAY DECLINE TO PURSUE A LAWFUL COURSE OF ACTION
PURSUANT TO RULE 1.5(b), AND, IF THE CLIENT INSISTS UPON SUCH
COURSE OF ACTION, THE LAWYER MAY WITHDRAW FROM
REPRESENTATION SUBJECT TO THE PROVISIONS OF RULE 1.16.

COMMENT:

The client has ultimate authority to determine the purposes to be served by legal
representation, within the limits imposed by law and the lawyer’s professional obligations.
Within those same limits, a client also has a right to consult on the means to be used in
pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or
employ means simply because a client may wish that the lawyer do so. The client-lawyer
relationship therefore partakes of a joint undertaking to which the client and lawyer both
subscribe. While a lawyer is bound to exercise independent professional judgment, the
lawyer also is required to respect the client’s choice of objectives and discretion as to the
means of pursuing them. In questions of means, the lawyer should assume responsibility for
wholly technical issues, but should defer to the client regarding such questions as the time
and effort to be committed and concern for interests of third persons that might by adversely
affected.

References: EC 7-7 through 7-9; American Bar Foundation, Annotated Code of Professional

1.4 ADEQUATE COMMUNICATION

(a) A LAWYER SHALL KEEP A CLIENT INFORMED ABOUT MATTERS IN WHICH
THE LAWYER’S SERVICES ARE BEING RENDERED. INFORMING THE
CLIENT INCLUDES:

(1) PERIODICALLY ADVISING THE CLIENT OF THE STATUS AND
PROGRESS OF THE MATTER;

(2) EXPLAINING THE SIGNIFICANT LEGAL AND PRACTICAL ASPECTS OF
THE MATTER AND FORESEEABLE EFFECTS OF ALTERNATIVE
COURSES OF ACTION; AND

(3) PROMPTLY COMPLYING WITH REASONABLE REQUESTS FOR
INFORMATION ABOUT THE MATTER.
(b) A LAWYER SHALL ADVISE A CLIENT OF THE RELEVANT LEGAL AND ETHICAL LIMITATIONS TO WHICH THE LAWYER IS SUBJECT IF THE LAWYER HAS REASON TO BELIEVE THAT THE CLIENT MAY EXPECT ASSISTANCE NOT PERMITTED BY LAW OR THE RULES OF PROFESSIONAL CONDUCT.

(c) A LAWYER SHALL NOT WITHHOLD INFORMATION TO WHICH A CLIENT IS ENTITLED EXCEPT WHEN DOING SO IS CLEARLY NECESSARY TO PROTECT THE CLIENT’S INTEREST OR TO COMPLY WITH THE REQUIREMENTS OF LAW OR THE RULES OF PROFESSIONAL CONDUCT.

COMMENT:

The client should be provided with sufficient information to participate intelligently in all critical 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.

Even when a client delegates authority to the lawyer, the client should be kept advised. A lawyer should guard against the tendency, common to all professionals, to leave the client in ignorance. Nothing is more frustrating to a client than being unable to find out about a matter, particularly if the client has made persistent inquiries about it.

Ordinarily, the information should be that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable under special circumstances. There are unavoidable limits on the extent to which the lawyer can inform a client who is a child or who suffers from mental disability. See Rule 1.14. If the client is potentially dangerous to himself or others, the lawyer may withhold information that might stimulate dangerous behavior. 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 officials or leaders of the organization. See Rule 1.13. Practical exigency may also require a lawyer to act for a client without prior consultation; in such an instance the lawyer should promptly inform the client of the nature, basis, and likely consequences of the action that has been taken.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should provide the client a complete resume of the important provisions before proceeding to an agreement. When acting as advocate, a lawyer should explain in advance of litigation the general strategy and assess the prospects of success. The client should be consulted on tactics that might injure or coerce others. On the other hand, an advocate ordinarily cannot be expected to describe trial strategy in detail. Similarly, when a lawyer for an organization or group handles a matter requiring secrecy, the need for secrecy limits the extent to which the lawyer can provide information to officials or members of the organization or group. In keeping the client informed, a particularly delicate situation arises when the lawyer seeks to act as intermediary between clients. See Rule 5.1. The guiding principle, whatever the service performed, is that the lawyer
should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests.

Some clients want information in great detail, perhaps being mistrustful of the lawyer or anxious about the situation. A lawyer should make every reasonable effort to respond to such requests short of permitting disruption in performance of the lawyer’s services. Other clients will accept proposed decisions and actions without question. If a client is inexperienced in employing legal services, the lawyer should provide initial orientation and periodic reports notwithstanding the client’s failure to request such information. Doing so protects against the client’s timidity or ignorance and safeguards the lawyer against belated accusation of nondisclosure.

Ethical limitations

A new client should be given a general explanation of the client-lawyer relationship. A client should understand the lawyer’s ethical obligations, such as the prohibitions against assisting a client in committing a fraud or presenting perjured evidence. A client who misapprehends such limitations may have erroneous expectations about the lawyer’s services. When such a misapprehension seems likely, the lawyer should advise the client of the relevant legal and ethical restrictions. The warning may lead the client to withhold or falsify relevant facts, thereby making the lawyer’s representation more difficult or less effective. In the final analysis, however, that choice must lie with the client.

Withholding information

A lawyer may withhold information from a client only under unusual circumstances. For example, in undertaking measures to prevent a client from committing a serious criminal offense, the lawyer may have to conceal such measures from the client. Whether withholding information is justified in any specific situation must be determined from the surrounding circumstances. The relevant considerations include the consequences to the client that may ensue from the withholding, the importance of the competing interest that the lawyer is required to protect and the degree in which it is in jeopardy, the clarity with which the relevant facts are apparent to the lawyer, and the availability of alternative courses of action. Sometimes a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. A lawyer may not withhold information to serve the lawyer’s own interest or convenience.


1.5 DILIGENCE
(a) A LAWYER SHALL ACT DILIGENTLY IN REPRESENTING A CLIENT. A LAWYER MAY TAKE ANY ACTION ON BEHALF OF A CLIENT THAT IS CONSISTENT WITH LAW AND THE RULES OF PROFESSIONAL CONDUCT.
(b) A LAWYER MAY DECLINE TO PURSUE A COURSE OF ACTION ON BEHALF OF A CLIENT THAT THE LAWYER CONSIDERS REPUGNANT OR IMPRUDENT ALTHOUGH IN CONFORMITY WITH LAW IF:

1. BEFORE UNDERTAKING THE REPRESENTATION THE LAWYER ADEQUATELY DISCLOSES THE INTENTION SO TO LIMIT ASSISTANCE IN SPECIFIED RESPECTS; OR
2. DURING THE REPRESENTATION AN OCCASION ARISES FOR SO LIMITING ASSISTANCE, THE LAWYER ADEQUATELY EXPLAINS TO THE CLIENT THE ALTERNATIVE THAT THE LAWYER DESIRES NOT TO FOLLOW, AND THE CLIENT CONSENTS TO THE LIMITATION.

(c) A LAWYER MAY LIMIT THE NATURE AND PURPOSES OF THE REPRESENTATION PROVIDED TO A CLIENT IF:

1. THE CLIENT’S INTERESTS WILL NOT BE MATERIALLY IMPAIRED BY THE LIMITATION; AND
2. THE LIMITATION IS ADEQUATELY DISCLOSED TO THE CLIENT BEFORE THE REPRESENTATION IS UNDERTAKEN.

COMMENT:

A lawyer should act with diligence as well as skill. Diligence includes pursuing matters despite opposition, obstruction, or personal inconvenience to the lawyer. It includes taking whatever lawful and ethical measures may be required to vindicate a cause or endeavor on behalf of the client. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. In addition, upon adequate disclosure to the client, a lawyer may decline to pursue objectives or employ means that the lawyer considers repugnant even though they are lawful. For example, a lawyer may decline to use a harsh summary remedy until the opposing party has been given additional prior warning, but should advise the client of any intention to follow such a policy, and the likely consequences of doing so. The exercise of such restraint exhibits a permissible application of effective professional diligence, and can result in the lawyer’s establishing a reputation for fairness that redounds to the client’s benefit.

Inasmuch as the client also has authority regarding the means and objectives in the representation, the client and the lawyer must concur in courses of action as to which either has serious reservations, subject to the qualifications stated in subparagraph (b). See Rule 1.3. When a lawyer wishes to consider terminating the representation, the provisions of Rule 1.16 would apply.

Services limited to particular legal purposes

A lawyer and client usually contract for the services that the lawyer is to perform for the client. When the lawyer’s services are paid for by someone else, however, the client’s desire is not the only factor determining the kind and extent of services to be provided. For example,
when the lawyer is employed by a legal aid agency, limitations on the types of cases the agency handles can limit the services the lawyer may provide; when a lawyer has been retained by an insurer to represent an insured, the representation is limited to matters related to the insurance coverage. An interest group may provide assistance only with regard to legal problems of a specified kind. For example, an industry association may wish to assist a company in contesting application of particular government regulations without supplying the company with general legal representation, or a civil rights group may wish to challenge certain employment practices without undertaking to represent an affected individual in collateral legal matters. Similar limitations may be imposed by the lawyer on the scope of representation.

Such arrangements involve both advantage and risk to the client. The client may obtain legal service at reduced cost or no cost at all. The risk is that the client’s case may become simply an instrument of the sponsor’s cause. A lawyer should participate in such an arrangement only if it can be undertaken without impairment of the client’s rights under the client-lawyer relationship. These rights include the right to terminate the lawyer’s services at any time, so the client should remain free to settle litigation that the lawyer or sponsor might wish to press forward. A lawyer should be aware that despite any agreed upon limitation, the lawyer may have to continue the representation until withdrawal can be effected without material prejudice to the client’s interests. See Rule 1.16. In any event, the client is entitled to candid advice and loyal assistance and should not be pressured into a position that may further the sponsor’s purposes but is inconsistent with the client’s best interests.


1.6 FEES

(a) A LAWYER'S FEE SHALL BE REASONABLE AND ADEQUATELY EXPLAINED TO THE CLIENT.

(b) THE BASIS OR RATE OF A LAWYER’S FEE SHALL BE PUT IN WRITING BEFORE THE LAWYER HAS RENDERED SUBSTANTIAL SERVICES IN THE MATTER, EXCEPT WHEN:

(1) AN AGREEMENT AS TO THE FEE IS IMPLIED BY THE FACT THAT THE LAWYER’S SERVICES ARE OF THE SAME GENERAL KIND AS PREVIOUSLY RENDERED TO AND PAID FOR BY THE CLIENT; OR

(2) THE SERVICES ARE RENDERED IN AN EMERGENCY WHERE A WRITING IS IMPRACTICABLE.

(c) THE FORM OF A FEE AND THE TERMS OF A FEE AGREEMENT SHALL INVOLVE NO INCENTIVE FOR THE LAWYER TO PERFORM THE
SERVICES IN A MANNER INCONSISTENT WITH THE BEST INTERESTS OF THE CLIENT.

(d) A FEE MAY BE CONTINGENT ON THE OUTCOME OF THE MATTER FOR WHICH THE SERVICE IS RENDERED, EXCEPT IN MATTERS IN WHICH A CONTINGENT FEE IS PROHIBITED BY LAW OR THE RULES OF PROFESSIONAL CONDUCT. A CONTINGENT FEE AGREEMENT 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, EXPENSES TO BE DEDUCTED FROM THE RECOVERY, AND WHETHER 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 CLOSING STATEMENT SHOWING THE FEE AND METHOD OF ITS DETERMINATION.

(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 BOTH LAWYERS EXPRESSLY ASSUME RESPONSIBILITY AS IF THEY WERE PARTNERS;

2. THE TERMS OF THE DIVISION ARE DISCLOSED TO THE CLIENT;

3. THE TOTAL FEE IS REASONABLE.

COMMENT:

Contract for services

An agreement concerning a lawyer’s fee is subject to careful scrutiny as to its fairness to the client. A lawyer is assumed to have superior knowledge concerning the nature and value of the services required, especially if the client is inexperienced in obtaining legal services.

The fee arrangement should be clearly understood by the client, both to protect the client and to prevent subsequent disputes. The terms of the fee should be established in writing or by reference to a written fee schedule before the lawyer renders substantial services. However, if the lawyer has recently served the client in a similar matter in which payment has been completed, it is sufficient for the lawyer to proceed upon an implied understanding that the ensuing services will be similarly compensated.
Reasonableness of fee

The amount of the fee should be reasonable. Relevant factors in determining the reasonableness of a fee include the novelty and difficulty of the matter; the skill, standing, and experience of the lawyer; the time involved; the degree of contingency; the effect in preempting the lawyer’s services in behalf of other clients; the amount involved and the results obtained; the client’s ability to pay; and the normal range of rates for legal services of similar kind.

Ordinarily, a lawyer’s compensation should be paid in money at the conclusion of the services or upon periodic statements during the period in which the services are rendered. A lawyer may require payment in advance of rendering services, but is thereupon obliged to return any sum by which the advance exceeds reasonable compensation for services actually rendered. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise. However, a fee paid in property instead of money is 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.

No agreement should be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way inimical to the client’s interest. See Rule 1.9. 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 may be required, unless the situation is adequately explained to the client. The client might then have to bargain for further assistance in the midst of a proceeding or transaction. At the same time, it is proper to define the extent of services in light of the client’s ability to pay, for otherwise a client could be obliged to pay for more extensive assistance than he or she could afford.

A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wastefully meticulous procedures. Most legal problems can be pursued to various depths; exhaustive technique is not justified if it will result in unwarranted cost to the client or to a third party paying for the services.

The provisions of a contingent fee should be clearly specified and a written closing statement should be provided when the matter is concluded. If applicable law imposes limitations on contingent fees, such as a ceiling on the percentage, the agreement shall conform to those limits.

Division of fee

A division of fee is a single billing to a client covering the fees of two or more lawyers who are not in the same firm. A division of fee should be distinguished from an arrangement in which one lawyer associates another in representing a client where each lawyer’s billing is separately stated. A division of fee ordinarily is used only when the fee is contingent and the division is between a referring lawyer and a trial specialist. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. However, unless the division is disclosed to the client, the client may misunderstand who is responsible for handling the matter and how the fee is to be divided.
Formerly the rules of ethics permitted a division only if the share of each lawyer was in proportion to the responsibility assumed and services rendered by each. This limitation was often ignored in practice and can be artificial. If the fee as a whole is reasonable and the terms of the division are explained to the client, the share between the lawyers may properly be a matter of contract between them as long as both accept full responsibility to the client. The referring lawyer’s responsibilities include giving the matter adequate attention and being obligated for the competence of the representation. See Rules 1.1 and 1.2.

**Disputes over fees**

A lawyer should hesitate to engage in a dispute with a client over a fee. The lawyer should see that the terms of the fee are understood, thus minimizing the possibility of a dispute. A lawyer should not sue for a fee unless the claim is fully justified. If suit is necessary, the lawyer’s superior knowledge of the situation should carry with it the burden of persuasion. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedures established by the bar, the lawyer should abide by 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. Both the lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.


### 1.7 CONFIDENTIAL INFORMATION

(a) IN GIVING TESTIMONY OR PROVIDING EVIDENCE CONCERNING A CLIENT’S AFFAIRS, A LAWYER SHALL NOT DISCLOSE INFORMATION CONCERNING THE CLIENT EXCEPT AS AUTHORIZED BY THE APPLICABLE LAW OF EVIDENTIARY PRIVILEGE. IN OTHER CIRCUMSTANCES, A LAWYER SHALL NOT DISCLOSE INFORMATION ABOUT A CLIENT WHICH RELATES TO THE CLIENT-LAWYER RELATIONSHIP, WHICH WOULD EMBARRASS THE CLIENT, WHICH IS LIKELY TO BE DETRIMENTAL TO THE CLIENT, OR WHICH THE CLIENT HAS REQUESTED NOT BE DISCLOSED, EXCEPT AS STATED IN PARAGRAPH (b) AND (c).

(b) A LAWYER SHALL DISCLOSE INFORMATION ABOUT A CLIENT TO THE EXTENT IT APPEARS NECESSARY TO PREVENT THE CLIENT FROM
COMMITTING AN ACT THAT WOULD RESULT IN DEATH OR SERIOUS BODILY HARM TO ANOTHER PERSON, AND TO THE EXTENT REQUIRED BY LAW OR THE RULES OF PROFESSIONAL CONDUCT.

(c) A LAWYER MAY DISCLOSE INFORMATION ABOUT A CLIENT ONLY:

(1) FOR THE PURPOSE OF SERVING THE CLIENT’S INTEREST, UNLESS IT IS INFORMATION THE CLIENT HAS SPECIFICALLY REQUESTED NOT BE DISCLOSED;

(2) TO THE EXTENT IT APPEARS NECESSARY TO PREVENT OR RECTIFY THE CONSEQUENCES OF A DELIBERATELY WRONGFUL ACT BY THE CLIENT, EXCEPT WHEN THE LAWYER HAS BEEN EMPLOYED AFTER THE COMMISSION OF SUCH AN ACT TO REPRESENT THE CLIENT CONCERNING THE ACT OR ITS CONSEQUENCES;

(3) TO ESTABLISH A CLAIM OR DEFENSE ON BEHALF OF THE LAWYER IN A CONTROVERSY BETWEEN THE LAWYER AND CLIENT, OR TO ESTABLISH A DEFENSE TO A CIVIL OR CRIMINAL CLAIM OR CHARGE AGAINST THE LAWYER BASED UPON CONDUCT IN WHICH THE CLIENT WAS INVOLVED; OR

(4) AS OTHERWISE PERMITTED BY LAW OR THE RULES OF PROFESSIONAL CONDUCT.

COMMENT:

To sets of rules govern disclosure by a lawyer of information concerning his client. One is the law of evidentiary privilege. The other, which may be called the rule of client-lawyer confidentiality, is a professional rule that information concerning a client must in general be kept confidential.

The law of evidentiary 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 principal evidentiary privilege is the attorney-client privilege, which permits the client, or the attorney on behalf of the client, to prevent disclosure of matter communicated in confidence by the client to the lawyer in the course of the attorney-client relationships. Another evidentiary privilege recognized in most jurisdictions is the conditional privilege covering attorney work-product or trial preparation materials.

The rule of client-lawyer confidentiality, while based on much the same policy considerations that support the evidentiary privileges, has a different scope. The confidentiality rule applies in situations other than those where evidence is sought from the lawyer through compulsion of law. Furthermore, the confidentiality rule applies not merely to matter communicated in confidence by the client or prepared for litigation but also to all information concerning the client, whatever its source.
The rule of client-lawyer confidentiality facilitates legal advice. It encourages the client to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. Frank communication by the client enables the lawyer to discuss the legal and ethical considerations that should be taken into account by the client.

Lawyers in a firm may disclose to each other confidences of clients of the firm to the extent necessary in representation of the client, except where a client has directed that a confidence be confined to an individual lawyer.

**Testimony under compulsion of law**

A lawyer has an obligation to give testimony and produce evidence, even concerning a client, except as the law of evidentiary privilege otherwise provides. The law of evidentiary privilege varies in some particulars from one jurisdiction to another. A lawyer ordinarily should invoke an applicable privilege on behalf of the client unless the client has decided to waive it.

**Adverse use of information**

A lawyer may not use information about the client in a way adverse to the client’s interests. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.10.

**Authorized disclosure**

A lawyer may disclose information about a client where doing so is reasonably necessary to the proper representation of the client—in litigation, for example, by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion. When the lawyer is acting as evaluator of the client’s activity, the very nature of the professional service often may require disclosure. See Rules 6.1 and 6.2. Thus, depending on the circumstances and the nature of the service undertaken by the lawyer, there can be an implied authorization to make disclosure of otherwise confidential information.

**Disclosure adverse to client**

The confidentiality rule is subject to limited exceptions according primacy to interests other than those of the client. Some exceptions are mandatory in that the lawyer must make a disclosure; under other exceptions the lawyer may make disclosure but is not obliged to do so.

Defining the scope of the duty to disclose a client’s confidences is most difficult. On the one hand, the client expects that matters imparted to a lawyer will be kept confidential. On the other hand, in becoming privy to client confidences a lawyer may foresee that the client intends serious and perhaps irreparable harm to another person. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client’s confidences even though the client’s purpose is wrongful. However, to the extent a lawyer is required to disclose a client’s purposes, the client may be inhibited from revealing facts
which would enable the lawyer to counsel against a wrongful course of action. Any rule governing disclosure of threatened harm involves balancing the interests of one group of potential victims against those of another. On the assumption that lawyers generally fulfill their duty to advise against the commission of a deliberately wrongful act, the public is better protected if full disclosure by the client is encouraged than if it is inhibited.

The rule of confidentiality therefore has three aspects. When no serious wrong is in prospect, client confidences must be preserved, as stated in paragraph (a). When homicide or serious bodily injury is threatened by the client, the lawyer must make disclosure to the extent necessary to prevent the wrong, as stated in paragraph (b). In such a case, the loss to the immediate victim ought to be prevented even if making the disclosure may to some extent inhibit other clients on other occasions from revealing such a purpose. When some lesser deliberate wrong is involved, as stated in paragraph (c) (2), the lawyer has professional discretion to make disclosure to prevent the client’s act. To some extent the existence of this discretion inhibits disclosure by the client and yet enables the lawyer to inhibit the client from committing the wrongful act.

The lawyer’s exercise of discretion requires consideration of the magnitude and proximity of the contemplated wrong, 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. Exercising discretion in such a matter inevitably involves stress for the client, the lawyer, and the client-lawyer relationship. However, if the question of disclosure is not made discretionary, a categorical preference has to be adopted in favor either of immediate victims of a present client or potential victims of later clients. There is no basis upon which such a categorical preference can be prescribed.

Qualification of the rule of confidentiality recognizes that a client’s right to assistance of counsel is itself qualified. A client is entitled to counsel for lawful purposes, including defense against an accusation of a past criminal act, but is not entitled to advice in carrying out deliberately wrongful purposes. The qualified protection of confidences in such circumstances is extended not in the interest of the client who is determined to pursue wrongful purposes, but in the interest of encouraging clients in general to be candid with their lawyers to the end that they may be guided in complying with the law.

The question of client perjury is dealt with in Rule 3.1.

Mandatory disclosure: Rules of Professional Conduct

Compliance with other provisions of the Rules of Professional Conduct may require a lawyer to disclose matter that otherwise would be confidential. Thus, if a client makes a misrepresentation, in certain circumstances the lawyer may have to correct it even though the correction reveals matter confided to the lawyer. See Rules 3.1 and 4.2. So also, if a lawyer jointly represents two clients, it may be necessary to disclose to each client matters that could not properly be disclosed to a third person.

Dispute concerning lawyer’s conduct
A lawyer entitled to a fee should not be prevented from collecting it by the rule of confidentiality. Otherwise it would be impossible to prove the extent and value of the services rendered. So also, if the lawyer is charged with wrongdoing in which the client’s conduct is relevant, the rule of confidentiality should not foreclose inquiry into what transpired between them. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding, and can be based on an alleged wrong against the client or on a wrong alleged by a third person, such as a person claiming to have been defrauded by the lawyer and client acting together.


1.8 CONFLICT OF INTEREST

IN CIRCUMSTANCES IN WHICH A LAWYER HAS INTERESTS, COMMITMENTS, OR RESPONSIBILITIES THAT MAY ADVERSELY AFFECT THE REPRESENTATION OF A CLIENT, A LAWYER SHALL NOT REPRESENT THE CLIENT UNLESS:

(a) THE SERVICES CONTEMPLATED IN THE REPRESENTATION CAN OTHERWISE BE PERFORMED IN ACCORDANCE WITH THE RULES OF PROFESSIONAL CONDUCT; AND

(b) THE CLIENT CONSENTS AFTER ADEQUATE DISCLOSURE OF THE CIRCUMSTANCES.

COMMENT:

Loyalty to a client

Loyalty is an essential element in the lawyer’s relationship to a client. The lawyer must be free of other responsibilities that would significantly inhibit giving advice or assistance to the client.

An improper conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken and cannot be remedied by disclosure to and consent by the clients involved, the lawyer should withdraw from one representation. If it is necessary to prevent prejudice to a client, withdrawal from both representations is required. See Rule 1.16.

It is practically impossible for a lawyer to be entirely unencumbered by obligations that might conflict with those of a client. The lawyer’s responsibilities as an officer of the legal
system can result in adverse consequences to a client, for example, when the lawyer is required to disclose wrongful behavior by the client. The lawyer’s interest in securing reasonable compensation for services can be financially adverse to the client in some circumstances. There may be conflicts for priority among clients in a lawyer’s work schedule. These and other inherent conflicts should be controlled and moderated but they cannot be eliminated.

Other conflicts of interest, however, are prohibited. 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 1.6. A lawyer should not undertake a matter if the lawyer is so busy that adequate communication with the client will be impossible, or if the lawyer’s personal scruples prevent the use of measures that the client’s situation may require. See Rules 1.4 and 1.5. Depending on the function that the lawyer contemplates performing, other Rules of Professional Conduct also apply. 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 in the matter. A lawyer also should not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Third party interests

Conflict can exist between the interests of the client and other persons to whom the lawyer has responsibilities, including other clients. Under various circumstances a lawyer is permitted to consider the interests of third persons and under some circumstances is required to do so. A lawyer may always consider whether third persons might regard a proposed course of action as unfair or inappropriate. However, a lawyer must place the lawful interests of a client above the interests of third persons and may not sacrifice the interests of one client in favor of another. While a lawyer may seek accommodation of the interests of different clients, doing so is permissible only when the accommodation is advantageous to both clients and the clients are adequately informed in the matter. See Rule 5.1.

Potential conflict also exists where the lawyer’s services are paid in whole or in part by someone other than the client. In such instances, the lawyer should represent the client and not the person or organization providing the compensation.

Conflicts in litigation

A lawyer may not represent two or more parties in litigation whose rights and obligations are formally adverse. An impermissible conflict may also exist by reason of significant 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. In doubtful situations or where the course of the proceeding cannot be clearly foreseen, the question of conflict should be resolved in favor of separate representation.

The question of separate representation should not necessarily depend on the fact that one of the parties is paying for the representation, for example where conflict of interest arises
between a liability insurer and its insured. Separate representation may be required in such situations.

Ordinarily a lawyer may not act as advocate against a person the lawyer represents in some other matter, even if the litigation is wholly unrelated. For example, a lawyer could not properly prosecute a breach of contract action against a person for whom the lawyer is preparing an estate plan. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer engaged in a suit against a large corporation with diverse operations may accept employment by the corporation in an unrelated matter if doing so will not affect the lawyer’s conduct of the suit and if both the litigant and the corporation consent upon adequate disclosure. Whether concurrent representation is proper 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.

Most if not all questions of conflict of interest are questions of degree. As noted above, minor and inevitable conflicts inherent in client-lawyer relationships necessarily must be tolerated. On the other hand, a conflict of interest may be so sharp as to preclude the lawyer from representing a particular client. For example, under no circumstances could a lawyer properly represent both plaintiff and the defendant in contested litigation, or represent parties to a negotiation whose interests are fundamentally antagonistic to each other. When it is plain that prejudice to the client’s interests is likely to result, the lawyer should not undertake the representation even with the consent of the client. A client’s consent does not legitimate a lawyer’s abuse of professional office.

Conflict charged by an opposing party

Raising a question of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation a court may do so when there is reason to infer that the responsibility has been neglected. Opposing counsel may in proper circumstances raise the question, certainly where there is a substantial possibility that the conflict could result in reversal of a judgment or invalidation of a transaction. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Disclosure

A difference of interest is not necessarily an improper conflict of interest. When the situation is such that the lawyer’s independence of judgment is not compromised, the lawyer may properly act if the client consents after being adequately informed. The critical question is whether disclosure of the conflict will put the client in a position where the client is able satisfactorily to protect his or her interests in the matter. If the client would remain vulnerable as a result of the conflict of interest despite the disclosure and the consent of the client, the representation would be improper. A lawyer who has learned intimate details about clients represented in a joint undertaking, for example, may not represent one against the other in litigation arising out of the undertaking.
1.9 PROHIBITED RELATIONSHIPS AFFECTING A LAWYER AND CLIENT

(a) A LAWYER SHALL NOT ENTER INTO A BUSINESS, FINANCIAL, OR PROPERTY TRANSACTION WITH A CLIENT UNLESS THE TRANSACTION IS FAIR AND EQUITABLE TO THE CLIENT.

(b) A LAWYER SHALL NOT PARTICIPATE IN THE PREPARATIONS OF AN INSTRUMENT GIVING THE LAWYER OR A MEMBER OF THE LAWYER’S FAMILY ANY GIFT, INCLUDING A TESTAMENTARY GIFT, FROM A CLIENT.

(c) A LAWYER SHALL NOT ARRANGE OR ACCEPT PAYMENT FOR SERVICES IN BEHALF OF A CLIENT FROM A PERSON HAVING INTERESTS THAT MAY CONFLICT WITH THOSE OF THE CLIENT, EXCEPT UPON ADEQUATE DISCLOSURE TO THE CLIENT AND THROUGH AN ARRANGEMENT THAT ASSURES THAT THE LAWYER CAN EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF THE CLIENT.

(d) PRIOR TO THE CONCLUSION OF REPRESENTATION OF A CLIENT, A LAWYER SHALL NOT MAKE OR NEGOTIATE AN AGREEMENT GIVING THE LAWYER LITERARY RIGHTS TO A MATTER ARISING FROM 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, REPAYMENT OF WHICH IS CONTINGENT ON THE OUTCOME OF THE MATTER;

(2) A LAWYER OR LEGAL SERVICES ORGANIZATION REPRESENTING A CLIENT WITHOUT A FEE MAY PAY COURT COSTS AND EXPENSES OF LITIGATION ON BEHALF OF A CLIENT.
(f) A LAWYER MAY SERVE AS GENERAL COUNSEL TO A CORPORATION OR OTHER ORGANIZATION OF WHICH THE LAWYER IS A DIRECTOR ONLY IF:

(1) THERE IS ADEQUATE DISCLOSURE TO AND CONSENT BY ALL PERSONS HAVING AN INVESTMENT INTEREST IN THE ORGANIZATION; OR

(2) WHEN DOING SO WOULD NOT INVOLVE SERIOUS RISK OF CONFLICT BETWEEN THE LAWYER’S RESPONSIBILITIES AS GENERAL COUNSEL AND THOSE AS DIRECTOR.

COMMENT:

Transactions between client and lawyer can go beyond the client-lawyer relationship as such. Such transactions can be advantageous to both client and lawyer but they can entail risk of unfairness to the client. As a general principle, all transactions between client and lawyer should be fair to the client. Beyond this general requirement there are specific restrictions concerning transactions between client and lawyer.
Gifts

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 the gift requires preparing a legal instrument such as a will or conveyance, however, the transaction necessarily involves a professional relationship between the client and lawyer. A lawyer should not be the donative beneficiary of the lawyer’s own professional services for a client, because such a transaction can easily be influenced by ill-considered gratitude on the part of the client. If the gift requires a legal instrument in its preparation, the client should have the detached advice that another lawyer can provide.

Payment for a lawyer’s service

A lawyer may properly provide legal services for which payment is made from a source other than the client, for example, publicly funded legal services and legal defense provided in connection with liability insurance. However, an arrangement for compensation of a lawyer must not compromise the lawyer’s duty of loyalty to the client. 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 insurer may provide funds for separate representation if the arrangement assures the special counsel’s professional independence. So also, when a corporation and its directors are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors, if the arrangement is based on adequate disclosure and ensures the lawyer’s professional independence in the matter.

Literary rights

An agreement by which a lawyer acquires literary rights concerning the subject matter of the representation involves incompatible standards for the lawyer’s performance, one being effectiveness in representing the client and the other being performance that has literary value. Even after conclusion of representation, a lawyer may make use of information about a client in an account of professional experience only to the extent permitted by Rule 1.7. Paragraph (d) does not prohibit a lawyer 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 1.6.

Financial assistance to a client

Formerly, a lawyer was prohibited from providing a client with financial assistance in connection with litigation unless the client remained ultimately liable for any amounts advanced. The prohibition was based in part on fear that such an arrangement would foment unwarranted litigation. It is now recognized, however, that lawyers have little incentive to finance baseless litigation and that a client of limited means with a potentially large claim often cannot prosecute the claim unless the lawyer advances litigation expenses. This Rule permits the lawyer to provide the assistance with only a contingent obligation of repayment.
Counsel as director of an organization

When a lawyer representing an organization is a member of its board of directors, dual responsibilities arise that may interfere with the lawyer’s independence of professional judgment. The lawyer may be required to pass upon managerial conduct in which the directors are involved or to resolve questions in which the directors’ position is potentially in conflict with that of the organization itself. When the activities of the organization are legally complex, there is a correspondingly greater likelihood that such complications will arise.

Nevertheless, it is often useful that a lawyer serve both as counsel to an organization and as one of its directors. When the risk of compromising the independence of counsel is remote, it is not improper that counsel be a member of the board. The provisions of paragraph (f) of the Rule apply only to a lawyer who is counsel to a corporation or other enterprise; they do not prohibit a person who is a lawyer from serving on the board of an enterprise that has other counsel. Further, they apply only to a lawyer who acts on a regular and continuing basis as principal legal adviser to an organization and not to a lawyer whose representation is occasional or limited to specific matters. They apply both to counsel employed by an organization and to a lawyer in independent practice who serves as general counsel.


1.10 REPRESENTATION ADVERSE TO A FORMER CLIENT

(a) A LAWYER WHO HAS REPRESENTED A CLIENT IN A MATTER SHALL NOT THEREAFTER:

(1) REPRESENT ANOTHER PERSON IN THE SAME OR A SUBSTANTIALLY RELATED MATTER IF THE INTEREST OF THAT PERSON IS ADVERSE IN ANY MATERIAL RESPECT TO THE INTEREST OF THE FORMER CLIENT; OR

(2) MAKE USE OF INFORMATION ACQUIRED IN SERVICE TO THE CLIENT IN A MANNER DISADVANTAGEOUS TO THE CLIENT, WHETHER OR NOT THE INFORMATION IS CONFIDENTIAL AS PROVIDED IN RULE 1.7, UNLESS THE INFORMATION HAS BECOME GENERALLY KNOWN OR ACCESSIBLE.

(b) A LAWYER WHO HAS SERVED AS AN ARBITRATOR SHALL NOT THEREAFTER REPRESENT ANYONE IN CONNECTION WITH THE SUBJECT MATTER OF THE ARBITRATION.

(c) UPON ADEQUATE DISCLOSURE, THE DISQUALIFICATION PROVIDED IN PARAGRAPH (a) MAY BE WAIVED BY THE FORMER CLIENT, AND THAT
PROVIDED IN PARAGRAPH (b) MAY BE WAIVED BY THE CONSENT OF ALL PARTIES TO THE ARBITRATION.

(d) FOR THE PURPOSE OF THIS RULE, “REPRESENT” INCLUDES ACTING IN BEHALF OF A PERSON IN A CAPACITY OTHER THAN AS LAWYER.

COMMENT:

A lawyer’s obligation to a client continues in modified form after termination of a client-lawyer relationship. In any given matter the lawyer may not subsequently represent another client having interests adverse to those of the former client. Thus, a lawyer who negotiated a contract on behalf of one party may not later represent any other party seeking to revise or rescind the contract. However, a lawyer may undertake representation adverse to a former client in a matter unrelated to the former representation. See also Rule 1.11.

Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer in a manner adverse to the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. For example, if a lawyer learns of a defect in a client’s title to property, the lawyer may not subsequently put that information to use in behalf of another client interested in the same property, but the lawyer is not prohibited from doing so if the facts have become generally known.

The scope of a “matter” for purposes of this Rule may depend on the facts of a particular situation or transaction. Similarly, the lawyer’s involvement in a matter can be a question of degree. When a lawyer has been directly involved in a specific transaction, disqualification in subsequent representation of other clients clearly is required. On the other hand, a lawyer who recurrently handled a type of problem for a client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. The underlying question is whether the lawyer was so involved in the matter that the former client can justly regard the subsequent representation as a changing of sides in the matter in question.

Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is adequate disclosure of the circumstances, including the lawyer’s intended role in behalf of the new client.


1.11 GOVERNMENT LAWYER CONFLICT OF INTEREST
(a) 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.

(b) A LAWYER SERVING AS A PUBLIC OFFICER OR EMPLOYEE SHALL NOT 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 OTHER THAN THE PUBLIC OFFICER OR EMPLOYEE IS AUTHORIZED TO ACT IN THE MATTER.

(c) A LAWYER SERVING AS A PUBLIC OFFICER OR EMPLOYEE SHALL NOT NEGOTIATE FOR PRIVATE EMPLOYMENT WITH ANY PERSON WHO IS INVOLVED AS A PARTY OR AS ATTORNEY FOR A PARTY IN A MATTER IN WHICH THE LAWYER IS PARTICIPATING PERSONALLY AND SUBSTANTIALLY AS A PUBLIC OFFICER OR EMPLOYEE.

(d) A LAWYER WHO HAS SERVED AS A JUDGE IN AN ADJUDICATORY PROCEEDING SHALL NOT THEREAFTER REPRESENT ANYONE IN CONNECTION WITH THE SUBJECT MATTER OF THE PROCEEDING.

(e) IF A LAWYER IS REQUIRED BY THE RULE TO DECLINE REPRESENTATION ON ACCOUNT OF PERSONAL AND SUBSTANTIAL PARTICIPATION IN A MATTER, EXCEPT WHERE THE PARTICIPATION WAS A JUDICIAL LAW CLERK, NO LAWYER IN A FIRM WITH THE DISQUALIFIED LAWYER MAY ACCEPT SUCH EMPLOYMENT.

(f) THE DISQUALIFICATIONS STATED IN PARAGRAPHS (a), (b), AND (c) MAY BE WAIVED BY THE APPROPRIATE GOVERNMENT AGENCY IN ACCORDANCE WITH APPLICABLE LAW. THE DISQUALIFICATION STATED IN PARAGRAPH (d) MAY BE WAIVED BY THE CONSENT OF ALL PARTIES TO THE ADJUDICATION.

COMMENT:

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, and is also subject to other rules and legislation regarding conflict of interest. In representation of private clients the determining factors in conflicts of interest are whether the subsequent representation is adverse and whether there is significant risk of disclosure of confidences. See Rules 1.7 and 1.10. Where the successive clients are a public agency and a private client, however, an additional consideration is involved. The risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. That risk exists even if the interests of the public and the private client are apparently in accord, for example, where the public authority is involved in investigation or enforcement of a legal wrong committed against the private client. In such a situation the costs, benefits, and collateral implications to the public of exercising power or
discretion in the matter do not necessarily correspond with those of the 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.

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.

A lawyer employed by a government agency is also required to comply with legislation and government regulations concerning conflict of interest.


1.12 SAFEKEEPING PROPERTY

(a) PROPERTY OF CLIENTS OR THIRD PERSONS THAT IS IN A LAWYER’S POSSESSION SHALL BE HELD IN TRUST, SEPARATE FROM THE LAWYER’S OWN PROPERTY. FUNDS SHALL BE KEPT IN A TRUST ACCOUNT MAINTAINED IN THE STATE WHERE THE LAWYER’S OFFICE IS SITUATED. OTHER PROPERTY SHALL BE IDENTIFIED AS SUCH AND APPROPRIATELY SAFEGUARDED.

(b) COMPLETE RECORDS OF TRUST ACCOUNT FUNDS AND OTHER PROPERTY SHALL BE KEPT BY THE LAWYER AND REGULARLY VERIFIED BY A QUALIFIED AND DISINTERESTED EXAMINER.

(c) UPON RECEIVING FUNDS OR OTHER PROPERTY IN WHICH A CLIENT HAS AN INTEREST, A LAWYER SHALL PROMPTLY NOTIFY THE CLIENT. EXCEPT AS PROVIDED IN THIS RULE OR OTHERWISE PERMITTED BY LAW, A LAWYER SHALL PROMPTLY DELIVER TO THE CLIENT ANY FUNDS OR OTHER PROPERTY THAT THE CLIENT IS ENTITLED TO RECEIVE.

(d) WHEN A LAWYER AND ANOTHER PERSON BOTH HAVE INTERESTS IN PROPERTY, THE PROPERTY SHALL BE TREATED BY THE LAWYER AS TRUST PROPERTY UNTIL AN ACCOUNTING AND SEVERANCE OF THEIR INTERESTS. IF A DISPUTE ARISES CONCERNING THEIR RESPECTIVE
INTERESTS, THE PORTION IN DISPUTE SHALL BE TREATED AS TRUST PROPERTY UNTIL THE DISPUTE IS RESOLVED.

COMMENT:

Failure to deal faithfully with property of a client or a third person is a breach of professional duty. A lawyer should hold such property with the care required of a professional fiduciary such as a trust company. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances.

Fund accounts and inventories of property should be regularly audited and a statement of audit periodically made available to the client. The audit may be through a bar association, by a certified public accountant, or by other procedures in which confidence is justified.

Lawyers often receive funds from which the lawyer’s fee will be paid. Payment of the fee may be secured by refusing to remit the funds to the client if there is risk that the client may divert the funds without paying the fee. However, when the fee is in dispute 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.

Third parties, such as a client’s creditors, may have just claims against funds or other property of a client in a lawyer’s custody. A lawyer has the right, and may have a legal duty, to protect such third party claims against wrongful interference by the client and for that purpose 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.

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.


1.13 AN ORGANIZATION AS THE CLIENT

(a) A LAWYER EMPLOYED OR RETAINED BY AN ORGANIZATION REPRESENTS THE ORGANIZATION AS DISTINCT FROM ITS DIRECTORS, OFFICERS, EMPLOYEES, MEMBERS, SHAREHOLDERS, OR OTHER CONSTITUENTS.

(b) IF A LAWYER FOR AN ORGANIZATION KNOWS THAT AN OFFICER, EMPLOYEE, OR OTHER PERSON ASSOCIATED WITH THE ORGANIZATION IS ENGAGED IN OR INTENDS ACTION, OR A REFUSAL TO ACT, THAT IS A

(1) ASKING RECONSIDERATION OF THE MATTER;

(2) SEEKING A SEPARATE LEGAL OPINION ON THE MATTER FOR PRESENTATION TO APPROPRIATE AUTHORITY IN THE ORGANIZATION;

(3) REFERRING THE MATTER TO HIGHER AUTHORITY IN THE ORGANIZATION, INCLUDING, IF NECESSARY, REFERRAL TO THE HIGHEST AUTHORITY THAT CAN ACT IN BEHALF OF THE ORGANIZATION AS DETERMINED BY APPLICABLE LAW.

(c) IF, DESPITE THE LAWYER’S EFFORTS IN ACCORDANCE WITH PARAGRAPH (b), THE HIGHEST AUTHORITY THAT CAN ACT ON BEHALF OF THE ORGANIZATION INSISTS UPON ACTION, OR A REFUSAL TO ACT, THAT IS CLEARLY A VIOLATION OF LAW AND IS LIKELY TO RESULT IN SUBSTANTIAL INJURY TO THE ORGANIZATION, THE LAWYER MAY TAKE FURTHER REMEDIAL ACTION, INCLUDING DISCLOSURE OF CLIENT CONFIDENCES TO THE EXTENT NECESSARY, IF THE LAWYER REASONABLY BELIEVES SUCH ACTION TO BE IN THE BEST INTEREST OF THE ORGANIZATION.

(d) A LAWYER REPRESENTING AN ORGANIZATION MAY ALSO REPRESENT ANY OF ITS DIRECTIONS, OFFICERS, MEMBERS, OR SHAREHOLDERS SUBJECT TO THE PROVISIONS OF RULE 1.8. A LAWYER UNDERTAKING SUCH DUAL REPRESENTATION SHALL DISCLOSE THAT FACT TO AN APPROPRIATE OFFICIAL OF THE ORGANIZATION OTHER THAN THE PERSON SO REPRESENTED.

(e) WHEN A SHAREHOLDER OR MEMBER OF AN ORGANIZATION BRINGS A DERIVATIVE ACTION, THE LAWYER FOR THE ORGANIZATION MAY ACT AS ITS ADVOCATE ONLY AS PERMITTED BY RULE 1.8.

(f) IN DEALING WITH AN ORGANIZATION’S OFFICIALS AND EMPLOYEES, A LAWYER SHALL EXPLAIN THE IDENTITY OF THE CLIENT WHEN NECESSARY TO AVOID EMBARRASSMENT OR UNFAIRNESS TO THEM.
COMMENT:

The entity as the client

It has long been recognized that a lawyer retained by an organization represents the entity and not the directors, officers, or others who may be in authority. Because the entity is an impersonal legal construct, its officials and employees must act for the entity in relationships with others, including the client-lawyer relationship. Although officials and employees personify the organization in the client-lawyer relationship, they do so only within the limits of their authority as determined by law and by the constitution, bylaws, and usages of the organization.

When officials or employees of the organization make decisions for the organization, 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 action by an official or employee is of doubtful legal propriety.

In the normal course of an organization’s business, matters presenting substantial legal questions should be referred to the lawyer for advice. When the advice has been given, the lawyer ordinarily may assume it has been followed. It can happen, however, that in an important matter an official or employee does not seek advice, or refuses to heed it. When that fact is known to the lawyer and the matter is of substantial consequence, the lawyer should seek its reconsideration and, failing that, refer the matter to higher authority in the organization.

Clear justification should exist for referring a matter over the head of the official or employee normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for doing so, 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 official in question has apparent motives to act at variance with the organization’s interest. The lawyer must be confident that the question is one of law and not merely policy, and should use reasonable efforts to have it properly resolved without upward referral. However, such a referral is required if the legal issue is clear and if the consequences are substantial. Referral to the chief executive officer or to the board of directors may be required when the matter is of importance commensurate with their authority. Somewhere along the line it may be useful or essential to obtain an independent legal opinion.

In an extreme case the lawyer must 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. In this respect, it must be recognized that applicable law is often ambiguous, sometimes suggesting that a governing body loses authority to act for an organization when it engages in an act constituting a deliberate legal wrong to the organization.
With regard to the lawyer’s duty to determine who personifies the organization for purposes of the client-lawyer relationship, the critical question concerns the circumstances under which the lawyer’s orientation should shift from the existing governing body to someone else. Clearly, that orientation should shift when the normal governing body is superseded by legal process, as when a receiver has been appointed for the organization. It has been argued that the lawyer’s orientation should shift not only then but also when it appears to the lawyer that grounds exist that plainly justify superseding of the governing body. The ultimate difficult question is whether the lawyer should be required to circumvent the organization’s governing body when it persists in a course of action that is violative of law and seriously harmful to the organization, where the governing body has not been superseded by process of law.

If the lawyer can take remedial action without disclosure of client confidences, the lawyer as a matter of professional discretion should take such action and applicable law may in effect compel him to do so. For example, a lawyer for a close corporation may be obliged to disclose misconduct by the board to the shareholders. Often, however, taking action to circumvent the governing body would also entail disclosure of client confidences, with consequent risk of injury to the client. When such is the case, the organization is threatened by alternative injuries: the injury that may result from the governing board’s improper action, and the injury that may result from the lawyer’s effort to prevent the action. There is no way to say categorically that one of these injuries will always be worse than the other. On behalf of the client the lawyer therefore should take the measures that reasonably appear best calculated to protect the client. That may include resigning, informing the members of shareholders, or informing appropriate public authority.

The duty defined in this Rule applies not only to corporations but also to unincorporated associations. The interests protected are those of the directors, owners, and members of the organization. The lawyer’s duty does not extend to third persons who may be injured by wrongful acts of the organization. However, such persons may be incidental beneficiaries of the lawyer’s authority to prevent a deliberately wrongful act by a client. See Rule 1.7.

**Government agency**

The duty defined in this Rule also applies to governmental organizations. 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. With this qualification, the lawyer’s substantive duty to the client and appropriate courses of action are essentially the same as when the client is a private organization.

**Dual representation**

Paragraph (d) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder. Such dual representation, although common in practice, entails serious potential conflicts of interest. For that reason it should be undertaken only with special caution and with notice to a responsible official other than the person whom the lawyer represents.
Derivative actions

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.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer’s client sheds little light on the issue. Theoretically, if the derivative claim is meritorious, counsel for the organization should assist the plaintiff; if the claim is not meritorious, the organization as such should intervene to oppose the suit. Another approach would require the organization’s counsel to take no part in the litigation, and simply abide the result. It is more realistic to regard most derivative actions as 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 and well-substantiated 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 right to treat the board as representative of the organization. In those circumstances, independent counsel should represent the directors.

Clarifying the lawyer’s role

The fact that the organization is the client may be quite unclear to the organization’s officials and employees. An organization official accustomed to working with the organization’s lawyer may forget that the lawyer represents the organization and not the official. The result of such a misunderstanding can be embarrassing or prejudicial to the individual if, for example, the situation is such that the attorney-client privilege will not protect the individual’s communications to the lawyer. The lawyer should take reasonable care to prevent such consequences. What measures are required depends on the circumstances. In routine legal matters a lawyer for a large corporation does not have to explain to a corporate official that the corporation is the client. On the other hand, if the lawyer is conducting an inquiry involving possibly illegal activity, a warning might be essential to prevent unfairness to a corporate employee who could be implicated.


1.14 THE CLIENT UNDER A DISABILITY
(a) A LAWYER WITH A CLIENT WHO IS INCAPABLE OF MAKING ADEQUATELY CONSIDERED DECISIONS, WHETHER BECAUSE OF MINORITY, MENTAL DISABILITY, OR FOR SOME OTHER REASON, SHALL, AS FAR AS REASONABLY POSSIBLE, MAINTAIN A NORMAL CLIENT-LAWYER RELATIONSHIP.

(b) A LAWYER SHALL SECURE THE APPOINTMENT OF A GUARDIAN OR OTHER LEGAL REPRESENTATION, OR SEEK A PROTECTIVE ORDER WITH RESPECT TO A CLIENT, WHEN DOING SO IS NECESSARY IN THE CLIENT’S BEST INTERESTS.

COMMENT:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about matters having significant legal implications. When the client is a minor or suffers from a mental disorder or disability, however, the client-lawyer relationship cannot in all respects be maintained in the ordinary way. In particular, an incapacitated person may have no authority 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 his or her 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.

The fact that a client suffers a disability does not diminish the lawyer’s obligation to treat him or her with attention and respect. If the person has no guardian or legal representative, the lawyer often acts 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.

If a legal representative has already been appointed for the client, the lawyer should 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 is not in the client’s best interests. The appointment procedure may be an expensive formality. If the client is an adult whose mental faculties are adequate, the procedure may be traumatic and demoralizing. Whether appointment of a legal representative should be sought thus depends on practical considerations. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

Disclosure of the client’s condition
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. A lawyer representing a party who is within the terms of such a rule has an obligation both to the court and to the client to see that the rule is complied with. See Rule 3.1.

In some circumstances, 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. If possible, the lawyer should consult an appropriate diagnostician for guidance.


1.14 ACCEPTING OR DECLINING REPRESENTATION

(a) A LAWYER’S REPRESENTATION OF A CLIENT, WHETHER BY RETAINER OR BY APPOINTMENT, DOES NOT CONSTITUTE AN ENDORSEMENT OF THE CLIENT’S POLITICAL, ECONOMIC, SOCIAL, OR MORAL VIEWS OR ACTIVITIES.

(b) A LAWYER SHALL NOT DECLARE APPOINTMENT BY A COURT OR OTHER AUTHORITY TO REPRESENT A PERSON EXCEPT FOR THE FOLLOWING REASONS OR OTHER GOOD CAUSE:

(1) REPRESENTING THE CLIENT WOULD BE LIKELY TO RESULT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT;

(2) REPRESENTING THE CLIENT WOULD RESULT IN AN UNREASONABLE FINANCIAL BURDEN ON THE LAWYER; OR

(3) THE CLIENT OR THE CAUSE IS SO REPUGNANT TO THE LAWYER AS TO IMPAIR THE LAWYER’S ABILITY TO REPRESENT THE CLIENT.

(c) A LAWYER SERVING A CLIENT BY APPOINTMENT HAS THE SAME POWERS AND OBLIGATIONS AS RETAINED COUNSEL.

COMMENT:

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. A potential client need persuade a lawyer only that the client’s cause has legal merit and not that it also is compatible with the lawyer’s political, social, or moral views. By the same token, representing a
client does not constitute approval of the client’s views or activities. A lawyer has a qualified freedom of association and ordinarily is not obliged to assist a client whose character or cause the lawyer regards as repugnant.

The lawyer’s freedom to select clients is, however, qualified. All lawyers have an obligation to assist in providing pro bono public service. See Rule 8.1. An individual lawyer fulfills this obligation by accepting a fair share of these matters. A lawyer may also be subject to the appointive power of a court or other agency with regard to persons unable to afford legal services or unpopular clients.

**Appointed counsel**

For good cause a lawyer may 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 or if undertaking the representation would result in an improper conflict of interest. A lawyer may also decline an appointment if acceptance would be unreasonably burdensome; for example, when it would impose a financial sacrifice so great as to be unjust. A lawyer may decline appointment on account of the repugnant nature of the cause, not out of concern about public disapproval, but from incapability to adequately represent the client in conformity with the Rules of Professional Conduct.

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. The latter responsibility could result in the lawyer’s withdrawal from representing a client unable to obtain other counsel, for example, if the client insists on committing perjury. Although withdrawal in such a case may result in special hardship for the client, suspending the principles of professional responsibility would taint the integrity of such representation.


**1.15 TERMINATING REPRESENTATION**

(a) EXCEPT AS STATED IN PARAGRAPH (c), A LAWYER SHALL WITHDRAW FROM REPRESENTING A CLIENT IF:

1. CONTINUING THE REPRESENTATION WILL RESULT IN A COURSE OF CONDUCT BY THE LAWYER THAT IS ILLEGAL OR INCONSISTENT WITH THE RULES OF PROFESSIONAL CONDUCT; OR

2. THE LAWYER’S PHYSICAL OR MENTAL CONDITION DISABLES THE LAWYER FROM ADEQUATELY REPRESENTING THE CLIENT; OR
(3) THE LAWYER IS DISCHARGED BY THE CLIENT.

(b) EXCEPT AS STATED IN PARAGRAPH (c), A LAWYER MAY WITHDRAW FROM REPRESENTING A CLIENT IF:

(1) WITHDRAWAL CAN BE EFFECTED WITHOUT MATERIAL PREJUDICE TO THE CLIENT;

(2) THE CLIENT PERSISTS IN A COURSE OF CONDUCT THAT IS ILLEGAL OR UNJUST; OR

(3) THE CLIENT FAILS TO FULFILL AN OBLIGATION TO THE LAWYER REGARDING THE LAWYER’S SERVICES.

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

(d) UPON TERMINATION OF REPRESENTATION, A LAWYER SHALL TAKE REASONABLE STEPS FOR THE CONTINUED PROTECTION OF A CLIENT’S INTERESTS, INCLUDING GIVING REASONABLE NOTICE TO THE CLIENT, ALLOWING TIME FOR EMPLOYMENT OF OTHER COUNSEL, DELIVERING ALL PAPERS AND PROPERTY TO WHICH THE CLIENT IS ENTITLED, AND REFUNDING ANY ADVANCE PAYMENT OF FEE THAT HAS NOT BEEN EARNED. THE LAWYER MAY RETAIN PAPERS RELATING TO THE CLIENT TO THE EXTENT PERMITTED BY APPLICABLE LAW.

COMMENT:

Unless there is good cause for terminating the relationship, 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 may properly assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Any 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.

MANDATORY WITHDRAWAL
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. The lawyer is not obliged to 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. Court approval may be required for withdrawal by retained counsel representing a party in litigation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct, such as the presentation of perjured testimony. The court may wish an explanation for the withdrawal, while the lawyer is 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

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. A lawyer should not necessarily accept at face value a client’s statement that the lawyer is discharged, for a client may act intemperately or without appreciation of the consequences. If the client’s determination is definite, however, the lawyer should promptly withdraw. Where future dispute about the withdrawal may be anticipated, a written statement reciting the circumstances should be prepared.

A client may effectively discharge appointed counsel, but should be given a full explanation of the consequences of doing so. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

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. In that eventuality, the question of discharge will probably be under judicial scrutiny, thus avoiding a unilateral decision by the lawyer that the client is incapable of discharging the lawyer. See Rule 1.14.

Optional withdrawal

A lawyer may withdraw from representation in a limited range of circumstances. A lawyer may always withdraw if no material prejudice will result to the client. Withdrawal is justified if the client persists in a course of wrongful conduct, for a lawyer is not required to lend assistance to such conduct. In such circumstances, withdrawal is permitted even if the client may be prejudiced, because that consequence can be prevented by the client’s desisting from the conduct in question.
When there is disagreement of a less serious character between lawyer and client, the lawyer has the option to withdraw if it can be accomplished without material prejudice to the client’s interests. A lawyer may withdraw if the client refuses to abide by the terms of an agreement limiting the lawyer’s assistance. See Rule 1.5.

Assisting the client upon withdrawal

Regardless of the circumstances of withdrawal, 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 applicable law.

References: EC 2-30 through 2-32, EC 7-5; DR 2-110, DR 5-05(B); ABA Op. 88 (1932); ABA Informal Op. 1397 (1977).
2. **ADVISER**

**Introduction:** The lawyer’s professional function historically originated as attorney and advocate, that is, appearing on behalf of a party to litigation. Giving legal advice evolved from giving advice about how to proceed in litigation. Today, serving as adviser is the lawyer’s predominant role.

As adviser, a lawyer informs clients about their legal rights and obligations and their practical implications. Giving advice is ordinarily an incident of other functions a lawyer performs on behalf of a client, such as advocacy or negotiation, but in many matters giving advice may be the lawyer’s sole function. Legal advice may be given orally or in writing. It may be reflected in documents effectuating courses of action by the client, such as wills, articles of organization of an enterprise, by-laws, contracts, formal opinions, and draft legislation or government regulations. In giving advice, a lawyer should consider not only the literal terms of the law but also its purposes and changing course. A lawyer should also take into account equitable and ethical considerations and problems of cost and feasibility.

2.1 **INDEPENDENCE AND CANDOR**

IN ADVISING A CLIENT A LAWYER SHALL EXERCISE INDEPENDENT AND CANDID PROFESSIONAL JUDGMENT, UNCONTROLLED BY THE INTERESTS OR WISHES OF A THIRD PERSON, OR BY THE LAWYER’S OWN INTERESTS OR WISHES.

**COMMENT:**

**Independence**

A lawyer’s advice should advance the client’s best interests. That objective can be achieved only if the lawyer is free to consider and to recommend courses of action that may be disadvantageous to persons other than the client. See Rule 1.8.

**Candor**

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 should endeavor to sustain the client’s morale and may put the 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.

2.2 SCOPE OF ADVICE

IN RENDERING ADVICE A LAWYER MAY REFER TO ALL RELEVANT CONSIDERATIONS UNLESS IN THE CIRCUMSTANCES IT IS EVIDENT THAT THE CLIENT DESIRES ADVICE CONFINED TO STRICTLY LEGAL CONSIDERATIONS.

COMMENT:

Legal advice may be formulated in a narrowly defined legal perspective or in a more general perspective that includes various practical implications of the situation. Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost on the effect on relationships with others, 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 adviser as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

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

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. A lawyer’s advice should be kept within the bounds of the lawyer’s training and experience in comparison with that of other professionals. Thus, a lawyer should not attempt to advise on the psychological aspects of a situation in which a psychiatrist or other such specialist ought to be consulted, or advise in matters of accounting whose complexity requires a professional in that field. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer’s responsibility includes making such a recommendation. At the same time, it should be recognized that a lawyer’s advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

References: EC 7-8.

2.3 ADVICE CONCERNING WRONGFUL CONDUCT

(a) A LAWYER SHALL NOT GIVE ADVICE WHICH THE LAWYER CAN REASONABLY FORESEE WILL:
(1) BE USED BY THE CLIENT TO FURTHER AN ILLEGAL COURSE OF CONDUCT EXCEPT AS PART OF A GOOD FAITH EFFORT TO DETERMINE THE VALIDITY, SCOPE, MEANING, OR APPLICATION OF THE LAW; OR

(2) AID THE CLIENT IN CONTRIVING FALSE TESTIMONY OR MAKING A LEGALLY WRONGFUL MISREPRESENTATION.

(b) A LAWYER MAY DECLINE TO GIVE ADVICE THAT MIGHT ASSIST THE CLIENT IN ANY CONDUCT THAT WOULD VIOLATE THE LAW OR, SUBJECT TO THE PROVISIONS OF RULE 1.5, THAT THE LAWYER CONSIDERS REPUGNANT.

COMMENT:

The right to have legal advice extends to persons who have bad motives and purposes as well as those who have good ones. As adviser, a lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client’s conduct and not an opinion reflecting what society might wish would be the consequences. At the same time, a lawyer should not become involved in deliberately wrongful conduct by the client. Furthermore, a lawyer may advise a client in a course of action openly undertaken to challenge the validity or interpretation of a provision of law.

The critical distinction is between commenting on legal aspects of questionable conduct and making suggestions about how illegal conduct might be pursued with impunity. The distinction can be subtle. A client may seek to act legally although at the borderline of what is permissible; on the other hand, a client may seek a lawyer’s knowledge to contrive a scheme of wrongdoing. The lawyer’s professional responsibility includes making an assessment of the client’s purposes and regulating the lawyer’s own conduct accordingly.

If the client’s contemplated conduct is inherently wrongful and seriously harmful, the lawyer may not simply remain passive. No worthwhile interest is served by encouraging a client’s belief in the possibility of getting away with a serious deliberate wrong and a lawyer should not lend such encouragement. Furthermore, a lawyer is free to withhold advice from a client who is determined to pursue any kind of wrongful act.

When the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is not required to reveal the client’s wrongdoing, except where necessary to avoid additional serious consequences. See Rule 1.7. However, the lawyer is required to avoid furthering the purpose by suggesting, for example, how it might be concealed.

2.4 DUTY TO OFFER ADVICE

A LAWYER WHO KNOWS THAT A CLIENT CONTEMPLATES A COURSE OF ACTION WHICH HAS A SUBSTANTIAL LIKELIHOOD OF SERIOUS LEGAL CONSEQUENCES SHALL WARN THE CLIENT OF THE LEGAL IMPLICATIONS OF THE CONDUCT, UNLESS A CLIENT HAS EXPRESSLY OR BY IMPLICATION ASKED NOT TO RECEIVE SUCH ADVICE.

COMMENT:

In general, a lawyer is not expected to give advice until asked by the client. However, a broader obligation rests upon a lawyer who knows that a client proposes a course of action that may inflict serious legal wrong on another or result in serious legal consequences to the client. As an officer of the legal system and a confidant of the client, the lawyer should if possible warn the client against pursuing the purpose in question. However, a lawyer has no duty to initiate investigation of a client’s affairs or to give advice that the client has indicated will be unwelcome.


2.5 ALTERATION OR DESTRUCTION OF EVIDENCE

A LAWYER SHALL NOT ADVISE A CLIENT TO ALTER OR DESTROY A DOCUMENT OR OTHER MATERIAL WHEN THE LAWYER REASONABLY SHOULD KNOW THAT THE MATERIAL IS RELEVANT TO A PENDING PROCEEDING OR ONE THAT IS CLEARLY FORESEEABLE.

COMMENT:

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 a person alters or destroys material that could be demanded by an opposing party. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. In any event, it is improper for a lawyer to advise a client deliberately to take steps that impair the legal rights of others.

The Rule applies to evidentiary material generally, including computerized information. The Rule does not require a lawyer to foresee all possible uses of material and does not preclude advice about a general policy concerning retention of records. It does preclude a lawyer from suggesting the destruction or falsification of specific material whose relevance can be foreseen in
pending or clearly foreseeable litigation. It also prohibits a lawyer from turning over such material at the client’s direction when the client plainly intends to destroy it.


3. ADVOCATE

Introduction: As advocate, a lawyer presents evidence and argument before a tribunal in behalf of a client. The advocate’s duty in the adversary system is to present the client’s case as persuasively as possible, leaving presentation of the opposing case to the other party. An advocate may not present a claim or defense lacking serious merit or for the purpose of delay, although an advocate for the defendant in a criminal case may insist on proof of the offense charged. An advocate does not vouch for the justness of a client’s cause but only its legal merit.

3.1 CANDOR TOWARD TRIBUNAL

A LAWYER SHALL BE CANDID TOWARD A TRIBUNAL.

(a) A LAWYER SHALL NOT:

(1) FILE A COMPLAINT, MOTION, OR PLEADING OTHER THAN ONE THAT PUTS THE PROSECUTION TO ITS PROOF IN A CRIMINAL CASE, UNLESS ACCORDING TO THE LAWYER’S BELIEF THERE IS GOOD GROUND TO SUPPORT IT;

(2) MAKE A KNOWING MISREPRESENTATION OF FACT;

(3) EXCEPT AS PROVIDED IN PARAGRAPH (f), OFFER EVIDENCE THAT THE LAWYER IS CONVINCED BEYOND A REASONABLE DOUBT IS FALSE, OR OFFER WITHOUT SUITABLE EXPLANATION EVIDENCE THAT THE LAWYER KNOWS IS SUBSTANTIALLY MISLEADING; OR

(4) MAKE A REPRESENTATION ABOUT EXISTING LEGAL AUTHORITY THAT THE LAWYER KNOWS TO BE INACCURATE OR SO INCOMPLETE AS TO BE SUBSTANTIALLY MISLEADING.

(b) EXCEPT AS PROVIDED IN PARAGRAPH (f), IF A LAWYER DISCOVERS THAT EVIDENCE OR TESTIMONY PRESENTED BY THE LAWYER IS FALSE, THE LAWYER SHALL DISCLOSE THAT FACT AND TAKE SUITABLE MEASURES TO RECTIFY THE CONSEQUENCES, EVEN IF DOING SO REQUIRES
DISCLOSURE OF A CONFIDENCE OF THE CLIENT OR DISCLOSURE THAT THE CLIENT IS IMPLICATED IN THE FALSIFICATION.

(c) IF A LAWYER DISCOVERS THAT THE TRIBUNAL HAS NOT BEEN APPRISED OF LEGAL AUTHORITY KNOWN TO THE LAWYER THAT WOULD PROBABLY HAVE A SUBSTANTIAL EFFECT ON THE DETERMINATION OF A MATERIAL ISSUE, THE LAWYER SHALL ADVISE THE TRIBUNAL OF THAT AUTHORITY.

(d) EXCEPT AS PROVIDED IN PARAGRAPH (f), A LAWYER SHALL DISCLOSE A FACT KNOWN TO THE LAWYER, EVEN IF THE FACT IS ADVERSE, WHEN DISCLOSURE:

(1) IS REQUIRED BY LAW OR THE RULES OF PROFESSIONAL CONDUCT; OR

(2) IS NECESSARY TO CORRECT A MANIFEST MISAPPREHENSION RESULTING FROM A PREVIOUS REPRESENTATION THE LAWYER HAS MADE TO THE TRIBUNAL.

(e) EXCEPT AS PROVIDED IN PARAGRAPH (f), A LAWYER MAY APPRISE ANOTHER PARTY OF EVIDENCE FAVORABLE TO THAT PARTY AND MAY REFUSE TO OFFER EVIDENCE THAT THE LAWYER BELIEVES WITH SUBSTANTIAL REASON TO BE FALSE.

(f) A LAWYER FOR A DEFENDANT IN A CRIMINAL CASE:

(1) IS NOT REQUIRED TO APPRISE THE PROSECUTOR OR THE TRIBUNAL OF EVIDENCE ADVERSE TO THE ACCUSED, EXCEPT AS LAW MAY OTHERWISE PROVIDE;

(2) MAY NOT DISCLOSE FACTS AS REQUIRED BY PARAGRAPH (d) IF DOING SO IS PROHIBITED BY APPLICABLE LAW;

(3) SHALL OFFER EVIDENCE REGARDLESS OF BELIEF AS TO WHETHER IT IS FALSE IF THE CLIENT SO DEMANDS AND APPLICABLE LAW REQUIRES THAT THE LAWYER COMPLY WITH SUCH A DEMAND.

(g) A PROSECUTOR HAS THE FURTHER DUTY OF DISCLOSURE STATED IN RULE 3.10.

COMMENT:

The advocate’s task is to present the client’s case with great persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate’s duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.
There are several important aspects of the duty of candor. First, a contention in a pleading or other court document should have good ground to support it. See Federal Rules of Civil Procedure, Rule 11. Second, a representation made by a lawyer should be true according to the lawyer’s own knowledge, unless the representation is indicated to be otherwise. Thus, when a lawyer asserts that an event occurred, or did not occur, or that a document does or does not exist, the assertion must be based on such knowledge. Third, a lawyer should disclose facts required to be disclosed by law or by the Rules of Professional Conduct. Fourth, a lawyer should not offer evidence that the lawyer knows is false, whether it be untruthful testimony or fabricated documents or other evidence. Although the tribunal is required to assess the probative value of conflicting proofs and to be watchful of deception, it is entitled to protection against deception at the hands of an advocate.

Representation by a lawyer

An advocate is responsible for pleadings and other documents prepared for litigation and for statements made to the tribunal. A lawyer is not required to have personal knowledge of the matters asserted, for litigation documents ordinarily purport to be assertions made by the client, or by someone on the client’s behalf, and not assertions by the lawyer. However, a lawyer must refrain from making contentions the lawyer knows lack a factual basis. 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, should 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.

Disclosure of facts

Although an advocate generally has no obligation to disclose adverse facts, disclosure is required in some circumstances. Disclosure of unprivileged matter may be required by law, as in discovery proceedings. Disclosure may be required by the Rules of Professional Conduct; for example, when necessary to correct a misapprehension created by a previous representation by the lawyer.

There is controversy whether disclosure is required of a fact that would substantially affect the determination of a material issue but which has not been presented by opposing counsel. The adversary system rests on the assumption that the tribunal will be fully informed by the competitive efforts of the parties in presenting material facts. Usually, therefore, the cause of justice is adequately served if the advocates perform their normal roles in the competition. If the fact in question is merely cumulative or incidental, failure to draw it to the tribunal’s attention is a de minimus matter. However, the problem is very different if the fact is probably decisive, that is, if the fact is one that opposing counsel clearly should have presented. When an adversary has failed to present such a fact, the system manifestly has suffered breakdown.

The law requires such disclosure by the prosecutor in criminal cases, and in some jurisdictions by the lawyer for the government or a lawyer for a fiduciary in litigation with a beneficiary. The law of discovery now requires broad disclosure of relevant facts upon appropriate demand. However, the rules of professional ethics in this country have not heretofore generally required an advocate to disclose facts that the tribunal plainly ought to know. (The Commission considered, but did not adopt, a provision requiring the disclosure of
facts known to a lawyer which “would probably have a substantial effect on the determination of a material issue.”)

The duty of disclosure generally does not devolve on counsel for the accused in a criminal case. The underlying theory is that criminal guilt must be established by the prosecution and not through the instrumentality of defense counsel. See paragraph (f)(1). Applicable law, including relevant constitutional provisions, may require that counsel for an accused make no statement that could affect the accused adversely, even if the statement is to correct a misapprehension on the part of the tribunal. The defense counsel’s obligation to the tribunal under these Rules is subordinate to such a requirement. See paragraph (f)(2).

False or fabricated evidence

When evidence known by a lawyer 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. When false evidence is offered by the client himself, however, a conflict may arise between the lawyer’s duty to keep the client’s revelations confidential and the duty of candor to the court. In dealing with this problem, the lawyer must first be satisfied that the evidence is false, and should make a reasonable investigation for this purpose. If it appears that the evidence is merely implausible, the lawyer is not precluded from introducing it. But it may be quite clear that the evidence is false, for example when the client proposes to testify in a way that he or she has clearly demonstrated to be perjurious. A similar problem can arise concerning real evidence, such as a forged document.

Upon learning that the evidence is fabricated or false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take responsibility for rectifying the situation. Except in the defense of a criminal accused, it is settled that an advocate must disclose the client’s deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the process the adversary system is designed to implement. Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent. See also rule 1.4. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a criminal defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning what the lawyer should do if that persuasion fails. If the confrontation with the client occurs before the trial, the lawyer may be able to resign. The client may then obtain another lawyer from whom the truth is concealed, with the result that the perjured testimony or other false evidence will be presented without the lawyer’s complicity. Resignation before trial may not be possible, however, either because trial
is imminent or because the confrontation with the client does not take place until the trial itself, or because no other counsel will be available.

The most difficult situation therefore arises in a criminal case where the accused insists on testifying when it is plain to the lawyer that the testimony will be perjurious, or when the accused actually takes the stand and then proceeds to commit perjury. If the lawyer seeks to prevent or correct the reception of the false testimony, it will increase the likelihood of conviction and open the possibility of a prosecution for perjury. If the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer’s questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but involves several costs. It makes the advocate an instrument of deception. It would invite an unscrupulous client, under cover of the attorney-client privilege, to ask the advocate’s advice in devising the most plausible perjury.

The other resolution of the dilemma is that the lawyer must reveal the client’s perjury. A criminal accused has a right to the assistance of an advocate, a right to testify on his own behalf, and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. It follows that the advocate must disclose a client’s perjury if efforts to prevent commission of perjury have failed.

If the client has given perjured testimony or presented fabricated evidence, the advocate’s proper course ordinarily is to make prompt disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. In making disclosure, the advocate must be prepared to face denunciation by the client for a betrayal of confidence. Although nothing can prevent such accusations, the advocate can be forearmed if an office record has been made of the confrontation with the client and of the warning that a lawyer cannot conceal a client’s perjury.

The possibility also has to be faced that the client may controvert the lawyer’s version of their communication when the lawyer discloses the situation to the court. If that happens and there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

All three resolutions of the problem of a criminal defendant’s perjury have some support in opinion within the legal profession and in the law governing the obligations of counsel in a
criminal case. The general rule—that an advocate must disclose perjury, even that of a client—applies 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 is qualified by the requirements of due process and the right to counsel in criminal cases. Due process and the right to counsel in criminal cases have been construed in some jurisdictions to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a requirement. See paragraph (f)(3).

Evidence known to be misleading

Evidence that is true or authentic may nevertheless be misleading if offered without explanation. Candor includes avoiding a presentation the lawyer knows will be misleading.

Misleading legal argument

Legal argument based on misrepresentation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize that the existence of pertinent legal authorities is as much a matter of fact as the existence of evidentiary documents. An assertion about the state of law that an advocate knows to be false is a misrepresentation of fact.

With regard to matters of law, it has long been recognized that an advocate has a duty to disclose to the tribunal important authority of which the advocate is aware but which has not been disclosed by an opposing party. The underlying concept is that legal argument is a discussion among the advocates and the tribunal, seeking to determine the legal premises properly applicable to the case. The extent of disclosure is at times a matter of judgment. An advocate is not required to present the full array of opposing authority. Where the lawyer knows of authority that the court clearly ought to consider, the court should be advised of its existence if the opposing party has not done so.

A legal argument may be so baseless as to amount to a misleading argument. An argument is frivolous if a disinterested legal analyst could say it lacks any basis in existing authority and could not be supported by good faith argument for an extension, modification, or reversal of existing authority. Even an advocate for a criminal defendant, who is obliged to state the best possible argument for the client, is not required to submit a frivolous argument.

Refusing to offer untrustworthy proof

Generally speaking, a lawyer has a right to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. No deception is involved in offering proof of which the lawyer is skeptical, for a lawyer often cannot know the true state of affairs. Nevertheless, 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. A refusal to offer untrustworthy proof reflects the more general proposition that a lawyer may decline to assist a client in an unjust course of conduct. See Rules 1.3 and 1.5.
In criminal cases, however, a lawyer is denied this right by the law governing the right to counsel. The lawyer’s right to refuse assistance in an unjust cause is overborne by the accused’s right to the assistance of counsel in requiring the state to establish the basis for conviction. If the lawyer could decline a dubious cause, the result could be denial of representation in a case resting on proofs that are weak but not clearly false. It is better that the right to representation in criminal cases be fully protected than that the lawyer be given the right to withhold dubious evidence.


3.2 FAIRNESS TO AN OPPOSING PARTY AND COUNSEL

(a) A LAWYER SHALL BE FAIR TO OTHER PARTIES AND THEIR COUNSEL, ACCORD THEM THEIR PROCEDURAL RIGHTS, AND FULFILL OBLIGATIONS UNDER THE PROCEDURAL LAW AND ESTABLISHED PRACTICES OF THE TRIBUNAL.

(b) A LAWYER SHALL NOT:

1. IMPROPERLY OBSTRUCT ANOTHER PARTY’S ACCESS TO EVIDENCE, DESTROY, FALSIFY OR CONCEAL EVIDENCE, OR USE ILLEGAL METHODS OF OBTAINING EVIDENCE;

2. DISOBEY AN OBLIGATION UNDER PROCEDURAL LAW, EXCEPT FOR AN OPEN REFUSAL BASED ON A GOOD FAITH BELIEF THAT NO VALID OBLIGATION EXISTS;

3. REFER IN A PROCEEDING TO A MATTER THAT THE LAWYER HAS NO REASONABLE BASIS TO BELIEVE IS RELEVANT THERETO, OR DOES NOT REASONABLY EXPECT WILL BE SUPPORTED BY ADMISSIBLE EVIDENCE;
(4) MAKE A KNOWING MISREPRESENTATION OF FACT OR LAW TO AN OPPOSING PARTY OR COUNSEL;

(5) INTERVIEW OR OTHERWISE COMMUNICATE WITH A PARTY WHOM THE LAWYER KNOWS IS REPRESENTED BY OTHER COUNSEL CONCERNING THE SUBJECT MATTER OF THE REPRESENTATION, EXCEPT WITH THE CONSENT OF THAT PARTY’S COUNSEL OR AS AUTHORIZED BY LAW.

COMMENT:

A trial should be conducted with a sense of propriety and respect for its purpose of arriving at a just and rational result. While a trial in its nature is a contentious proceeding, the law’s procedure aims to determine a controversy nonviolently and, if possible, in an atmosphere of tranquility.

While the court has primary responsibility for establishing the spirit of fairness, the advocates significantly influence the atmosphere of litigation. If their interactions involve harassment, procrastination, or deception, the proceeding will inevitably by regarded as unjust by the losing party, and perhaps by all parties. If on the other hand the lawyers display courtesy, respect for procedural rights and obligations, and restraint in their dealings with each other and with the parties, a trial can be a manifestation of justice.

A lawyer should refrain from making personal derogatory remarks about another party or counsel; accede to reasonable requests from an opposing party for the waiver of formalities; reasonably accommodate the convenience of the party or counsel; and be punctual in fulfilling professional commitments. A lawyer should not merely avoid harassing litigation but should engage in litigation only when a negotiated resolution cannot be obtained on satisfactory terms.

A lawyer is not required to prepare an opponent’s case. Furthermore, a lawyer may properly advise a client against giving a statement or other evidence except under the lawyer’s supervision. But these legitimate precautions should not be transformed into a suggestion that testimony or other evidence may be contrived, destroyed, or withheld from another party entitled to obtain it. Subject to reasonable precautions against ill-advised disclosure, an advocate should encourage the client to be honest and respectful in dealing with an opposing party. And a lawyer should refrain from any conduct that would constitute an abuse of process.

A lawyer should act in a similar fashion in dealing with opposing counsel. A lawyer should avoid harassment, unfair tactics in the production of evidence, and diversionary or prejudicial interjections in a hearing. In making representations to opposing counsel or to an opposing party, a lawyer should adhere to the same standard of candor as is required toward the tribunal. See Rule 3.1. As a matter of both fairness to the opposing party and professional courtesy to opposing counsel, a lawyer should not deal with an opposing party except through the latter’s counsel.

A conscientious lawyer should go beyond this by expediting the formulation of issues and the determination of preliminary matters without either intentional or neglectful delay; honoring an opposing party’s request for relevant evidence without requiring formal demand unless there
good reason for requiring such a demand; readily stipulating to matters that are not genuinely controverted; observing the conventions of professional courtesy toward other parties; and contributing to an atmosphere of serious and evenhanded deliberation in the tribunal. See also rule 3.3.

References: Canon 7; EC 7-22, 7-25, 7-27, 7-28; DR 7-101, 7-102, 7-106; Annot., 87 A.L.R.3d 351 (1978) (abusive behavior toward another lawyer).

3.3 EXPEDITING LITIGATION

(a) A LAWYER SHALL MAKE EVERY EFFORT CONSISTENT WITH THE LEGITIMATE INTERESTS OF THE CLIENT TO EXPEDITE LITIGATION. REALIZING FINANCIAL OR OTHER BENEFIT FROM OTHERWISE IMPROPER DELAY IN LITIGATION IS NOT A LEGITIMATE INTEREST OF THE CLIENT. A LAWYER SHALL NOT ENGAGE IN ANY PROCEDURE OR TACTIC HAVING NO SUBSTANTIAL PURPOSE OTHER THAN DELAY OR INCREASING THE COST OF LITIGATION TO ANOTHER PARTY.

(b) EXCEPT AS STATED IN PARAGRAPH (c), A LAWYER SHALL BRING OR DEFEND A PROCEEDING, OR ASSERT OR CONTROVERT AN ISSUE THEREIN, ONLY WHEN A LAWYER ACTING IN GOOD FAITH WOULD CONCLUDE THAT THERE IS A REASONABLE BASIS FOR DOING SO.

(c) A LAWYER FOR A CRIMINAL ACCUSED MAY SO DEFEND THE PROCEEDING THAT THE PROSECUTION IS REQUIRED TO ESTABLISH EVERY ELEMENT OF A CHARGE ACCORDING TO THE GOVERNING STANDARD OF PROOF.

COMMENT:

A lawyer has a duty not merely to avoid frivolous or dilatory proceedings but also to expedite the progress of litigation. The critical problem is to define the standard by which to appraise a lawyer’s failure to keep litigation moving forward. The standard must require more than nominal observance, for otherwise all but the most flagrant abuses of procedure can become commonplace.

No precise definition can be given of a dilatory or baseless proceeding. A claim or defense having little or no authority in existing precedent may have great potential for inviting a change in the law. A factually implausible claim or defense may nevertheless be sustainable. It is not improper to assert a claim or defense that can be supported by good faith argument for an extension, modification, or reversal of existing law. Account has to be taken of the potential for the law’s development, the exigencies of proof, and other variables that go into the assessment of a cause. Nevertheless, there is a limit beyond which legal inventiveness becomes frivolity, and the propriety of a lawyer’s conduct in supporting a cause cannot depend simply on personal good faith. The essential question is whether reasonably competent counsel could conclude in good faith that the claim or defense in question has a substantial basis. The same principle applies to issues within a case.
Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged for the convenience of the advocates, nor for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose. It is not enough that a lawyer’s procedural act, or refusal to act, is in personal good faith, or that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the act or refusal to act as having some substantial purpose other than delay.


3.4 RESPECT FOR THE INTERESTS OF OTHERS

(a) IN PREPARING AND PRESENTING A CAUSE, A LAWYER SHALL RESPECT THE INTERESTS OF THIRD PERSONS, INCLUDING WITNESSES, JURORS, AND PERSONS INCIDENTALLY CONCERNED WITH THE PROCEEDING.

(b) A LAWYER SHALL NOT:

(1) USE MEANS OF OBTAINING EVIDENCE THAT VIOLATE A THIRD PERSON’S LEGAL RIGHTS; OR

(2) USE A PROCEDURE HAVING NO SUBSTANTIAL PURPOSE OTHER THAN TO EMBARRASS, DELAY, OR BURDEN A THIRD PERSON.

COMMENT:

Responsibility to a client generally requires a lawyer to subordinate the interests of others to the vindication of the client’s cause. Properly understood, this obligation means that a lawyer should permit no consideration of political interests or concern for the personal or financial interests of others to detract from the lawyer’s duty to the client. It does not mean that a lawyer may disregard the legal rights of third persons.

It is impossible to catalogue all such rights. Among then, however, is immunity from illegal methods of gathering evidence. A person also has the right not to produce documents or other evidence except by consent or pursuant to process of law such as subpoena duces tecum.

A lawyer is justified in lawfully aiding a client even though the means are unpleasant or damaging to a third person. For example, a lawyer may in accordance with law elicit testimony from a witness despite its being embarrassing to the witness or subjecting the witness to civil liability. A lawyer may ask questions that test a witness’s credibility, even if it discredits testimony of a witness the lawyer believes is truthful. In interviewing or examining a witness, a lawyer ordinarily has no obligation to advise the witness of his or her legal rights, such as the privilege of refusing to give testimony that might tend to incriminate. A lawyer is obliged, however, to avoid misleading a witness in that respect. For example, a lawyer should not give an
unwarranted assurance that a witness will suffer no adverse consequences as a result of giving a statement.

Persons related to a party, such as a spouse, partner, employee, or a friend of a party, are often subject to embarrassment, inconvenience, or distress by reason of the litigation. The law provides little protection against these consequences but a lawyer should mitigate them to the extent compatible with diligent representation of the client.

References: EC 7-10, 7-29 through 7-31; DR 7-102 (A)(1), 7-106(C).

3.5 REPRESENTATION IN EX PARTE PROCEEDINGS

IN AN EX PARTE PROCEEDING, A LAWYER SHALL:

(a) SEEK NO GREATER RELIEF OR CHANGE IN THE STATUS QUO THAN IS LEGALLY JUSTIFIED; AND

(b) INFORM THE TRIBUNAL OF ALL RELEVANT FACTS KNOWN TO THE LAWYER THAT SHOULD BE DISCLOSED TO THE TRIBUNAL, WHETHER OR NOT THE FACTS ARE ADVERSE.

COMMENT:

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 opposing counsel. However, in an ex parte proceeding, such as an application for a temporary restraining order or a default judgment, 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 all relevant disclosures required by the governing procedural law.


3.6 APPEARING AGAINST AN UNREPRESENTED PARTY

WHEN AN OPPOSING PARTY IS UNREPRESENTED, A LAWYER SHALL REFRAIN FROM UNFAIRLY EXPLOITING THAT PARTY’S IGNORANCE OF THE LAW OR THE PRACTICES OF THE TRIBUNAL.

COMMENT:
When one party to a controversy is represented by a lawyer and the other is not, there may not be a balanced presentation of the controversy. Many persons without legal training are able to represent themselves adequately in legal proceedings, particularly if the procedure is relatively simple or if the person is especially familiar with the subject matter in dispute. Ordinarily, however, an unrepresented person is at a disadvantage in trying to manage a contested proceeding and the court has a duty to warn him or her of that fact. As an officer of the legal system, a lawyer may properly encourage an unrepresented opposing party to obtain counsel and to seek legal aid if the party cannot afford counsel.

When one party is unrepresented, the tribunal is expected to take corrective measures, for example, by examining the represented party’s case with special scrutiny. The lawyer for the represented party remains bound to seek an advantageous result for his client, but should not exploit the unrepresented person’s unfamiliarity with the law or legal procedure. An advocate should not procure an unconscionable result against an unrepresented party; for example, by enforcing a claim that is plainly invalid or obstructing enforcement of a plainly meritorious claim.


3.7 PRESERVING THE IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A LAWYER SHALL ASSIST A TRIBUNAL IN MAINTAINING IMPARTIALITY AND CONDUCTING THE PROCEEDINGS WITH DECORUM.

(b) A LAWYER SHALL NOT:

(1) SEEK IMPROPERLY TO INFLUENCE A JUDGE, JUROR, OR OTHER DECISION-MAKER, OR, EXCEPT AS PERMITTED BY LAW, COMMUNICATE EX PARTE WITH SUCH A PERSON;

(2) SEEK IMPROPERLY TO INFLUENCE A WITNESS;

(3) BE ABUSIVE OR OBSTREPEROUS;

(4) REFUSE TO COMPLY WITH AN OBLIGATION OF PROCEDURAL LAW OR AN ORDER OF THE TRIBUNAL, EXCEPT FOR AN OPEN REFUSAL BASED ON A GOOD FAITH BELIEF THAT COMPLIANCE IS NOT LEGALLY REQUIRED.

COMMENT:

The tribunal has primary responsibility for maintaining the impartiality and decorum of its proceedings. However, a lawyer can facilitate the tribunal’s efforts to fulfill its responsibility for impartiality and can exemplify the dignity and self-restraint that the tribunal should emulate.
Many forms of improper influence upon a tribunal are proscribed by law. Others are specified in the ABA Model Code of Judicial Conduct with which an advocate should be familiar. In addition to specific requirements, that Code requires generally that a judge avoid impropriety or the appearance of impropriety. A lawyer is required to avoid contributing to any such impropriety or its appearance.

Similarly, a lawyer should not improperly influence a witness. There are various forms of improper influence, many of them criminal offenses such as bribery, intimidation, encouraging a witness to fabricate or color testimony, or inducing a witness to withhold evidence. It is not improper to pay a witness’s expenses or to compensate an expert witness on terms permitted by law, so long as such arrangements are disclosed upon proper inquiry. It is improper to compensate an expert witness by a fee contingent on the outcome of the proceeding unless applicable law permits such a fee.

Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. The advocate’s function is to present evidence and argument so that the cause may be decided according to law, not by rhetorical coercion. A lawyer subjected to abuse by a judge may stand firm against it 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.

References: EC 7-28 through 7-39; DR 7-107 through 7-110; ABA Model Code of Judicial Conduct, Canons 2 and 3.

3.8 TRIAL PUBLICITY

(a) TO ENSURE A FAIR TRIAL, A LAWYER INVOLVED IN THE INVESTIGATION OF A CRIMINAL MATTER OR IN CRIMINAL OR CIVIL LITIGATION SHALL NOT, EXCEPT AS PROVIDED IN PARAGRAPH (b), MAKE AN EXTRAJUDICIAL STATEMENT:

(1) INTENDED TO INDUCE THE TRIBUNAL TO DETERMINE THE MATTER OTHERWISE THAN IN ACCORDANCE WITH LAW; OR

(2) WHEN THE MATTER UNDER INVESTIGATION OR IN LITIGATION IS A CRIMINAL CASE OR A CIVIL CASE TRIABLE TO A JURY AND THE STATEMENT RELATES TO:

(i) THE IDENTITY, CHARACTER, CREDIBILITY, REPUTATION, OR CRIMINAL RECORD OF A PARTY, SUSPECT IN A CRIMINAL INVESTIGATION, OR WITNESS, OR THE EXPECTED TESTIMONY OF A PARTY OR WITNESS;

(ii) IN A CRIMINAL CASE, THE POSSIBILITY OF A PLEA OF GUILTY TO THE OFFENSE, OR THE EXISTENCE OR CONTENTS OF
ANY CONFESSION, ADMISSION, OR STATEMENT GIVEN BY THE ACCUSED OR THE ACCUSED’S REFUSAL OR FAILURE TO MAKE A STATEMENT;

(iii) 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;

(iv) ANY OPINION AS TO THE GUILT OR INNOCENCE OF AN ACCUSED OR SUSPECT IN A CRIMINAL CASE OR AS TO THE MERITS OF A CRIMINAL OR CIVIL CASE;

(v) INFORMATION THE LAWYER KNOWS OR REASONABLY SHOULD KNOW WOULD BE INADMISSIBLE AS EVIDENCE IN A TRIAL;

(vi) ANY OTHER MATTER THAT SIMILARLY CREATES A SERIOUS AND IMMINENT RISK OF PREJUDICING AN IMPARTIAL TRIAL.

(b) A LAWYER INVOLVED IN THE INVESTIGATION OR LITIGATION OF A MATTER MAY STATE WITHOUT ELABORATION:

(1) INFORMATION CONTAINED IN A PUBLIC RECORD;

(2) THAT INVESTIGATION OF THE MATTER IS IN PROGRESS, INCLUDING THE GENERAL SCOPE OF THE INVESTIGATION, THE OFFENSE OR CLAIM OR DEFENSE INVOLVED, AND, EXCEPT WHEN PROHIBITED BY LAW, THE IDENTITY OF THE PERSONS INVOLVED;

(3) THE SCHEDULING OR RESULT OF ANY STEP IN LITIGATION;

(4) A REQUEST FOR ASSISTANCE IN OBTAINING EVIDENCE;

(5) A WARNING OF DANGER CONCERNING THE BEHAVIOR OF A PERSON INVOLVED, WHEN THERE IS REASON TO BELIEVE THAT SUCH DANGER EXISTS; AND

(6) IN A CRIMINAL CASE:

(i) THE NAME, AGE, RESIDENCE, OCCUPATION, AND FAMILY STATUS OF THE ACCUSED;

(ii) IF THE ACCUSED HAS NOT BEEN APPREHENDED, INFORMATION NECESSARY TO AID IN APPREHENSION OF THE ACCUSED;
(iii) THE FACT, TIME, AND PLACE OF ARREST, RESISTANCE, PURSUIT, AND USE OF WEAPONS;

(iv) THE IDENTITY OF INVESTIGATING AND ARRESTING OFFICERS OR AGENCIES AND THE LENGTH OF THE INVESTIGATION;

(v) AT THE SAME TIME OF SEIZURE, A DESCRIPTION OF THE PHYSICAL EVIDENCE SEIZED, OTHER THAN A CONFESSION, ADMISSION OR STATEMENT; AND

(vi) THAT THE ACCUSED DENIES THE CHARGES.

(c) WHEN EVIDENCE OR INFORMATION RECEIVED IN OR RELATING TO A PROCEEDING IS BY LAW OR ORDER OF A TRIBUNAL TO BE KEPT CONFIDENTIAL, THE LAWYER SHALL NOT UNLAWFULLY DISCLOSE THE EVIDENCE OR INFORMATION.

COMMENT:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding rights of 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 profound 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.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule reflects a balance that has reasonably well withstood the test of experience. It is based upon substantially similar provisions in the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

Paragraph (c) recognizes that special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings, and perhaps other types of litigation.

3.9 **LITIGATION IN WHICH A LAWYER IS PERSONALLY INVOLVED**

(a) A LAWYER SHALL NOT ACT AS ADVOCATE, EXCEPT ON THE LAWYER’S OWN BEHALF, IN LITIGATION IN WHICH THE LAWYER’S OWN CONDUCT IS A MATERIAL ISSUE OR IN WHICH THE LAWYER IS LIKELY TO BE A WITNESS, UNLESS:

1. THE TESTIMONY RELATES TO AN UNCONTESTED ISSUE;

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

3. DISQUALIFICATION OF THE LAWYER WOULD WORK SUBSTANTIAL HARDSHIP TO THE CLIENT.

(b) A LAWYER MAY ACT AS ADVOCATE IN LITIGATION IN WHICH A MEMBER OF THE LAWYER’S FIRM IS LIKELY TO BE A WITNESS UNLESS DOING SO WOULD RESULT IN A VIOLATION OF RULE 1.8.

**COMMENT:**

An advocate seeking to protect the interest of a client while also defending the advocate’s own conduct lacks the detachment required for effective representation. While a lawyer has a right to self-representation in litigation, there is no right to represent other clients at the same time. On the contrary, the conflict of interest inherent in such a situation ordinarily should disqualify the lawyer as advocate in the case.

It is also often difficult for a lawyer to be both advocate and witness. The dual roles of advocate and a witness lead to the confusion of testimony with argument. A witness is required to testify on the basis of personal knowledge. An advocate, however, is expected to explain and comment on evidence given by others. It may therefore not be clear whether a statement by a lawyer-witness should be taken as proof or as an analysis of the proof. The dual role necessarily disturbs the normal relationships that both witness and advocate have with opposing counsel and with the court. In addition, the examination of the lawyer as witness may weaken his effectiveness as advocate.

However, in a limited number of situations, disqualification is inappropriate. If the testimony involved will be uncontested, the difficulties of the dual role are purely theoretical; thus, there is no practical justification for requiring another lawyer to make the presentation. Another exception exists where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered. If the participating lawyers were not permitted to testify on this issue, a second trial with new counsel would be required to resolve the issue of legal fees. Moreover, in such a situation the judge has substantial first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony. The rule of disqualification should also be inapplicable when it deprives a party of the services of a uniquely qualified counsel or requires burdensome orientation of new counsel.
The situation is usually quite different when different lawyers in the same firm or department are involved as advocate and witness. If a single lawyer is involved, intermixing the roles of advocate and witness is unavoidable. On the other hand, if different lawyers are involved, the testimony of the lawyer-witness ordinarily can be presented by an advocate from the same office without undue confusion. The essential problem is that of assessing the relative significance of the burden on the client of having to retain different counsel, the burden on the opposing party of confronting an advocate-witness, and the risk of serious conflict of interest between the firm involved and its client. In this connection, it must be borne in mind that when an opposing party invokes the disqualification, the purpose may be harassment rather than well-grounded concern for the integrity of the adversary system.


3.10 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

THE PROSECUTOR IN A CRIMINAL CASE SHALL:

(a) REFRAIN FROM PROSECUTING A CHARGE THAT THE PROSECUTOR KNOWS IS NOT SUPPORTED BY PROBABLE CAUSE;

(b) ADVISE THE DEFENDANT OF THE RIGHT TO COUNSEL AND PROVIDE ASSISTANCE IN OBTAINING COUNSEL;

(c) NOT INDUCE AN UNREPRESENTED DEFENDANT TO SURRENDER IMPORTANT PROCEDURAL RIGHTS, SUCH AS THE RIGHT TO A PRELIMINARY HEARING;

(d) SEEK ALL EVIDENCE, WHETHER OR NOT FAVORABLE TO THE ACCUSED, AND MAKE TIMELY DISCLOSURE TO THE DEFENSE OF ALL EVIDENCE SUPPORTING INNOCENCE OR MITIGATING THE OFFENSE;

(e) NOT DISCOURAGE A PERSON FROM GIVING RELEVANT INFORMATION TO THE DEFENSE;

(f) IN CONNECTION WITH SENTENCING, DISCLOSURE TO THE DEFENSE AND TO THE COURT ALL UNPRIVILEGED INFORMATION KNOWN TO THE PROSECUTOR THAT IS RELEVANT THERETO.

COMMENT:

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. The provisions of this Rule are based upon the ABA Standards of Criminal Justice, Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.5, governing ex parte proceedings, among which grand jury proceedings are included.


3.11 SPECIAL RESPONSIBILITIES OF DEFENSE COUNSEL IN A CRIMINAL CASE

A LAWYER FOR THE ACCUSED IN A CRIMINAL CASE, SHALL NOT:

(a) AGREE TO REPRESENT A PERSON PROPOSING TO COMMIT A CRIME, EXCEPT AS PART OF A GOOD FAITH EFFORT TO DETERMINE THE VALIDITY, SCOPE, MEANING, OR APPLICATION OF THE LAW;

(b) ACT IN A CASE IN WHICH THE LAWYER’S PARTNER OR OTHER PROFESSIONAL ASSOCIATE IS OR HAS BEEN THE PROSECUTOR;

(c) ACCEPT PAYMENT OF FEES BY ONE PERSON FOR THE DEFENSE OF ANOTHER EXCEPT WITH THE CONSENT OF THE ACCUSED AFTER ADEQUATE DISCLOSURE; OR

(d) CHARGE A CONTINGENT FEE.

COMMENT:

The provisions of this Rule are based on the ABA Standards of Criminal Justice, Defense Function. Paragraph (a) reflects the proposition that a lawyer, in agreeing to undertake representation in a criminal matter, may not do so in circumstances that may be an aid or inducement to criminal conduct. However, it does not preclude undertaking a criminal defense incident to a general retainer for legal services to a person or organization engaged in lawful activity. Paragraph (b) is a particular application of the general principle stated in Rule 1.8. Paragraph (c) is an application of the general principle stated in Rule 1.9(c), except that it requires disclosure to the client in every case of the payment of the lawyer’s fee by a third person. The prohibition on contingent fees in criminal cases does not generate a fund from which a fee can be paid and is designed to insulate the lawyer from having an improper financial stake in the outcome of a criminal case.

References: DR 2-106(c); ABA Standards Relating to the Administration of Criminal Justice, The Defense Function (1978).

3.12 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS
(a) A LAWYER REPRESENTING A CLIENT BEFORE A LEGISLATIVE OR ADMINISTRATIVE TRIBUNAL IN A NONADJUDICATIVE PROCEEDING SHALL DEAL FAIRLY WITH THE BODY CONDUCTING THE PROCEEDING AND WITH OTHER PERSONS MAKING PRESENTATIONS THEREIN AND THEIR COUNSEL.

(b) A LAWYER IN SUCH A PROCEEDING SHALL:

1. IDENTIFY THE CLIENT ON WhOSE BEHALF THE LAWYER APPEARS, UNLESS THE IDENTITY OF THE CLIENT IS PRIVILEGED;

2. CONFORM TO THE PROVISIONS OF RULES 3.1 AND 3.4.

COMMENT:

In representation before bodies such as legislatures, municipal councils, and executive administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, help 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 is not responsible for the justice or wisdom of its decisions but is responsible for dealing with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. Some members of the bar fear that lawyers will thus be put at a competitive disadvantage with nonlawyers. Legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts. Indeed, the fact that lawyers are subject to requirements of candor and fairness may instill special confidence in their presentations and thus inure to their benefit. In any event, if a single standard should govern all advocates before such bodies, it should be the standard provided in this Rule.


4. NEGOTIATOR

Introduction: As negotiator a lawyer seeks agreement concerning matters of interest to a client and another party. Negotiation may concern dispute settlement, settlement of litigation, organization of an enterprise, conclusion of a contract, labor relations, government regulatory activity, custody and support in a family matter, and other legally significant relationships. A lawyer’s function in negotiation can include presenting a bargaining position, exploring bases of common interest, reconciling differences, persuading other parties of the merits of the client’s position, ironing out details, and formalizing the terms of an agreement.

A negotiator should seek the most advantageous result for the client that is consistent with the requirements of law and the lawyer’s responsibilities under the Rules of Professional
Conduct. As negotiator, a lawyer should consider not only the client’s short-run advantage but also his or her long-run interests, such as the state of future relations between the parties. The lawyer should help the client appreciate the interests and position of the other party and should encourage concessions that will effectuate the client’s larger objectives. A lawyer should not transform a bargaining situation into a demonstration of toughness or hypertechnicality or forget that the purely legal aspects of an agreement are often subordinate to its practical aspects. When the alternative to reaching agreement is likely to be litigation, the lawyer should be aware that, although litigation is wholly legitimate as a means of resolving controversy, a fairly negotiated settlement generally yields a better conclusion. A lawyer should also recognize that the lawyer’s own interest in resorting to litigation may be different from a client’s interest in doing so.

A lawyer’s style in negotiations can have great influence on the character of the negotiations—whether they are restrained, open, and business-like, or acrimonious and permeated with distrust. Whatever their outcome, negotiations should be conducted in a civil and forthright manner. Nevertheless, it must be recognized that in negotiations a lawyer is the agent for the client and not an arbitrator or mediator. Negotiation is in part a competition for advantage between parties who have the legal competence to settle their own affairs. A lawyer as negotiator should not impose an agreement on the client, even if the lawyer believes the agreement is in the client’s best interests. By the same token, a lawyer does not necessarily endorse the substance of an agreement arrived at through his or her efforts.

4.1 DISCLOSURE TO A CLIENT

A LAWYER CONDUCTING NEGOTIATIONS FOR A CLIENT SHALL:

(a) INFORM THE CLIENT OF FACTS RELEVANT TO THE MATTER AND OF COMMUNICATIONS FROM ANOTHER PARTY THAT MAY SIGNIFICANTLY AFFECT RESOLUTION OF THE MATTER;

(b) IN CONNECTION WITH AN OFFER, TAKE REASONABLE STEPS TO ASSURE THAT THE JUDGMENT OF THE CLIENT RATHER THAN THAT OF THE LAWYER DETERMINES WHETHER THE OFFER WILL BE ACCEPTED.

COMMENT:

A lawyer should conduct negotiations with a view to maximizing the interest of the client. Ordinarily the interests of client and lawyer are harmonious in that a resolution advantageous to the client is correspondingly advantageous to the lawyer. However, the interests of lawyer and client can diverge. For example, in contingent fee litigation a substantial offer may be forthcoming before the lawyer has invested much effort in preparation of the case; at that point it may be in the lawyer’s interest to accept the offer, while it might be in the client’s interest to have the case more fully developed as a means of provoking a larger offer. Conversely, a lawyer compensated on an hourly basis has an interest in full preparation of a case apart from settlement. So also, a lawyer’s interest in maintaining a reputation as a hard bargainer may lead the lawyer to disparage a proposal that the client might welcome as an end to an irksome controversy.
In some circumstances, variance between the lawyer’s and the client’s interest is unavoidable. The lawyer should present such divergence of interest to the client as openly and as objectively as possible. A lawyer who withholds a serious offer from an opposing party, or fails to disclose how it might affect the lawyer’s own interest, in effect assumes a proprietary position in the transaction to the detriment of the client. Information about such an offer cannot be withheld because the lawyer believes accepting the offer would not be in the client’s best interests; that is a matter for the client to decide. See Rules 1.3 and 1.4.

A lawyer should assume other lawyers will comply with the obligations imposed by this Rule. It is therefore inappropriate to circumvent opposing counsel in order to present facts or communicate an offer directly to the other party, for doing so undermines the negotiator’s function. A lawyer’s refusal to communicate an offer or position is a violation of a duty not only to the lawyer’s client but also to the party who submitted the offer. In transmitting an offer to the lawyer for another party, reference can be made to this obligation. If it appears that the opposing lawyer persists in refusing to transmit the offer, complaint may properly be made to the appropriate disciplinary authority; if the negotiation is conducted in the context of litigation, it is proper to inform the court.


4.2 FAIRNESS TO OTHER PARTICIPANTS

(a) IN CONDUCTING NEGOTIATIONS A LAWYER SHALL BE FAIR IN DEALING WITH OTHER PARTICIPANTS.

(b) A LAWYER SHALL NOT MAKE A KNOWING MISREPRESENTATION OF FACT OR LAW, OR FAIL TO DISCLOSE A MATERIAL FACT KNOWN TO THE LAWYER, EVEN IF ADVERSE, WHEN DISCLOSURE IS:

(1) REQUIRED BY LAW OR THE RULES OF PROFESSIONAL CONDUCT; OR

(2) NECESSARY TO CORRECT A MANIFEST MISAPPR EHENSION OF FACT OR LAW RESULTING FROM A PREVIOUS REPRESENTATION MADE BY THE LAWYER OR KNOWN BY THE LAWYER TO HAVE BEEN MADE BY THE CLIENT, EXCEPT THAT COUNSEL FOR AN ACCUSED IN A CRIMINAL CASE IS NOT REQUIRED TO MAKE SUCH A CORRECTION WHEN IT WOULD REQUIRE DISCLOSING A MISREPRESENTATION MADE BY THE ACCUSED.

(c) A LAWYER SHALL NOT:

(1) ENGAGE IN THE PRETENSE OF NEGOTIATING WITH NO SUBSTANTIAL PURPOSE OTHER THAN TO DELAY OR BURDEN ANOTHER PARTY;
(2) ILLEGALLY OBSTRUCT ANOTHER PARTY’S RIGHTFUL ACCESS TO INFORMATION RELEVANT TO THE MATTER IN NEGOTIATION;

(3) COMMUNICATE DIRECTLY WITH ANOTHER PARTY WHO THE LAWYER KNOWS IS REPRESENTED BY OTHER COUNSEL, EXCEPT WITH THE CONSENT OF THE PARTY’S COUNSEL OR AS AUTHORIZED BY LAW.

COMMENT:

Fairness

Fairness in negotiation implies that representations by or in behalf of one party to the other party be truthful. This requirement is reflected in contract law, particularly the rules relating to fraud and mistake. A lawyer involved in negotiations has an obligation to assure as far as practicable that the negotiations conform to the law’s requirements in this regard.

Disclosure

Under the usually accepted conventions of negotiation, the parties have only limited duties of disclosure to each other. Generally, a party is not required to apprise another party of background facts or collateral opportunities for gain that may accrue as a result of a transaction between them. Facts that must be disclosed do not include estimates of price or value that a party places on the subject of a transaction, or a party’s intentions as to an acceptable settlement of a claim, or the existence of an undisclosed principal except where nondisclosure would constitute fraud. A party is permitted to suggest advantages to an opposing party that may be insubstantial from an objective point of view. The precise contours of the legal duties concerning disclosure, representation, puffery, overreaching, and other aspects of honesty in negotiations cannot be concisely stated. They have changed over time and vary according to circumstances. They also can vary according to the parties’ familiarity with transactions of the kind involved. Thus, the modern law of commercial transactions places duties of disclosure on sellers that go well beyond the classic rule of caveat emptor, and modern securities transactions often must conform to elaborate disclosure rules. It is a lawyer’s responsibility to see that negotiations conducted by the lawyer conform to applicable legal standards, whatever they may be.

In negotiation as in litigation, a lawyer generally has no duty to inform an opposite party of relevant facts and circumstances. However, it is the lawyer’s duty to be forthcoming when the lawyer or the client has misled another party with respect to a matter of fact or law, for in such circumstances the failure to act is the equivalent of actively misleading the other party. A lawyer should not induce a belief that the lawyer is disinterested in a matter when in fact he or she represents a client.

Whether there should be a further burden of disclosure on a lawyer has long been a matter of some controversy. Canon 41 of the Canons of Ethics required, in general terms, that “when a lawyer discovers that some fraud or deception has been practiced he should endeavor to rectify it,” if necessary by undertaking to “inform the injured person or his counsel.” A more limited requirement was imposed by DR 7-102(B) of the ABA Model Code of Professional
Responsibility. The competing considerations are clear but difficult to resolve. A lawyer could properly be regarded as having a professional responsibility to see that negotiations under his or her auspices are informed on all sides. However, to make a lawyer responsible for an opposing party’s information about the matter in negotiation exposes the lawyer to charges of misfeasance that can be easily contrived, and exposes the transaction to additional risk of being legally avoided on the ground of mistake. The likelihood of these consequences is especially severe when the facts concerning the matter in negotiation are inherently uncertain or complex, or where there is substantial discrepancy between parties’ access to information about the matter. Counsel for the accused in a criminal case is subject to constraint against disclosing during negotiations facts that might incriminate the client. See also Rule 1.7.

Tactics

Negotiation is ordinarily a voluntary process. The parties usually determine the agenda and procedure of negotiation, without the constraint of externally imposed rules or an external authority, such as a judge, to enforce them. The principal sanction supporting standards of decorum and fairness is that of breaking off negotiations, although in some situations, such as collective bargaining, there may also be legal sanctions to compel bargaining.

There are, however, limitations that should be observed by a lawyer in conducting negotiations. As an aspect of the duty to deal fairly with other parties, a lawyer should not engage in the pretense of negotiation when the client has no real intention of seeking agreement. In particular, it is dishonest to pretend to negotiate when the real purpose is to prevent the other party from pursuing an alternative course of action. More generally, a lawyer acting as negotiator should recognize that maintaining a fair and courteous tenor in negotiations can contribute to a satisfactory resolution. This is particularly true when the parties to the negotiation have a continuing relationship with each other, as in collective bargaining or in negotiations between divorcing parents concerning child custody. An agreement that is the product of open, forbearing, and fair-minded negotiation can be a demonstration by the lawyers of the conduct that the parties themselves should display toward each other.


4.3 ILLEGAL, FRAUDULENT, OR UNCONSCIONABLE TRANSACTIONS

A LAWYER SHALL NOT CONCLUDE AN AGREEMENT, OR ASSIST A CLIENT IN CONCLUDING AN AGREEMENT, THAT THE LAWYER KNOWS OR REASONABLY SHOULD KNOW IS ILLEGAL, CONTAINS LEGALLY PROHIBITED TERMS, WOULD WORK A FRAUD, OR WOULD BE HELD TO BE UNCONSCIONABLE AS A MATTER OF LAW.

COMMENT:
Although a lawyer is generally not responsible for the substantive fairness of the result of a negotiation, the lawyer has a duty to see that the product is not offensive to the law. There are many legal proscriptions concerning contractual arrangements. Being a party to some types of agreement is a penal offense. Some types of contractual provisions are prohibited by law, such as provisions purporting to waive certain legally conferred rights. Modern commercial law provides that grossly unfair contracts are unconscionable and may therefore be invalid. Such proscriptions are intended to secure definite legal rights. As an officer of the legal system, a lawyer is required to observe them. On the other hand, there are legal rules that simply make certain contractual provisions unenforceable, allowing one or both parties to avoid the obligation. Inclusion of such provisions in a contract may be unwise but is not ethically improper, nor is it improper to include a provision whose legality is subject to reasonable argument.

A lawyer is not obliged to make an independent investigation of the circumstances of a transaction to assure that it is legally unimpeachable. Generally speaking, the lawyer is only obliged to act upon the basis of matters that the lawyer actually knows or reasonably should be expected to know in the circumstances, and upon reasonable suppositions about the resolution of doubtful questions of law. However, in certain situations the lawyer may be legally required to make a particular investigation or determination with regard to the regularity of a transaction; if so, the lawyer is bound by the prescribed standard of conduct. Moreover, a lawyer is not absolved of responsibility for a legally offensive transaction simply because the client takes the final step in carrying it out. For example, a lawyer who prepares a form contract containing legally proscribed terms is involved in a transaction in which the form is used, even though the lawyer does not participate in a specific transaction.

A transaction that works a fraud on another person is proscribed by law, and a lawyer should not be involved in such a transaction. This principle applies whether the defrauded party is a party to the transaction or not. Hence, a lawyer should not participate in a sham transaction whose purpose is to interfere with an obligation to a third party: a conveyance in fraud of creditors, for example, or a transaction involving tax evasion.

References: DR 7-102 (A)(7), 7-102 (A)(8).

5. INTERMEDIARY BETWEEN CLIENTS

Introduction: A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. A lawyer acts as intermediary, for example, in drafting the documents organizing a business in which two or more clients are entrepreneurs but have differing financial or personal interests in the enterprise. A lawyer acts as intermediary in working out a plan of financial reorganization for an enterprise on behalf of two or more clients who have differing financial interests in the enterprise, or in arranging the distribution of specific property in settlement of an estate among distributees. Under some circumstances, a lawyer may act as intermediary between spouses in arranging the terms of an uncontested separation or divorce settlement. A lawyer may act as intermediary in mediating a dispute between clients.
In all such situations, the lawyer seeks to resolve potentially conflicting interests by developing the parties’ mutual interests. The alternative often is that each party may have to obtain separate representation, with the possibility in some situations of incurring added burdens of cost, complication, and even litigation. In some nonlitigation situations, the stakes involved may be so modest that separate representation of the parties is financially impractical. Given these factors, all the clients may prefer that the lawyer act as intermediary. If they do, and if the lawyer’s independent professional judgment indicates that acting as intermediary will further the client’s mutual interests, a lawyer may undertake that function.

This Rule does not deal with a lawyer acting as mediator or arbitrator between parties with whom the lawyer does not have a client-lawyer relationship, nor does it govern a situation where a lawyer represents a party in negotiation with a party who is unrepresented. A lawyer acts as intermediary under this Rule when the lawyer represents both parties. A key factor in defining the relationship is whether the parties share responsibility for paying the lawyer’s fee, but the existence of a joint or common representation can be inferred from other circumstances. Because confusion can arise as to the lawyer’s role and responsibility where each party is not separately represented, it is important that the lawyer make clear whom he represents in such situations.

5.1 CONDITIONS FOR ACTING AS AN INTERMEDIARY

(a) A LAWYER MAY ACT AS AN INTERMEDIARY BETWEEN CLIENTS IF:

(1) THE POSSIBILITY OF ADJUSTING THE CLIENTS’ INTERESTS IS STRONG; AND

(2) EACH CLIENT WILL BE ABLE TO MAKE ADEQUATELY INFORMED DECISIONS IN THE MATTER, AND THERE IS LITTLE LIKELIHOOD THAT ANY OF THE CLIENTS WILL BE SIGNIFICANTLY PREJUDICED IF THE CONTEMPLATED ADJUSTMENT OF INTERESTS IS UNSUCCESSFUL; AND

(3) THE LAWYER CAN ACT IMPARTIALLY AND WITHOUT IMPROPER EFFECT ON OTHER SERVICES THE LAWYER IS PERFORMING FOR ANY OF THE CLIENTS; AND

(4) THE LAWYER FULLY EXPLAINS TO EACH CLIENT THE IMPLICATIONS OF THE COMMON REPRESENTATION, INCLUDING THE ADVANTAGES AND RISKS INVOLVED, AND OBTAINS EACH CLIENT’S CONSENT TO THE COMMON REPRESENTATION.

(b) WHILE SERVING AS INTERMEDIARY A LAWYER SHALL EXPLAIN FULLY TO EACH CLIENT THE DECISIONS TO BE MADE AND THE CONSIDERATIONS RELEVANT TO MAKING THEM, SO THAT EACH CLIENT CAN MAKE ADEQUATELY INFORMED DECISIONS.
COMMENT:

There are substantial potential advantages to clients when a lawyer serves them as an intermediary, but there is also an element of risk. By hypothesis, the interests of the clients differ in some respects, for otherwise intermediation would be unnecessary. In the process of intermediation, the differences may deepen because unanticipated facts surface, conditions change, or the parties become antagonistic. If the differences become deep enough, the lawyer not only will be unable to continue as intermediary but may have to withdraw altogether. The consequences of intermediation collapsing can include additional cost, embarrassment, and recrimination.

A lawyer must be mindful that these consequences may materialize. In some situations, the risks are so great that intermediation by the lawyer is plainly impossible. A lawyer cannot undertake to adjust a controversy on behalf of both parties when litigation is imminent. Similarly, if the parties contemplate contentious negotiation, it is unlikely that a lawyer could properly represent both in conformity with the Rules of Professional Conduct. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients’ interests can be adjusted by intermediation is ordinarily not very good. It is only when that possibility is strong, according to the lawyer’s independent analysis of the situation, that acting as intermediary is proper.

Whether acting as intermediary is appropriate in given circumstances can depend on the form of intermediation. Forms of intermediation range along a spectrum from arbitration of a controversy, where each client presents his case and the lawyer decides the outcome, to mediation, to joint representation where the parties’ interests are substantially though not entirely compatible. One form of intermediation may be appropriate in circumstances where another would not. The propriety and form of intermediation may also be affected by whether the lawyer subsequently will represent both parties on a continuing basis. Intermediation can be a transitional process, as when a lawyer represents two parties in forming a corporation of which the lawyer then becomes counsel, or where a lawyer seeks to maintain a status quo between clients who have come to such differing positions that they require separate representation. It is therefore essential that the lawyer clarify the form of intermediation involved.

Confidentiality and privilege

Another factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. If a lawyer undertakes common representation of multiple clients, the lawyer is required to keep each client adequately informed of matters affecting that client’s interest in the transaction. See Rule 1.4. Preserving confidentiality and maintaining adequate communication with each client requires a delicate balance. If the balance cannot be maintained, the common representation is improper.

Regarding the attorney-client privilege, the possibility that the lawyer may have to testify about a communication from one of the clients must be foreseen and explained to the clients. How the applicable rule of attorney-client privilege deals with the problem of jointly
represented clients may also be relevant. The prevailing formulation is that, as between the clients, the privilege does not attach to communications from any jointly represented client to the attorney relating to the subject of the joint representation. Hence, it must be assumed that if litigation eventuates between the clients, none of the lawyer’s communications with any of them or their communications with each other will be protected by the privilege.

**Likelihood of prejudice**

In considering whether either client may suffer prejudicial consequences from the joint representation, relevant factors include the effect of delay in resolving the matter; whether special legal expertise is required in representation of any of the clients’ interests; whether the lawyer may be asked to represent one client against the other in the future; and whether relationships with third parties might be implicated.

**Impartiality**

A lawyer should not act as intermediary when the lawyer’s impartiality might reasonably be questioned. For example, if a lawyer has acted as counsel for one of the clients for a long period and in a variety of matters, it would be difficult for the lawyer to be impartial between that client and one to whom the lawyer had only recently been introduced. Similarly, if a lawyer is representing one of the parties as advocate in pending litigation, it could be difficult for the lawyer also to act as intermediary between that client and another in a matter related to the litigation.

**Disclosure**

If, having regard for all these factors, a lawyer concludes that acting as intermediary between clients would be in their interest, the lawyer should fully inform the clients of the implications of doing so, and proceed only upon consent based on such a disclosure. It must be made clear to the clients that the lawyer’s role is not the one of partisanship naturally expected in other circumstances. Disclosure must continue during the joint representation. If adequate communication with all clients becomes embarrassing in any respect, this joint representation should be terminated.


5.2 WITHDRAWAL AS AN INTERMEDIARY

A LAWYER SHALL WITHDRAW AS INTERMEDIARY IF ANY OF THE CLIENTS SO REQUESTS, IF THE CONDITIONS STATED IN RULE 5.1 CANNOT BE MET, OR IF IT BECOMES APPARENT THAT A MUTUALLY ADVANTAGEOUS ADJUSTMENT OF INTERESTS CANNOT BE MADE. UPON WITHDRAWAL, THE LAWYER MAY CONTINUE TO REPRESENT ANY OF THE CLIENTS ONLY TO THE EXTENT
COMPATIBLE WITH THE LAWYER’S RESPONSIBILITIES TO THE OTHER CLIENT OR CLIENTS.

COMMENT:

The fact that a lawyer has undertaken common representation of two or more clients does not vitiate the rights of each client in the client-lawyer relationship. Each client remains free to discharge the lawyer, with or without cause. See Rule 1.16. Each client is protected by the lawyer’s duties of diligent and loyal representation. See Rules 1.5 and 1.7. Furthermore, if the lawyer is discharged or obliged to withdraw, each former client remains protected by the provisions of Rule 1.10 concerning representation adverse to a former client. For example, if a lawyer undertook to mediate a dispute between clients, it would be improper for him later to represent one against the other in litigation concerning the dispute. Under some circumstances, the lawyer would be required to withdraw entirely from the representation of either client.

References: EC 5-20; DR 5-105(B).

6. LEGAL EVALUATOR

Introduction: A lawyer may be retained to make a legal evaluation of a client’s affairs. A legal evaluation may be performed solely or primarily for the client’s internal use; for example, an investigation ordered by a corporation concerning legally questionable activity of its employees. 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 prospect lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the materiality of matter subject to disclosure under the securities laws. In other instances, the evaluation may be required by a third person such as a purchaser of a business.

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 instance 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 on the same kind of question. The critical question is whether the opinion is to be made public as a legal determination of the matter in question.

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 these Rules. The essential distinction is whether the lawyer is retained by the person whose affairs are being examined. If the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, although they may be subject to the qualifications stated in Rules 6.2 and 6.3. If the lawyer is retained by someone else, the lawyer is not bound by
those general rules. For this reason, when a legal evaluation or investigation of the affairs of a person or organization is contemplated, 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.

A legal evaluation can be performed by a lawyer solely for the benefit of the client or for the benefit of third persons. When the evaluation is intended solely for the client, the transaction is unqualifiedly subject to the rules of client-lawyer confidentiality and, at least ordinarily, the attorney-client privilege. When the evaluation is for third persons, however, they have an interest in the integrity of the evaluation. Depending on the terms of reference under which the evaluation is conducted, that interest may be merely the right to know that an evaluation has been made or may include the right to the supplied with a full report of the evaluation. Whatever the third-party interest, it implies that the lawyer conducting the evaluation has duties not only to the client but also to that party.

The function of legal evaluation is a developing one. In contrast with a financial audit by a certified public accountant, there are no established conventions concerning the depth and procedures of a legal evaluation. These aspects of a legal audit must therefore be prescribed by the terms of reference under which the evaluation is made or determined by inference from the circumstances.

6.1 CONFIDENTIAL EVALUATION

A LAWYER UNDERTAKES A CONFIDENTIAL EVALUATION OF A MATTER AFFECTING A CLIENT WHEN A REPORT OF THE EVALUATION IS TO BE GIVEN TO THE CLIENT ALONE AND TO BE DISCLOSED TO OTHERS ONLY AT THE DIRECTION OF THE CLIENT.

COMMENT:

A lawyer may be employed to make an evaluation of a client’s affairs for the purpose of informing the client or enabling the client to take appropriate action. Such evaluations are increasingly necessary in the activities of organizations, public as well as private, that have complex operations with important legal implications. A lawyer may also be employed to make an evaluation that is provisionally intended by the client for the use or reference of third persons, where the client retains the right to be the first apprised of the evaluation and to withhold its dissemination if the client so decides. In either circumstance, the lawyer’s function is essentially that of giving advice coupled with making an inquiry upon which to base the advice.

In making the evaluation the lawyer assumes responsibility solely to the client, subject to the Rules of Professional Conduct. Communications that are made by the client to the lawyer in the course of the evaluation are protected by the rule of client-lawyer confidentiality and by the attorney-client privilege. When the client is an organization, the same protections are afforded communications by persons who personify the organization for purposes of the client-lawyer relationship. When a lawyer undertakes an evaluation of a matter affecting a client, it should be assumed that the evaluation is confidential except when the terms of reference otherwise provide.
6.2 INDEPENDENT EVALUATION

(a) A LAWYER UNDERTAKES AN INDEPENDENT EVALUATION OF A MATTER AFFECTING A CLIENT WHEN A REPORT OF THE EVALUATION IS TO BE GIVEN TO SOMEONE OTHER THAN THE CLIENT. A LAWYER MAY MAKE AN INDEPENDENT EVALUATION IF:

(1) MAKING THE EVALUATION IS COMPATIBLE WITH OTHER ASPECTS OF THE LAWYER’S RELATIONSHIP WITH THE CLIENT; AND

(2) THE TERMS UPON WHICH THE EVALUATION IS MADE ARE CLEARLY DESCRIBED, PARTICULARLY THE LAWYER’S ACCESS TO INFORMATION AND THE PERSONS TO WHOM THE REPORT OF THE EVALUATION IS TO BE MADE; AND

(3) THE CLIENT AGREES THAT THE LAWYER MAY, WITHIN THE TERMS UPON WHICH THE EVALUATION IS MADE, DISCLOSE INFORMATION ABOUT THE CLIENT, INCLUDING MATTER OTHERWISE CONFIDENTIAL OR PRIVILEGED, THAT THE LAWYER DETERMINES OUGHT TO BE DISCLOSED IN MAKING A FAIR AND ACCURATE EVALUATION; AND

(4) AFTER ADEQUATE DISCLOSURE OF THE TERMS UPON WHICH THE EVALUATION IS TO BE MADE AND THEIR IMPLICATIONS FOR THE CLIENT, THE CLIENT REQUESTS THE LAWYER TO MAKE THE EVALUATION.

(b) IN REPORTING THE EVALUATION, THE LAWYER SHALL INDICATE ANY LIMITATIONS ON THE SCOPE OF THE INQUIRY THAT ARE REASONABLY NECESSARY TO A PROPER INTERPRETATION OF THE REPORT.

(c) IF, AFTER A LAWYER HAS COMMENCED AN INDEPENDENT EVALUATION, THE CLIENT REFUSES TO COMPLY WITH THE TERMS UPON WHICH IT IS TO BE MADE, THE LAWYER SHALL GIVE TO THE PERSON FOR WHOM THE EVALUATION IS INTENDED THE FULLEST REPORT THAT CAN BE MADE IN THE CIRCUMSTANCES.

(d) EXCEPT AS DISCLOSURE IS REQUIRED IN CONNECTION WITH A REPORT OF THE EVALUATION, INFORMATION RELATING TO AN INDEPENDENT EVALUATION IS CONFIDENTIAL UNDER RULE 1.7.

COMMENT:
When a lawyer undertakes an independent evaluation of a matter affecting a client, it is contemplated that the third person, who may or may not be specifically identified, will rely on the evaluation. The lawyer therefore assumes a duty to that person as well as to the client. The duty to the third person may be one of reasonable care, perhaps a duty to use high care, perhaps some other standard, depending on the law governing the particular relationships involved. For example, the duty to a purchaser of property arising from a title evaluation may be different from the duty to prospective shareholders arising from a legal evaluation of a company issuing shares. The duty, whatever it is, is a matter of law and not professional ethics. Even if the duty is legally minimal, however, it goes beyond the obligations a lawyer normally has to third persons.

A related responsibility assumed by the lawyer is that of making an informative report. The lawyer therefore must make disclosures about the client’s affairs in order to carry out the representation, an obligation that is the reverse of the usual duty to keep information confidential.

**Incompatibility with other functions**

Since an independent legal evaluation involves a change in the normal terms of the client-lawyer relationship, careful analysis of the situation and an explanation to the client are required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is not incompatible 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 independent evaluation concerning the same or related transactions. Assuming that no such incompatibility is apparent, the lawyer should fully advise the client of the implications, giving particular attention to the lawyer’s responsibilities to third persons and to the necessity of disseminating the findings. The lawyer properly may proceed only if the client consents after having been so informed.

**Disclosure**

The terms upon which the evaluation is conducted should be disclosed to the intended recipients of the evaluation. The form and extent of the disclosure may depend on the number, situation, and identifiability of such persons. If the recipient is a specific person, for example the purchaser of a business, the terms of reference may be different from those governing a report to a group that is large in number and changing in composition, such as prospective purchasers of securities. In some circumstances, it may be impossible to identify any specific person who foreseeably will make use of the evaluation. In any event, the recipient should be enabled fairly to assess the depth and independence of the report.

**Access to and disclosure of information**

The quality of an independent 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 non-cooperation of persons having relevant information. Any such limitations should be described in
the report of the evaluation. Subject to those limitations, the client must authorize the lawyer to make whatever disclosure is required for a fair and accurate evaluation. A disinterested inquiry is impossible if the client refuses to permit disclosure of results that might be considered unfavorable. Having agreed to an independent evaluation, the client should not be permitted to prevent a fair and candid report. Correlatively, the lawyer, having assumed responsibility for an independent evaluation, should fulfill the duty to the third person despite the client’s demands to the contrary.

References: DR 4-101(C).

6.3 FINANCIAL AUDITORS’ REQUESTS FOR INFORMATION

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 SHALL BE MADE IN ACCORDANCE WITH PROCEDURES RECOGNIZED IN THE LEGAL PROFESSION UNLESS SOME OTHER PROCEDURE IS ESTABLISHED AFTER CONSENT BY THE CLIENT UPON ADEQUATE DISCLOSURE.

COMMENT:

In a financial audit of a client’s affairs, the auditor may be required to obtain information concerning legal claims by or against the client, or other information concerning the client’s legal situation. Information necessary to the audit may concern matter protected by the rules of client-lawyer confidentiality and attorney-client privilege. A careful procedure is therefore required for eliciting the information. Such a procedure has been prescribed in the American Bar Association Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information, adopted 1975. In general, that procedure calls for the client to inform the lawyer of the auditor’s request for information and to request that the lawyer respond on behalf of the client. The procedure prescribes that exchange in detail, but allows for variation as circumstances may require.

The procedure prescribed by the Statement principally concerns matter that is informational as distinct from evaluative. In that respect, the Statement involves a specific application of the rule that a lawyer may disclose confidential information upon the request of the client. See Rule 1.7. However, a response to an auditor’s request may require the lawyer to evaluate legal claims affecting the client. In making such a legal evaluation, a lawyer should do so according to recognized procedures such as Paragraph 5 of the Statement, unless there is proper occasion for responding on some other basis. Paragraph 5 of the Statement provides in part:

In view of the inherent uncertainties, the lawyer should normally refrain from expressing judgments as to outcome except in those relatively few clear cases where it appears to the lawyer that an unfavorable outcome is either “probable” or “remote;” for purposes of any such judgment it is appropriate to use the following meanings:
(i) probable — an unfavorable outcome for the client is probable if the prospects of the claimant not succeeding are judged to be extremely doubtful and the prospects for success by the client in its defense are judged to be slight.

(ii) remote — an unfavorable outcome is remote if the prospects for the client not succeeding in its defense are judged to be extremely doubtful and the prospects of success by the claimant are judged to be slight.

If, in the opinion of the lawyer, considerations within the province of his professional judgment bear on a particular loss contingency to the degree necessary to make an informed judgment, he may in appropriate circumstances communicate to the auditor his view that an unfavorable outcome is “probable” or “remote,” applying the above meanings.


7. LAW FIRMS AND ASSOCIATIONS

Introduction: A majority of American lawyers practice in law firms or the law departments of government or private organizations. In the legal and ethical rules governing lawyers’ conduct, a law firm or law department generally is treated as though it were a single practitioner. Thus, the rules prohibiting representation of opposing parties in litigation or suing one’s own client apply not only to a single practitioner but also to a law firm or law department. So also, the rule that prohibits a lawyer from revealing the confidences of a client requires that all lawyers in a firm refrain from revealing confidences of a client served by any lawyer in the firm. However, a law firm or organization is in fact comprised of individual lawyers who work in association with each other. In certain circumstances, that fact is significant for purposes of professional ethics. These circumstances include the question of vicarious disqualification of lawyers in law firms and legal departments, a supervising lawyer’s responsibility for ethical misconduct by a subordinate lawyer, and a subordinate lawyer’s responsibility for misconduct committed at the direction of a supervisor.

For purposes of the Rules of Professional Conduct, the term “law firm” includes lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers employed in the legal department of a government agency, or in a legal services organization. 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 if they share professional work and fees regularly, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the ethical rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in
litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

With respect to the law department of an enterprise or government agency, 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. So also, the client of a government law department may consist of a specific agency or bureau, but in other cases, such as an attorney general’s office, the client may be the government as a whole. In all such instances, the identity of the client may vary according to the type of matter in which the lawyer is acting. Similar questions can arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal aid agency 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 ethical rule that is involved, and on the specific facts of the situation.

7.1 VICARIOUS DISQUALIFICATION

(a) A LAW FIRM SHALL NOT REPRESENT MULTIPLE CLIENTS WHEN A LAWYER PRACTICING ALONE WOULD BE PROHIBITED FROM DOING SO.

(b) WHEN LAWYERS TERMINATE AN ASSOCIATION IN A FIRM, NEITHER A LAWYER REMAINING IN THE FIRM NOR ONE WHO HAS LEFT IT, NOR ANY OTHER LAWYER WITH WHOM EITHER LAWYER SUBSEQUENTLY BECOMES ASSOCIATED, SHALL UNDERTAKE REPRESENTATION THAT INVOLVES:

(1) A SIGNIFICANT RISK OF DISCLOSING CONFIDENCES OF A CLIENT IN VIOLATION OF RULE 1.17, OR MAKING USE OF INFORMATION TO THE DISADVANTAGE OF A FORMER CLIENT IN VIOLATION OF RULE 1.10; OR

(2) A LAWYER’S ASSUMING SIGNIFICANT PARTICIPATION IN REPRESENTING A PERSON IN THE SAME OR A SUBSTANTIALLY RELATED MATTER IF THE INTEREST OF THAT PERSON IS ADVERSE IN ANY MATERIAL RESPECT TO THAT OF A CLIENT IN Whose REPRESENTATION THE LAWYER HAD PREVIOUSLY PARTICIPATED IN A SIGNIFICANT WAY.

(c) SUBJECT TO THE LIMITATIONS OF RULE 1.8, A DISQUALIFICATION PRESCRIBED BY THIS RULE MAY BE WAIVED BY THE CONSENT OF THE AFFECTED CLIENT UPON ADEQUATE DISCLOSURE.

COMMENT:
The rule of vicarious disqualification gives effect to the principle of loyalty to the client as it applies to lawyers who practice in association, as in a law firm or a legal department. When lawyers practice in a firm, as defined in the Rules of Professional Conduct, their relationships with current clients are governed by the same rules that apply to a lawyer practicing alone. Thus, a law firm cannot represent different clients who have conflicting interests as defined in Rule 1.8. So also, a firm that has formerly represented a client may not undertake representation of a new client when doing so would violate the provisions of Rule 1.10. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the firm is the same as a single lawyer is no longer wholly realistic. Hence, the problem must be analyzed in terms of vicarious application of the principle of loyalty. In such an analysis there are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having the fullest choice of legal counsel reasonably possible. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection it should be recognized that today most lawyers practice in firms, that most are to some degree specialists in one field or another, and that most move from one association to another several times in their careers. If the concept of vicarious disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

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 firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one firm and then becomes a partner in another firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption could properly be applied when both firms are relatively small and all the clients extensively represented, but may be unrealistic when the firms are large or where the clients are represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms, and does not address associations other than law firms; for example, lawyers associated in the law department of a government agency.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a twofold problem. First, prohibiting the appearance of impropriety can be taken to prohibit any new client-lawyer relationship that might make a former client feel uncomfortable. If that meaning is adopted, disqualification becomes 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 vicarious disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety. On the
contrary, the interrelationships between and among the persons involved occur in complex variety.

A rule based on a functional analysis of these relationships is more appropriate for determining the question of vicarious disqualification. Two functions are involved, preserving client confidences and avoiding positions adverse to a client.

Preservation of client confidences is a question of access to information. Access to information in turn is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all the confidences of all the firm’s clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to the confidences of the clients he has served but not those of other clients.

An infinite range of variations between these cases can be conceived. Relevant factors in determining the likelihood of actual access to client confidences include the professional experience of the lawyer in question, the division of actual responsibility for the matters involved, the organizational structure of the firm or other association involved, and the sensitivity of the information and its relevance to the affairs of the affected clients. Application of this Rule can therefore depend on a situation’s particular facts. In any such inquiry, the burden of proof should rest upon the lawyer whose disqualification is sought.

Independent of the question of disqualification, a lawyer changing professional association has a continuing duty to preserve confidences of clients formerly represented. See Rules 1.7, 1.10 and 1.11. If a lawyer breaches that duty by disclosing the confidences of a former client to lawyers in a new association, participation in the breach by receiving the disclosure would also be a violation of professional duty.

The second aspect of loyalty to client is the avoidance of positions adverse to a client. Determining this question requires analysis of the positions of each client in the matter in question and also of the nature and extent of the lawyer’s responsibility on behalf of each. Proper resolution of a specific situation is sometimes quite clear. For example, if the positions of two clients are opposed in litigation, a lawyer who substantially assisted in preparing one client’s case could not thereafter participate in representing the opposing party. However, that would not preclude representation of the opposing party by the firm with which the lawyer had become associated if the lawyer had no involvement in the representation and if no risk of disclosing confidences was involved. So also, a lawyer who had prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. On the other hand, a lawyer who prepared isolated legal memoranda for a client while in one firm should be able to reassociate with another firm representing an opposing party without disqualifying the latter firm, if the lawyer thereafter takes no part in the matter on which he worked.
Between such instances is a range involving difficult questions of proximity and degree. Relevant factors include the kind and degree of the lawyer’s participation in the respective representations; whether the lawyer’s involvement concerned issues of law or issues of fact particular to one of the clients; the scope of the matter involved; and the separation in time between the lawyer’s prior and subsequent involvements. In any event, the question is not simply whether each of the firms developed a position on behalf of one affected client that was adverse to the other. The question is whether the lawyer was a participant in the work involved for one client and whether the lawyer has become such a participant for the second client. As in the question of preserving confidences, the burden of proof should be on the lawyer whose disqualification is sought.


7.2 RESPONSIBILITIES OF A SUPERVISORY LAWYER

(a) A LAWYER HAVING SUPERVISORY AUTHORITY OVER ANOTHER LAWYER SHALL MAKE A REASONABLE EFFORT TO SEE THAT THE CONDUCT OF THE LAWYER UNDER SUPERVISION CONFORMS TO THE RULES OF PROFESSIONAL CONDUCT.

(b) A LAWYER IS CHARGEABLE WITH ANOTHER LAWYER’S VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT IF:

(1) THE LAWYER ORDERS OR RATIFIES THE CONDUCT INVOLVED; OR

(2) THE LAWYER HAS SUPERVISORY RESPONSIBILITY OVER THE OTHER LAWYER AND HAS KNOWLEDGE OF THE CONDUCT AT A TIME WHEN ITS CONSEQUENCES CAN BE AVOIDED OR MITIGATED BUT FAILS TO TAKE APPROPRIATE REMEDIAL ACTION.

COMMENT:

For disciplinary purposes every lawyer ordinarily is answerable for his or her own conduct. Correlatively, there is no vicarious disciplinary liability by which a lawyer is per se responsible for the conduct of a partner, associate, or subordinate. Whether there may exist civil or criminal liability for another lawyer’s conduct is a question of law beyond the scope of the Rules of Professional Conduct. To a limited extent, however, a lawyer is responsible for disciplinary purposes for another lawyer’s conduct.
Three distinct relationships and obligations are referred to in this Rule. Paragraph (a) refers broadly to all lawyers who have supervisory authority, direct or indirect, over the professional work of a firm. This includes members of a partnership, except those explicitly denied authority in management of the partnership; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Partners in a private firm individually are responsible for seeing that appropriate measures are taken by the firm, including its other partners. A lawyer having such authority has an educational and preventive duty to use reasonable efforts to see that the Rules are complied with in the course of the firm’s activity.

The measures a firm should take to fulfill its supervisory responsibility depend on the firm’s structure and the nature of its practice. They should include procedures for systematic monitoring of the ethical as well as the technical aspects of each lawyer’s work. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. A large firm should have a procedure whereby junior members can seek ethical guidance from top-level authority in the firm outside normal management channels. See Rule 7.3. 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. Firms, whether large or small, may also rely on continuing legal education obligations among their members. The essential points are that the ethical atmosphere of a firm can influence the conduct of all its members and that a lawyer having authority over the work of another may not simply assume that the subordinate lawyer will inevitably conform to the Rules.

Paragraph (b)(1) expresses a general principle of responsibility for acts of another that have been ordered or ratified.

Paragraph (b)(2) defines the duty of a lawyer having direct authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Thus, partners of a private firm do not as such have direct authority over all work being done by the firm, but a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. When a lawyer has such authority, in accordance with general principles of law the supervisory lawyer is responsible for conduct that the supervisor has ordered or ratified. Beyond this, the supervisor should have a duty of intervention to prevent avoidable consequences of misconduct, once the supervisor learns of it. The supervisor’s authority entails the power to act in such circumstances and failure to use that power is an act of professional neglect. Thus, if a supervising lawyer learned that a subordinate had misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension. See Rule 4.2.

7.3 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A LAWYER ACTING UNDER THE SUPERVISORY AUTHORITY OF ANOTHER PERSON IS BOUND BY THE RULES OF PROFESSIONAL CONDUCT NOTWITHSTANDING THE FACT THAT THE LAWYER’S CONDUCT WAS ORDERED BY THE SUPERVISOR.

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

COMMENT:

By virtue of being licensed to practice, a lawyer assumes personal responsibility for complying with the Rules of Professional Conduct. A lawyer is not relieved of responsibility for a violation by the fact that the conduct in question was suggested by a client; so also, that responsibility is not relieved by the fact that the lawyer acted under the direction of a superior. Thus, if a subordinate lawyer knowingly files a frivolous pleading, it constitutes misconduct even though the filing was directed by a supervisor. However, the fact that an act was done at the direction of a supervisor may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules, or should have taken remedial action in particular circumstances. 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 he knew or should have known of the document’s frivolous character. Moreover, the fact that a lawyer was acting under orders of a supervisor may be relevant in determining the degree of violation and the sanction to be imposed.

When lawyers having a superior-subordinate relationship encounter a matter involving professional discretion, it is incumbent on the superior to assume authority and responsibility for deciding how the discretion should be exercised. Otherwise a consistent course of action or position could not be taken. Otherwise a consistent course of action or position could not be taken. When a course of action raises a question of professional duty a more difficult problem is presented. 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 superior, and a subordinate may be guided accordingly. For example, if a reasonably arguable question arises whether the interests of two clients conflict under Rule 1.8, the superior’s resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.


7.4 SUPERVISION OF NONLAWYER ASSISTANTS
A LAWYER SHALL USE REASONABLE EFFORT TO ENSURE THAT NONLAWYERS EMPLOYED OR RETAINED BY THE LAWYER CONDUCT THEMSELVES IN A MANNER COMPATIBLE WITH THE PROFESSIONAL OBLIGATIONS OF THE LAWYER.

COMMENT:

Lawyers generally employ assistants in their practice, including secretaries, investigators, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. The lawyer should retain complete responsibility for their work product.

References: EC 3-6, EC 4-5, EC 7-28; DR 4-101(D); ABA Informal Op. 1367 (1976).

7.5 PROFESSIONAL INDEPENDENCE OF A FIRM

A LAWYER SHALL NOT PRACTICE WITH A FIRM IN WHICH AN INTEREST IS OWNED OR MANAGERIAL AUTHORITY IS EXERCISED BY A NONLAWYER, UNLESS SERVICES CAN BE RENDERED IN CONFORMITY WITH THE RULES OF PROFESSIONAL CONDUCT. THE TERMS OF THE RELATIONSHIP SHALL EXPRESSLY PROVIDE THAT:

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

(b) THE CONFIDENCES OF CLIENTS ARE PROTECTED AS REQUIRED BY RULE 1.7; AND

(c) THE ARRANGEMENT DOES NOT INVOLVE ADVERTISING OR SOLICITATION PROHIBITED BY RULES 9.2 AND 9.3; AND

(d) THE ARRANGEMENT DOES NOT RESULT IN CHARGING A CLIENT A FEE WHICH VIOLATES RULE 1.6.

COMMENT:

In its classical form the law firm consisted solely of lawyers, assisted by apprentices and scriveners. Over the course of time the law firm has evolved into a variety of organizations. These include multi-member partnerships, firms employing paraprofessionals on a large scale, professional corporations, casualty insurance companies that employ counsel who represent insureds, law departments of private organizations and government agencies, legal aid agencies and defender organizations, and group legal service organizations in which nonlawyers, or lawyers acting in a managerial capacity, may be directors or have managerial responsibility. Lawyers may be employed in an organization along with nonlawyers to render both legal and other professionals services. In professional corporations it is sometimes essential or convenient
that a nonlawyer be an officer or director. Provision has been made for ownership in a firm by an estate or a surviving spouse of a lawyer, to facilitate transmission of a lawyer’s partnership interest at death. Many modern law firms employ nonlawyers to exercise broad managerial authority in the operation of the firm.

All such arrangements in which nonlawyers participate raise problems concerning the preservation of the client-lawyer relationship. These problems must be dealt with if the firm is to conform to the requirements of ethical practice. Given the complex variety of modern legal services, it is impractical to specify organizational forms that uniquely can guaranty compliance with the Rules of Professional Conduct. Thus, if nonlawyers were prohibited from having managerial authority in a legal services organization, management efficiency could be hampered in private firms and community participation in legal aid would be curtailed. So also, many arrangements in which corporations are involved in providing themselves or others with legal assistance would be prohibited. However, the fundamental requirements of ethical practice must be adhered to in any legal services organization, whatever its structure.

Where nonlawyers have an ownership interest or managerial authority in an organization rendering legal services, the requirements of this Rule must be met. To that end it may be advisable for the organization to establish written specifications concerning independence of professional judgment. For example, many corporations have such specifications concerning the authority of general counsel, and legal aid organizations have similar definitions of the authority of staff attorneys.


B. THE RESPONSIBILITIES OF A PUBLIC PROFESSION

8. PUBLIC SERVICE

Introduction: The distinctive characteristic of a profession is the dedication of its members to public service. Commitment to public service is evidenced not only by adherence to professional ethics but also by direct effort in advancement of the public good. A lawyer may properly be expected to contribute time and effort to civic undertakings in general and to improvement in the administration of the law in particular. Such endeavors may at times be controversial and involve a lawyer in causes that other clients regard as unworthy, trivial, or burdensome. A lawyer should persevere in public service notwithstanding such disapproval, with the same diligence and loyalty as in the service of a client’s cause.

8.1 PRO BONO PUBLICO SERVICE

A LAWYER SHALL RENDER UNPAID PUBLIC INTEREST LEGAL SERVICE. A LAWYER MAY DISCHARGE THIS RESPONSIBILITY BY SERVICE IN ACTIVITIES FOR IMPROVING THE LAW, THE LEGAL SYSTEM, OR THE LEGAL PROFESSION, OR BY
PROVIDING PROFESSIONAL SERVICES TO PERSONS OF LIMITED MEANS OR TO PUBLIC SERVICE GROUPS OR ORGANIZATIONS. A LAWYER SHALL MAKE AN ANNUAL REPORT CONCERNING SUCH SERVICE TO APPROPRIATE REGULATORY AUTHORITY.

COMMENT:

As stated by the ABA House of Delegates, “it is the basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services.” This responsibility derives from the lawyer’s commitment to the law’s ideal of equal justice. The lawyer’s service may be rendered directly in a public service activity or by participation in programs administering such service, including programs sponsored by the organized bar and by civic groups and organizations.

The responsibility for pro bono publico service should be borne by each lawyer individually. This Rule does not specify the contribution to be made. Such a requirement could be justly imposed but would involve difficulties of enforcement and of equitable distribution of burden. Hence, this Rule requires only that there be some contribution and that some report concerning it be rendered annually to the appropriate bar regulatory authority. The report could, for example, consist of a simple declaration in connection with the annual renewal of a lawyer’s license to practice. A lawyer unable to make a contribution in case of extreme hardship, such as severe economic adversity or physical or mental disability, could report that fact in satisfaction of the requirements of this Rule.

Pro bono service is not a substitute for providing legal services through public means as a matter of public policy; for example, to the poor, to unrepresented criminal defendants, and to other groups that may be considered entitled to such assistance.

References: Canon 2; EC 2-16, 2-25; ABA House of Delegates Resolution on Public Interest Legal Services, August, 1975; ABA Special Committee on Public Interest Practice, Implementing the Lawyer’s Public Interest Practice Obligation (1977); Association of the Bar of the City of New York, Report of the Special Committee on the Lawyer’s Pro Bono Obligation (1979).

8.2 CONFLICT OF INTEREST IN PRO BONO PUBLICO SERVICE

(a) A LAWYER ENGAGED IN SERVICE PRO BONO PUBLICO SHALL AVOID IMPROPER CONFLICTS OF INTEREST THEREIN.

(b) A LAWYER MAY SERVE AS A DIRECTOR, OFFICER, OR MEMBER OF AN ORGANIZATION PROVIDING LEGAL SERVICES TO PERSONS OF LIMITED MEANS NOTWITHSTANDING THAT SUCH SERVICES ARE PROVIDED TO PERSONS HAVING INTERESTS ADVERSE TO A CLIENT OF THE LAWYER IF:

(1) THE ORGANIZATION COMPLIES WITH RULE 7.5 CONCERNING THE PROFESSIONAL INDEPENDENCE OF ITS LEGAL STAFF;
(2) WHEN THE INTERESTS OF A CLIENT OF THE LAWYER COULD BE AFFECTED, THE LAWYER TAKES NO PART IN ANY DECISION BY THE ORGANIZATION THAT COULD HAVE A MATERIAL ADVERSE EFFECT ON THE INTEREST OF A CLIENT OF THE ORGANIZATION OR UPON THE INDEPENDENCE OF PROFESSIONAL JUDGMENT OF A LAWYER REPRESENTING SUCH A CLIENT; AND

(3) THE LAWYER OTHERWISE COMPLIES WITH RULE 1.8 WITH RESPECT TO THE LAWYER’S CLIENT.

(c) A LAWYER MAY SERVE AS A DIRECTOR, MEMBER OR OFFICER OF AN ORGANIZATION INVOLVED IN REFORM OF THE LAW OR ITS ADMINISTRATION NOTWITHSTANDING THE FACT THAT THE REFORM MAY AFFECT INTERESTS OF A CLIENT OF THE LAWYER IF:

(1) WHEN THE INTERESTS OF THE CLIENT COULD BE AFFECTED, THAT FACT IS DISCLOSED IN THE COURSE OF DELIBERATIONS ON THE MATTER, BUT THE IDENTITY OF THE CLIENT NEED NOT BE DISCLOSED;

(2) WHEN THE CLIENT COULD BE ADVERSELY AFFECTED, THE LAWYER COMPLIES WITH RULE 1.8 WITH RESPECT TO THE CLIENT; AND

(3) THE LAWYER TAKES NO PART IN ANY DECISION THAT COULD RESULT IN A DIRECT MATERIAL BENEFIT OR DETRIMENT TO THE CLIENT.

COMMENT:

A lawyer has a responsibility to assist in providing legal services to persons of limited means and to work for improvement of the law. Fulfilling those responsibilities can involve membership in organizations whose activities may involve positions adverse to the lawyer’s clients. If a lawyer were prohibited from association with organizations whose activities include such positions, it would follow that a lawyer could not serve on a legal services board if legal services clients might be involved in litigation against a client of the lawyer. It might also follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. Such disqualifications would severely curtail the profession’s involvement in such activities.

The provisions of this Rule accommodate these considerations. In the case of legal service organizations, it may also be necessary in appropriate cases to reassure a client 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.

9. INFORMATION ABOUT LEGAL SERVICES

Introduction: 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 a 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 previously 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. Regulation is therefore necessary. The Rules governing advertising and solicitation permit public dissemination of truthful information about legal services, while prohibiting misleading communications and restricting direct solicitation.

9.1 TRUTHFULNESS

A LAWYER SHALL NOT MAKE ANY FALSE, FRAUDULENT, OR MISLEADING STATEMENT ABOUT THE LAWYER OR THE LAWYER’S SERVICES TO A CLIENT OR PROSPECTIVE CLIENT. A STATEMENT IS FALSE, FRAUDULENT, OR MISLEADING IF IT:

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

(b) IS LIKELY TO CREATE AN UNJUSTIFIED EXPECTATION, OR STATES OR IMPLIES THAT THE LAWYER CAN ACHIEVE RESULTS BY LEGALLY IMPROPER MEANS; OR

(c) COMPARES THE QUALITY OF THE LAWYER’S SERVICES WITH THAT OF OTHER LAWYERS’ SERVICES, UNLESS THE COMPARISON CAN BE FACTUALLY SUBSTANTIATED.

COMMENT:

Whatever means a lawyer may use to make known the professional services he or she provides, statement about the lawyer or such services should be truthful.


9.2 ADVERTISING
(a) A LAWYER MAY ADVERTISE SERVICES THROUGH PUBLIC
COMMUNICATIONS MEDIA SUCH AS A PROFESSIONAL ANNOUNCEMENT,
TELEPHONE DIRECTORY, LEGAL DIRECTORY, NEWSPAPER OR OTHER
PERIODICAL, RADIO, TELEVISION, OR GENERAL DIRECT MAILING, SUBJECT O
THE REQUIREMENT OF RULE 9.1 AND 9.3.

(b) A COPY OR RECORD OF AN ADVERTISEMENT IN ITS ENTIRETY SHALL
BE KEPT FOR ONE YEAR AFTER ITS DISSEMINATION.

(c) A LAWYER SHALL NOT GIVE ANYTHING OF VALUE TO A PERSON FOR
RECOMMENDING THE LAWYER’S SERVICES, EXCEPT THAT A LAWYER MAY PAY
THE REASONABLE COST OF ADVERTISING PERMITTED BY THIS RULE.

COMMENT:

Lawyer advertising traditionally was prohibited by rules of professional ethics, but is now
substantially protected by the Constitution. See Bates v. State Bar of Arizona, 433 U.S. 350
(1977). This Rule permits public dissemination of information that directs attention to the need
for legal services or which might assist in finding a lawyer. Advertising may include a lawyer’s
name or firm name, address, 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. The media of communication may include
television, radio, newspapers, and direct mailing, as well as such traditional means as legal
directories, law lists, and the telephone directory.

It is universally recognized that there should be prohibitions on false and misleading
advertising. See Rule 9.1. Beyond this basic requirement, choice of technique in advertising
legal services is a matter of speculation as to effectiveness and subjective judgment as to taste.
Some jurisdictions have had extensive prohibitions against television advertising, for example,
against advertising going beyond a few permitted 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 middle income; prohibiting television advertising
therefore would impede flow of information about legal services to a substantial sector of the
public. Limiting the information that advertising may contain has a similar effect and assumes
that the bar can accurately forecast in ethical rules the kind of information that is relevant to the
public.

Record of advertising

Paragraph (b) requires that a record of the content of advertising be kept in order to
facilitate enforcement of this Rule. It does not require that advertising be subject to review prior
to dissemination. Such a requirement would be burdensome and expensive relative to its
possible benefits, and is of doubtful constitutionality.

Paying others to recommend a lawyer
A lawyer should be allowed to pay for advertising permitted by this Rule; for example, media charges or the cost of participating in a lawyer referral service. Beyond this, a lawyer should not pay another person for channeling professional work. Paying a person to solicit by personal contact with nonlawyers is prohibited. See Rule 9.3. However, 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.


9.3 SOLICITATION

(a) A LAWYER SHALL NOT INITIATE CONTACT WITH A PROSPECTIVE CLIENT IF:

(1) THE LAWYER REASONABLY SHOULD KNOW THAT THE PHYSICAL, EMOTIONAL, OR MENTAL STATE OF THE PERSON SOLICITED IS SUCH THAT THE PERSON COULD NOT EXERCISE REASONABLE JUDGMENT IN EMPLOYING A LAWYER;

(2) THE PERSON SOLICITED HAS MADE KNOWN A DESIRE NOT TO RECEIVE COMMUNICATIONS FROM THE LAWYER; OR

(3) THE SOLICITATION INVOLVES COERCION, DURESS, OR HARASSMENT.

(b) SUBJECT TO THE REQUIREMENTS OF PARAGRAPH (a), A LAWYER MAY INITIATE CONTACT WITH A PROSPECTIVE CLIENT IN THE FOLLOWING CIRCUMSTANCES:

(1) IF THE PROSPECTIVE CLIENT IS A CLOSE FRIEND OR RELATIVE OF THE LAWYER:

(2) BY A LETTER CONCERNING A SPECIFIC EVENT OR TRANSACTION IF THE LETTER IS FOLLOWED UP ONLY UPON POSITIVE RESPONSE BY THE ADDRESSEE; OR

(3) UNDER THE AUSPICES OF A PUBLIC OR CHARITABLE LEGAL SERVICES ORGANIZATION OR A BONA FIDE POLITICAL, SOCIAL, CIVIC, FRATERNAL, EMPLOYEE, OR TRADE ORGANIZATION WHOSE PURPOSES INCLUDE BUT ARE NOT LIMITED TO PROVIDING OR RECOMMENDING LEGAL SERVICES.
(c) A LAWYER SHALL NOT GIVE ANOTHER PERSON ANYTHING OF VALUE TO INITIATE CONTACT WITH A PROSPECTIVE CLIENT ON BEHALF OF THE LAWYER.

COMMENT:

Solicitation by a lawyer or by someone on the lawyer’s behalf is subject to regulation under the decisions in Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978), and In re Primus, 436 U.S. 412 (1978). In re Primus held that a lawyer who had been brought together with a prospective client by a legal rights organization, and who subsequently proposed that the prospective client bring suit regarding a legal rights issue, could not constitutionally be sanctioned for engaging in solicitation. Ohralik v. Ohio State Bar Ass’n held that a private practitioner who solicited a personal injury victim in the hospital and at home, and obtained a contingent fee retainer, could be sanctioned for solicitation. It is not entirely clear what limitations those decisions impose on the nature and extent of regulation of solicitation. It is clear, however, that aggressive in-person solicitation by a lawyer seeking to generate a fee-paying case may be prohibited, as Ohralik indicates. It would appear that In re Primus may accord constitutional protection to direct communication concerning legal services in connection with the efforts of a political or civil rights organization to promote legal protection of civil liberties and civil rights. However, these and other decisions leave it uncertain whether in-person solicitation is constitutionally protected so long as it does not involve coercion, harassment or misrepresentation. In light of this state of the law, it is incumbent on the profession to formulate limitations on solicitation, consistent with the Constitution as interpreted by the Supreme Court, that strike a proper balance between the interest of making persons aware of the need for legal services and the interest of preventing the evils associated with unrestricted solicitation.

Unrestricted solicitation involves definite evils. Among these are harassment, overreaching, provocation of nuisance litigation, and schemes for systematic fabrication of claims, all of which were experienced prior to adoption of restrictions on solicitation. Measures reasonably designed to suppress these evils are constitutionally legitimate. At the same time, measures going beyond realization of such objectives would appear to be invalid under the decisions in In re Primus, supra, and Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

This Rules does not prohibit communications authorized by law; for example, notice to members of a class in class suit litigation. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications for solicitation permitted by this Rule.

References: DR 2-104; In re Arnoff, 22 Cal. 3d 740, 586 P.2d 960 (1978); Pace v. State, 368 So. 2d 340 (Fla. 1979); In re Teichner, 75 Ill. 2d 88, 387 N.E.2d 265 (1979); Kentucky Bar Ass’n v. Stuart, 568 S.W.2d 933 (Ky. 1978).

9.4 INDICATION OF AREAS OF PRACTICE
A LAWYER MAY COMMUNICATE THE FACT THAT THE LAWYER WILL ACCEPT EMPLOYMENT IN SPECIFIED AREAS OF PRACTICE. A LAWYER WHOSE PRACTICE IS LIMITED TO SPECIFIED AREAS OF PRACTICE MAY COMMUNICATE THAT FACT. CERTIFICATION OR DESIGNATION AS A SPECIALIST MAY BE INDICATED BY A LAWYER ONLY AS FOLLOWS:

(a) A LAWYER ADMITTED TO PRACTICE BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE MAY USE THE DESIGNATION “PATENT ATTORNEY” OR A SUBSTANTIALLY SIMILAR DESIGNATION;

(b) [PROVISIONS ON DESIGNATION OF SPECIALIZATION OF THE PARTICULAR STATE.]

COMMENT:

Specialization involves both specialization in fact and formally recognized specialization.

A lawyer may indicate a wish to attract new professional business in areas of practice with which the lawyer is particularly familiar. This Rule permits a lawyer to indicate such areas of practice in communications about the lawyer’s services, for example, in a telephone directory or other advertising. If a lawyer’s practice is limited to specified areas of practice—that is, if the lawyer in fact will not accept matters except in such areas of practice—a lawyer is permitted so to indicate. However, stating that a lawyer is a “specialist” or “specializes” in an area of practice implies that the lawyer has achieved special recognition for proficiency. It is therefore misleading to suggest that a lawyer is a specialist except in accordance with procedures for recognition of specialization in a particular jurisdiction.

Recognition of specialization in patent matters is a matter of long-established policy of the Patent Office.

References: EC 2-14; DR 2-105; ABA Standing Committee on Specialization, Discussion Draft (1976), Discussion Draft II (1978); ABA Section of Corporation, Banking and Business Law, Committee on Advertising and Specialization, Discussion Draft, 35 Bus. Law. 303 (1979).

9.5 FIRM NAMES AND LETTERHEADS

(a) A LAWYER SHALL NOT USE A FIRM NAME, LETTERHEAD, OR OTHER PROFESSIONAL DESIGNATION THAT VIOLATES RULE 9.1. 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. A FIRM PRACTICING IN MORE THAN ONE JURISDICTION MAY USE THE SAME NAME IN EACH JURISDICTION.

(b) THE NAME OF A LAWYER HOLDING A PUBLIC OFFICE SHALL NOT BE USED IN THE NAME OF A FIRM, OR IN COMMUNICATIONS ON ITS BEHALF,
DURING ANY SIGNIFICANT PERIOD IN WHICH THE LAWYER IS NOT ACTIVELY AND REGULARLY PRACTICING WITH THE FIRM.

COMMENT:

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm’s identity, or by a trade name such as the “ABA Legal Clinic.” A listing of lawyers in an office should indicate those not admitted to practice in the jurisdiction where the office is located. Although the 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.

References: EC 2-11 through 2-13; DR 2-102(B), 2-102(D); ABA Formal Op. 315 (1965).

10. MAINTAINING THE INTEGRITY OF THE PROFESSION

Introduction: 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.

Self-government of the legal profession serves important social purposes. One is reduction of the need for governmental interference in private sector activity. To the extent that the legal profession can secure conformity of its members to the obligations of their professional calling, the occasion for government regulation is obviated. Another objective of self-government is the maintenance of 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. From a substantive viewpoint, the profession is responsible for seeing that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. From a procedural viewpoint, every lawyer is responsible for observance of the Rules of Professional Conduct; a lawyer must not only conform his or her conduct to the Rules, but also must aid in securing their observance by other lawyers. This duty involves irksome and sometimes onerous responsibilities. However, neglect of these responsibilities will compromise the independence of the profession and the public interest which it serves.
10.1 CANDOR IN BAR ADMISSION AND DISCIPLINARY MATTERS

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

(a) MAKE A KNOWING MISREPRESENTATION OF FACT;

(b) FAIL TO DISCLOSE A FACT NECESSARY TO CORRECT A MISAPPREHENSION KNOWN BY THE PERSON TO HAVE ARISEN IN THE MATTER.

COMMENT:

Effective regulation of the practice of law requires that truthful information be provided to regulatory authorities in connection with admissions to the bar and disciplinary matters. 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 misrepresentation in connection with an application for admission, it may be the basis for subsequent discipline if the person is admitted, and may be relevant in a subsequent admission application if the person is not admitted. The duty imposed on a lawyer by this Rule applies with respect to both the admission or discipline of others and that of the lawyer himself. Thus, if a lawyer made a knowing misrepresentation or omission in connection with a disciplinary investigation of the lawyer’s own conduct, it would be a separate professional offense.

The duty to provide truthful information goes beyond the duties of either an advocate or a witness. An advocate is required to correct a tribunal’s misapprehension only if the lawyer was involved in creating the misapprehension. See Rule 3.1. A witness is required only to respond truthfully to questions addressed to him. The obligation of this Rule is not only to be forthright in these respects, but affirmatively to clarify any misunderstanding on the part of the admission or disciplinary authority of which the person involved becomes aware. The duty is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on the protection of such a provision in response to a question, however, should openly claim it and not use the right of nondisclosure as a justification for failure to comply with this Rule.

This Rule does not apply to a lawyer representing an applicant for admission to the bar or representing a lawyer who is the subject of a disciplinary inquiry or proceeding. A lawyer serving in such a capacity is governed by the obligations of a lawyer in service of a client.


10.2 STATEMENTS CONCERNING JUDGES
(a) A LAWYER SHALL NOT KNOWINGLY MAKE A FALSE STATEMENT CONCERNING THE QUALIFICATIONS OF A JUDGE OR OTHER ADJUDICATORY OFFICER OR OF A CANDIDATE FOR ELECTION OR APPOINTMENT TO A JUDICIAL OFFICE.

(b) A LAWYER WHO IS A CANDIDATE FOR JUDICIAL OFFICE SHALL COMPLY WITH THE APPLICABLE PROVISIONS OF THE CODE OF JUDICIAL CONDUCT.

COMMENT:

The opinions of lawyers are relied on in evaluating the professional or personal fitness of a person being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer about a judge or candidate for judicial office can unfairly undermine public confidence in the judiciary. As an officer of the legal system, a lawyer should therefore be careful, and certainly honest, in making statements about the fitness and probity of judges and candidates for judicial office.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

References: EC 8-6; DR 8-102, 8-103; ABA Model Code of Judicial Conduct (1972).

10.3 REPORTING PROFESSIONAL MISCONDUCT

A LAWYER HAVING INFORMATION INDICATING THAT ANOTHER LAWYER HAS COMMITTED A SUBSTANTIAL VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT SHALL REPORT THE INFORMATION TO THE APPROPRIATE DISCIPLINARY AUTHORITY.

COMMENT:

Self-regulation of the legal profession implies that members of the profession should initiate disciplinary investigation when they encounter evidence indicating the possibility that the Rules of Professional Conduct have been violated. Although making such a report can be personally distasteful, that consideration should not deter a lawyer from carrying out his or her responsibility to the public. A lawyer is privileged to report information indicating that another lawyer has engaged in unethical conduct. An apparently isolated violation can be indicative of a pattern of misconduct that only a disciplinary investigation can uncover. It is especially important to report a violation where the victim is the offending lawyer’s client and it is unlikely that the client will discover the offense.

The lawyer’s responsibility for protecting the public by reporting professional misconduct is qualified by duties owed to the lawyer’s client. A report about misconduct should not be made if doing so would involve violation of Rule 1.7, for example. Although a lawyer has a right to
report any evidence of professional misconduct, the lawyer should have a duty to do so only if the misconduct is serious. If it were obligatory to report every violation of the Rules, the failure to report any such violation would itself be a professional offense. A measure of judgment is therefore required in complying with the provisions of this Rule. However, when circumstances indicate the offense is serious, or is indicative of persistent violations, there is a correspondingly firm obligation to report it.

The duty to report professional misconduct does not apply to a lawyer who has been 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.


10.4 MISCONDUCT

IT IS PROFESSIONAL MISCONDUCT FOR A LAWYER TO:

(a) VIOLATE THE RULES OF PROFESSIONAL CONDUCT OR KNOWINGLY AID ANOTHER TO DO SO;

(b) COMMIT A CRIME OR OTHER DELIBERATELY WRONGFUL ACT THAT REFLECTS ADVERSELY ON THE LAWYER’S HONESTY, TRUSTWORTHINESS, OR FITNESS IN OTHER RESPECTS TO PRACTICE LAW;

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

(d) PRACTICE LAW IN A JURISDICTION IN VIOLATION OF THE REGULATION OF THE LEGAL PROFESSION IN THAT JURISDICTION; OR

(e) AID A PERSON WHO IS NOT A MEMBER OF THE BAR IN THE PERFORMANCE OF ACTIVITY THAT CONSTITUTES THE PRACTICE OF LAW.

COMMENT:

A lawyer is expected generally to conform his or her conduct to law, including the Rules of Professional Conduct. Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction between offenses that should be a basis for professional discipline and those that should not 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 practice of law. Although a lawyer is answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those personal characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust are in that category. On the other hand, a pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. The fact that the victim of an offense was a client is highly relevant but not determinative of whether the offense implies unfitness to practice law.

A lawyer may refuse to comply with an obligation imposed by law when doing so openly and upon a good faith belief that no valid obligation exists.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office suggests that the lawyer may also lack the self-discipline required to fulfill the professional role of attorney. Ethical constraints have long applied to a prosecutor’s conduct of office, and the same principles should apply to other lawyers holding other public or private positions of trust and authority. Positions of private trust include such offices as trustee, executor, administrator, guardian, agent, and officer, director, or manager of a corporation or other organization.

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limitation of the practice of law to members of the bar serves to protect the public against rendition of legal services by unqualified persons. Enforcement of that policy would be frustrated if lawyers were to lend assistance to unqualified persons who attempt to provide legal services to others. Paragraph (e) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer retains full responsibility for their work. It also does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires some knowledge of law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies.
