This is a collection of ethics and professional responsibility program materials prepared for ABA Business Law Section CLE programs that were recently presented at a meeting or as an audiocast or webcast. We hope these materials will prove of value to practicing lawyers, judges, and academics. Please note that the materials are as presented, have not been edited, peer reviewed, or otherwise submitted to any review process, and have not been updated to reflect changes in the law. These materials should not be relied on in giving legal advice or in reaching legal conclusions, and should not be cited as authority. We believe they may be helpful, however, by raising issues, provoking thought, noting areas for further inquiry, and providing convenient access to useful resources.

We hope that you find these materials useful. For access to extensive high-level content across a broad range of fields of business law practice, please consider joining the Business Law Section of the American Bar Association. The Business Law Section is the preferred resource and the premier networking and collaboration forum for sophisticated business lawyers. Section members may participate to the extent desired in any or all of the Section's Committees without charge other than the modest Section dues. For further information about the Business Law Section and its Committees, meetings, publications, and other resources click Section Information. To join the Section online click Join.
Programs and Materials Included

- **What You Need to Know About Ethics 20/20 and Why You Need to Know It**, presented by Professional Responsibility Committee, March 24, 2012. Explanation and discussion of changes proposed by the ABA Ethics 20/20 Commission in the ABA Model Rules of Professional Conduct to address technological innovation and globalization.

**Materials from Ethics 20/20 Program**

- Creamer, “Issues in Lawyer Mobility”
- ABA Formal Opinion 09-455 (Oct. 8, 2009) [Disclosure of Conflicts Information When Lawyers Move Between Firms]
- ABA Formal Opinion 06-442 (Aug. 5, 2006) [Review and Use of Metadata]
- ABA Formal Opinion 11-459 (Aug. 4, 2011) [Duty to Protect the Confidentiality of Email Communications with One’s Client]
- ABA Formal Opinion 11-460 (Aug. 4, 2011) [Duty when Lawyer Receives Copies of a Third Party’s E-Mail Communications with Counsel]
- Solicitors Regulation Authority: Conflicts of Interest
- Lorne, “The Foreign Lawyer (Arguably) Practicing in the (Model) United States” [Lawyer’s Obligations When Outsourcing Legal and Nonlegal Support Services]
- ABA Formal Opinion 08-451 (Aug. 5, 2008) [Lawyer’s Obligations When Outsourcing Legal and Nonlegal Support Services]

(Program Chair and Moderator: Robert H. Mundheim; Speakers: Robert A. Creamer, Paula Frederick, Simon M. Lorne, Andrew Perlman, James P. Tallon)


**Materials from Ethics of Negotiations Program**

- Program Outline
- ABA Formal Opinion 06-439, dated April 12, 2006, “Lawyer’s Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation
- ABA Section of Litigation, August 2002, “Ethical Guidelines for Settlements”
• Charles Craver, “Negotiation Ethics”
• William Frievogel, “Negotiation Ethics,” originally published by the ABA Committee on Professional Responsibility


  Ethical Issues in Commercial Transactions, presented by Uniform Commercial Code Committee, March 22, 2012. The program explored the following topics: 1) Conflict issues, including waivers and representing creditor groups; 2) Ethics issues arising in multijurisdictional practice and a world in which social media are pervasive; 3) Opinion assumptions and the ethics of negotiations, and 4) Lessons from social and organizational psychology for issues of ethics and professional responsibility.

Materials from Commercial Transactions Program

• Hypothetical 1
• Hypothetical 2
• Informal Opinion 86-1518, Notice to Opposing Counsel of Inadvertent Omission of Contract Provision
• Maryland State Bar Association, Inc., Committee on Ethics, Ethics Docket 89-44, Communication with and/or Attorney Adversary
• Hypothetical 3
• Barnes v. Turner, 606 S.E.2d 849 (Ga. 2004) (A lawyer who neither notified his client of the need to renew a financing statement nor renewed the financing statement himself may be held liable for malpractice.)
• Hypothetical 4
• Veras Inv. Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP, 17 Misc.3d 1103(A), 851 N.Y.S.2d 61 (N.Y.Sup. Sep 27, 2007). (Law firm’s representation of a corporation in investigations by the SEC and subsequent failure to disclose a conflict of interest arising from law firm’s substantial involvement in the matters giving rise to the investigation may constitute claim for malpractice.)
• Hypothetical 5
• Vega v. Jones, Day, Reavis & Pogue, 121 Cal. App. 4th 282, 17 Cal. Rptr.3d 26 (Cal.App. 2 Dist. 2004). (Non-client’s allegation that law firm deliberately omitted material facts in its disclosure schedule sufficient to state claim for fraud.)
• Mega Group, Inc. v. Pechenik & Curro, P.C., 819 N.Y.S. 2d 796 (App. Div. 2006). (Although an opinion letter may create liability to a non-client, a law firm giving an
opinion letter will not be liable for failing to reveal matters outside the scope of the requested opinion letter.)

- Relevant Provisions of the Model Rules of Professional Conduct:
  - Model Preamble
  - Model Rule 1.0 Terminology
  - Model Rule 1.1 Competency
  - Model Rule 1.2(d). Scope of Representation and Allocation of Authority Between Client and Lawyer
  - Model Rule 1.4. Communication
  - Model Rule 1.6 Confidentiality of Information
  - Model Rule 1.7 Conflict of Interest: Current Clients
  - Model Rule 1.16 Declining or Terminating Representation
  - Model Rule 2.3 Evaluation for Use by Third Persons
  - Model Rule 4.1 Truthfulness in Statements to Others
  - Model Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers
  - Model Rule 8.4(c). Misconduct

- Selected Reference Materials
- “Cognitive Twists” PowerPoint Slides (The slides describe how cognitive errors cause smart people to make bad decisions.)

(Program Chairs: Kristin David Adams, R. Marshall Grodner; Speakers: Henry S. Byrans, Nancy B. Rapoport, Michael H. Rubin)


Materials for Negotiating and Drafting Business Contracts Program

- Hypothetical 1
- Hypothetical 2
- Hypothetical 3
- Hypothetical 4
- Selected Bibliography for Further Reading

What Business Lawyers Need to Know About Ethics 20/20

Las Vegas
March 24, 8:00 AM – 10:00 AM

1. Discussion Outline

2. Time Line for HOD’s Consideration of ABA Commission on Ethics 20/20 Proposals


4. Cremer, Issues in Lawyer Mobility

5. ABA Formal Opinion 09-455 (Oct. 8, 2009)


7. ABA Formal Opinion 06-442 (Aug. 5, 2006)


10. ABA Commission on Ethics 20/20 Resolutions on Terminology, Competence, Communication, Respect for the Rights of Third Persons, Prospective Clients, and Advertising (Sept. 19, 2011)


12. Model Rules of Professional Conduct: Rule 1.7, comment 7; Rule 1.9, comments 1-9; Rule 1.10, comments 1-12; Rule 5.4, comments 1-2; Rule 5.5; Rule 8.5(b), comment 2-7


14. Solicitors Regulation Authority: Conflicts of Interest

15. Lorne, The Foreign Lawyer (Arguably) “Practicing in the (Model) United States


17. ABA Commission on Ethics 20/20 Revised Proposal – Outsourcing (Sept. 19, 2011)
Discussion Outline

Introduction

I. 20/20 Commission
   1. Mandate
   2. Schedule

II. Lawyer Mobility: Confidentiality Issues
    1. The problem under the present rules
       a. The young lawyer seeking to move to a new firm
          i. What does new firm want to know? Why? When?
          ii. What is the lawyer ethically permitted to disclose?
       b. The partner discussing a move from his present firm to a new firm
          i. What does new firm want to know? Why? When?
          ii. What is the partner ethically permitted to disclose?
    2. Recent ABA opinion (09-455)
    3. 20/20 proposal to amend Model Rule 1.6
       a. How does it relate to the opinion?
       b. Would it be more helpful to redefine what is confidential information (e.g., NY or MASS definition) and thus expand proposed exception to Model Rule 1.6?
       c. Would it be more helpful to amend MR 1.6(b)(6) to say: “to detect and resolve conflicts of interest” or “to comply with these Rules, other law or a court order”?
       d. Other suggestions

III. Technology
    1. When senior management of MR client are on travel, they regularly communicate with MR Lawyer via hotel email facilities. The last communication contained
sensitive information about a proposed take-over of T Corporation and asked for advice on share buying of T stock and financing of such purchases.

a. Duties of counsel with respect to the communication and counsel’s reply
   i. Under present rules (see SCEPR opinion)
   ii. Under 20/20’s proposal

2. Lawyer keeps confidential client information on laptop, smartphone, and flash drives. What steps must Lawyer take to satisfy ethical obligations to protect the confidential information? Under present rules? Under 20/20 proposal?

a. Can lawyers store client information on a cloud storage system?

3. Investment Bank has been trying to ease Jones out of the firm. Jones is an aggressive young M&A banker working out of the Model Rules office, who the firm worries is less than discreet and may involve the firm in insider trading issues. There is not enough evidence to warrant a discharge for cause. Jones claims he was promised two years security at the firm and is resisting leaving without a substantial payment. He is represented by Tough Guy and the negotiations surrounding Jones’ departure have been contentious. You are the in-house lawyer counseling HR in those negotiations.

As the negotiations get nastier, HR reviews Jones’ e-mails in Investment Bank’s computer system. A number of e-mails obtained by Investment Bank in Jones’ personal password-protected email account and marked ‘Private and Confidential’ relate to discussions Jones had with Tough Guy about facts concerning the dispute and tactics to be pursued. HR asks you to review these e-mails.

a. May you?

b. Must you notify Tough Guy that Investment Bank has these e-mails and offer to return them?

c. If employer says not to do so, must lawyer obey?

Answer under present rules

d. Does 20/20’s proposal change the answers?

e. In what cases, if any, did 20/20 intend to change results under present law?

4. Lawyer gives a talk to a large group of non-lawyers, including corporate executives, on the subject of corporate governance. Lawyer’s firm has a website which provides information on Lawyer’s practice and some of the innovative governance practices she has developed. A member of the audience writes
Lawyer an email containing information about some dissension on Company D’s board and asking if Lawyer would be willing to represent the dissident directors. Lawyer knows that a client of the firm would very much like to know about the dissension on D’s board. May Lawyer provide the information she has received?

a. Answer under present rules (see SCEPR opinion)
b. Will 20/20’s proposal change the answers?

IV. The Global Firm

1. Client A, a UK company, has recently retained London Partner P of Global Law Firm headquartered in MR state to negotiate a small acquisition of assets located in the UK from X. Client B, a global company headquartered in Germany (a long time, significant client of the firm), would like to retain London Partner Q to negotiate an acquisition of assets located in the UK from A’s wholly owned subsidiary. May Partner Q take the assignment without obtaining consent of A?

2. Client A, a UK company, has retained Partner P of Global Law Firm headquartered in MR state to negotiate an acquisition of assets located in the UK from X. Client B, a US company and long time, significant client of the firm, would like to retain New York Partner Q to negotiate an acquisition of assets located in the US from a wholly owned subsidiary of A. May Partner Q take on the retention without obtaining consent of A?

a. Would the result be different if A were a US company and B a UK company?

3. How would IV (1) and (2) be handled under present rules?

a. Does the 20/20 proposal to add comment 23 to Model Rule 1.7 help answer questions not clearly answered under the present rules?

b. Would the following amendment to Model Rule 1.10 present a desirable solution?

i. (e) To the extent that a lawyer associated with a firm is representing a client with respect to a matter in a jurisdiction where the lawyer’s conduct is governed by rules of professional conduct that are not substantially similar to Rules 1.7 or 1.9, the prohibition applicable to lawyers governed by Rules 1.7 and 1.9 shall not be imputed to such lawyers associated with the firm, provided that the client of the lawyer governed by Rules 1.7 or 1.9 is informed in writing of such result at the beginning of that client’s representation."

4. Global Law Firm headquartered in London, but with an office in MR state, would like to associate in the London office a small group of accountants who would
assist the law firm in its providing of legal advice and maintain a small practice in accounting for a limited number of clients. The leader of the group would like to be called a partner and would be paid an amount equal to that paid Level 5 partners in the firm. The other members of the group would be paid a salary and a discretionary bonus.

Is there a way to structure the association so that it does not violate any applicable Model Rules as they presently exist? Or as they would exist if the 20/20 proposals were adopted?

V. In-Bound Lawyer

1. UK lawyer comes to the US to work as in-house counsel in the MR office of a UK company
   a. Can the UK lawyer act without being admitted to the bar of MR? Can she provide advice on US law??

2. UK lawyer travels to MR state with his UK client and provides advice to his client on a loan agreement being negotiated in MR state, but governed by UK law
   a. She also reviews engagement letter with an MR lawyer who UK client wants to hire to conduct a suit in MR state court
   b. Different result if UK lawyer provides the advice (or does the negotiation) on the telephone (or by videoconference)?

3. A UK lawyer has a website which can be accessed in MR state. He builds a clientele of MR residents who think they need advice on UK law.
   a. UK lawyer opens a modest presence in MR state by having a secretary in an accountant’s office to facilitate acquisition of clients who need advice on UK law.

4. A UK lawyer’s UK client is involved in litigation against a UK Company in MR state. The UK lawyer moves for admission in the case pro hac vice.
   a. Would the result be different if the client were a US client?

5. How would each of these situations be handled under present rules:
   a. To what extent will 20/20 provide a different answer?

VI. Outsourcing

1. MR lawyer needs to choose counsel in a non-MR state to give an opinion on the enforceability of mortgages in such state
   a. What standard of diligence is expected of MR lawyer?
b. Would the standard be different if the lawyer chosen is located in Saudi Arabia? In Latvia?

c. Could they be chosen if their duties of confidentiality have more exceptions than the MR?
   
i. Suppose their conflict rules were materially less restrictive than in MR state?

d. What responsibility does MR lawyer have for the work product?

e. Are the answers different if client suggested the lawyer?

2. MR lawyer needs to select firm of non-lawyers to review documents in an MR litigation

   a. What due diligence is required?

   b. What responsibility does MR lawyer have for the work product?

   c. If the work outsourced is copying of materials, what responsibility does MR lawyer have for the work product?

   d. Are the answers different if client suggested the non-lawyer?

3. Presently outsourcing guidance is contained in a SCEPR opinion

   a. Do 20/20’s amendments overrule the opinion? Set new standards? If so, in what respects?
## Technology (confidentiality)

Key proposals include:

- Amendments to Model Rule 1.6 (Duty of Confidentiality) to address a lawyer’s ethical obligations to protect a client’s confidences from inadvertent disclosure and unauthorized access.

- Amendments to Model Rule 4.4 (Respect for Rights of Third Persons) to clarify a lawyer’s obligations upon receiving inadvertently disclosed confidential information in electronic form.

- Amendments to Model Rule 1.1 (Competence) to emphasize a lawyer’s duty to keep abreast of changes in technology, including the benefits and risks associated with its use.

## Technology (marketing)

Key proposals include:

- Amendments to Model Rule 1.18 (Duties to Prospective Client) to clarify when electronic communications give rise to a prospective client-lawyer relationship.

- Amendments to Model Rule 7.2 (Advertising) to address how the prohibition against paying others for a “recommendation” applies to Internet-based client development tools.

- Amendments to Model Rule 7.3 (Direct Contact with Prospective Clients) to clarify when a lawyer’s online communications constitute “solicitations” that are governed by the Rule.

## Outsourcing

Key proposals include:

- Amendments to Model Rule 1.1 (Competence) to clarify that lawyers have an obligation under the Rule to make reasonable efforts to ensure that the work outsourced to lawyers is performed competently and contributes to the overall competent and ethical representation of the client. A new Comment identifies the relevant factors to consider when assessing whether those efforts have been reasonable.

- Amendments to Model Rule 5.3 to underscore that lawyers should make reasonable efforts to ensure that nonlawyers outside the firm provide their services in a manner that is compatible with the lawyer’s own professional obligations, including the lawyer’s obligation to protect client information. The changes also alert lawyers that they have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers.

## Uniformity/Mobility Issues

Key proposals include:

- Amendments to Model Rule 1.6 (Confidentiality of Information) that explain the ethical considerations associated with the disclosure of confidential client information to detect and prevent conflicts of interest, such as when lawyers move to another firm or when firms merge.

- A new Model Court Rule on Practice Pending Admission that would enable a lawyer licensed in one jurisdiction to establish a systematic and continuous presence in a new jurisdiction while diligently pursuing admission in the new jurisdiction through one of the procedures that the
| **TIMELINE FOR HOUSE OF DELEGATES’ CONSIDERATION**  
OF ABA COMMISSION ON ETHICS 20/20 PROPOSALS |
| --- |

**February 2013**

**Inbound Foreign Lawyers.** Key proposals still out for comment:

- Amendments to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice) that would incorporate the provisions of the 2002 ABA Model Rule for Temporary Practice by Foreign Lawyers to encourage increased implementation of this ABA policy by state supreme courts.

- Amendments that would include foreign lawyers within the ABA Model Rule on Pro Hac Vice Admission, with appropriate regulatory safeguards. Many courts, including the Supreme Court of the United States, already permit this type of admission.

- Amendments that would allow foreign lawyers (like U.S. lawyers) to work as in-house counsel in a jurisdiction where they are not admitted, provided such services are limited to the organizational client (employer) and its affiliates.

**Alternative Law Practice Structures (choice of law).** Key proposals still out for comment:

- Amendments to Model Rule 1.5 (Fees) that would clarify that a lawyer can divide a legal fee with another firm that has nonlawyer partners and owners.

- Amendments to Model Rule 5.4 that would allow a lawyer who is practicing in the office of a law firm where nonlawyer fee sharing is not permitted to share fees with nonlawyers in the same firm who are located in another office where such fee sharing is permissible.

**Alternative Law Practice Structures (nonlawyer fee sharing)**

- The Commission has eliminated from consideration outside nonlawyer ownership of law firms, publicly traded law firms, and multidisciplinary practices.

- The Commission continues to study whether to propose a change to Model Rule 5.4 (Professional Independence of a Lawyer) to permit a form of nonlawyer ownership that is similar to (but more restrictive than) what has existed in the District of Columbia for more than 20 years.

**Uniformity/Choice of Law.** Proposal still out for comment:

- Amendments to the Comments to Model Rule 1.7 (Conflict of Interest: Current Clients) that would permit, under limited circumstances, lawyers and clients to agree to be bound by the conflict of interest rules of a particular jurisdiction.
To: ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals

From: Jamie S. Gorelick and Michael Traynor, Co-Chairs
ABA Commission on Ethics 20/20

Re: Summary of Actions by the ABA Commission on Ethics 20/20

Date: December 28, 2011

The Commission’s Mission. The Commission was appointed to look at the impact of technology and globalization on the legal profession and to determine what, if any, changes to the ABA Model Rules of Professional Conduct and other policies governing lawyer regulation should be proposed.

The Commission’s Process. We spent our first year listening to the profession and the public about the ethical challenges lawyers and clients face from the changes produced by the proliferation of technology and increased globalization. We spent the second year formulating possible solutions to these problems and putting them out for comment and feedback. We have held hearings, taken submissions and appeared before over 60 different Sections, Committees, and state and local bar associations.

At our October 2011 meeting we decided that, to better facilitate the House of Delegates’ consideration of the issues on the Commission’s agenda, we would split our recommendations to the House into two sets of proposals. The first set will proceed to the House in August 2012, and the second set will proceed to the House in February 2013.

We have published for comment all of our initial policy proposals and discussion drafts. Now, more than with earlier drafts circulated for comment, we need to hear from you about what we have produced. We want feedback and input from as many people as possible so that we can present fully vetted recommendations to the House of Delegates for its consideration.

What We Heard. For two years, we listened to all elements of the profession as well as clients, consumer groups and businesses that support, sell to, and report on the profession. Our proposals respond to what we have heard and are intended to address the following developments:
• Legal advice and information about legal services are increasingly communicated through electronic media – including e-mail, texts, podcasts, blogs, tweets, and websites – reaching easily across jurisdictional lines, both domestically and globally.

• Client confidences are no longer kept just in file cabinets, but on laptops, smart phones, tablets, and in the cloud.

• Connections with potential clients are sought not just through print advertisements but via social networks, lead generation services, “pay-per-click” ads, and “deal of the day” coupon sites.

• Legal and non-legal services are increasingly outsourced, both domestically and internationally, raising questions for lawyers working with other people and entities about who is responsible for the work that is being outsourced.

• Lawyers in all practice settings increasingly need to cross state and national borders – virtually and physically – in order to serve their clients. They need to know what rules apply to them.

• Non-U.S. lawyers increasingly seek to practice in the United States, and U.S. lawyers increasingly need to practice internationally in order to meet their clients’ needs.

• In other countries, there is movement toward both more liberal multijurisdictional practices and permitting new law firm practice structures, including nonlawyer ownership interests in law firms.

• Lawyers change jobs regularly, triggering potential conflicts of interest and other ethics issues that need to be addressed.

• Many new ways of funding litigation are emerging.

What We Concluded. In general, we have found that the principles underlying our current Model Rules are applicable to these new developments. As a result, many of our recommendations involve clarifications and expansions of existing Rules and policies rather than an overhaul. In sum, our goal has been to apply the core values of the profession to 21st century challenges.

Our recommendations take several forms. In addition to recommending changes to some Model Rules, we are suggesting that the ABA provide resources – such as continuously updated websites – to help lawyers stay abreast of changes wrought by technology and globalization and to describe useful practices for dealing with those changes. We are also producing white papers to explain some problems, and possible solutions, in more detail. Finally, we have made referrals of several questions to other ABA entities that are better able to address them.
Our Proposals. The following is a summary of our proposals by subject matter, along with links to the actual proposals, discussion drafts, and accompanying draft reports. The Commission’s proposals and reports, as well as the comments the Commission has received in response, may also be viewed at http://www.americanbar.org/Ethics2020.

Technology: Confidentiality

The Commission is suggesting the creation of a user-friendly, continuously updated website containing answers to common questions about the protection of confidential information when using technology. The website also will contain detailed information about the latest data security standards.

The Commission is also proposing several amendments to the Model Rules and their Comments to clarify a lawyer’s obligations when using technology, particularly a lawyer’s obligations with regard to competence and confidentiality. They are:

- A new paragraph (c) in Model Rule 1.6 (Confidentiality of Information) and related amendments to the Comments that would make clear that a lawyer has an ethical duty to take reasonable measures to protect a client’s confidential information from inadvertent disclosure and unauthorized access. The website mentioned above is intended to offer guidance on what those measures might include.

- Amendments to Model Rule 4.4 (Respect for Rights of Third Persons) and its Comments to clarify a lawyer’s obligations upon receiving confidential information that the lawyer was not supposed to receive, including confidential information contained in e-mails, hard drives, and data embedded in electronic documents.

- Amendments to Comment [6] of Model Rule 1.1 (Competence) to emphasize that, in order to stay abreast of changes in the law and its practice, lawyers should have a basic understanding of technology’s benefits and risks.

- Amendments to Comment [9] of Model Rule 1.0 (Terminology) to make clear that, when erecting screens to prevent the sharing of information within a firm, those screens should prevent the sharing of both tangible and electronic information.

More details are available here:

Technology: Client Development

The Commission concluded that the principles underlying the existing Rules are applicable to new forms of client development tools and that these tools should not be subject to new restrictions. The Commission determined, however, that lawyers could use more guidance regarding the use of these new tools. To that end, the Commission is proposing:
• Amendments to Model Rule 1.18 (Duties to Prospective Client) and its Comments to clarify when electronic communications give rise to a prospective client-lawyer relationship. The proposed amendments clarify that a prospective client is someone who communicates with a lawyer about the possibility of forming a client-lawyer relationship and has a reasonable expectation that the lawyer is willing to consider forming that relationship. The proposed amendments also identify several precautions that lawyers should take to prevent the inadvertent creation of such a relationship – especially when using electronic media - and to ensure that the public does not misunderstand the consequences of communicating electronically with a lawyer.

• Amendments to the title and text of Model Rule 7.3 (Direct Contact with Prospective Clients) and its Comments to clarify when a lawyer’s online communications constitute “solicitations” that are governed by the Rule. For example, new Comment [1] clarifies that communications in response to a request for information, such as requests for proposals and advertisements generated in response to Internet searches, are not “solicitations.”

• Amendments to the Comments to Model Rule 7.2 (Advertising) to address confusion concerning the kinds of technology-based client development tools that lawyers are permitted to use, especially because of an ambiguity regarding the prohibition against paying others for a “recommendation.” The proposals clarify that a recommendation exists only when someone endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities.

More details are available here: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_technology_and_client_development_posting.authcheckdam.pdf

Uniformity, Conflicts of Interest, and Choice of Law

The Commission is proposing amendments that would make it easier for lawyers to cross jurisdictional lines to serve their clients’ needs, but with appropriate safeguards to protect clients and the public. We are also proposing to clarify how to resolve inconsistencies among jurisdictions’ ethics rules and to clarify the circumstances under which lawyers are permitted to disclose limited confidential information to detect and prevent conflicts of interest, such as when lawyers seek to move to another firm or when two firms consider a merger. In particular, the Commission is recommending:

• Amendments to Model Rule 1.6 (Confidentiality of Information) that explain the ethical considerations associated with the disclosure of confidential client information to detect and prevent conflicts of interest. Consistent with ABA Formal Opinion 09-455, which addressed the same issue, the Commission’s proposal ensures protection of client confidences while allowing lawyers to identify potential conflicts of interest that might arise in commonly encountered situations, such as when a lawyer seeks an association with another firm or two firms consider a merger.
• A stand-alone Model Rule on Practice Pending Admission that would enable a lawyer licensed in one jurisdiction to establish a systematic and continuous presence in a new jurisdiction while diligently pursuing admission in the new jurisdiction through one of the procedures that the jurisdiction authorizes (e.g., admission by motion or passage of that jurisdiction’s bar examination). The new Model Rule’s restrictions and limitations, including various registration and disclosure requirements, are designed to protect the public.

• Reduction of the “time in practice” requirement in the ABA Model Rule on Admission by Motion from 5 of 7 years to 3 of 7 years. The Commission will also seek a resolution that encourages jurisdictions that have not adopted the Model Rule on Admission by Motion to do so and urges other jurisdiction to eliminate any restrictions in their admission by motion procedures that do not appear in the Model Rule, such as reciprocity requirements.

• Amendments to Model Rules 1.5 (Fees) and 5.4 (Professional Independence of a Lawyer) to address inconsistencies among jurisdictions, both domestically and abroad, with regard to the sharing of fees with nonlawyers. The proposed amendment to Model Rule 1.5 would clarify that a lawyer can divide a legal fee with another firm that has nonlawyer partners and owners. The proposed amendment to Model Rule 5.4 would clarify when a lawyer who is practicing in the office of a law firm where nonlawyer fee sharing is impermissible can share fees with nonlawyers in the same firm who are located in another office where such fee sharing is permissible. The Commission concluded that a lawyer should be permitted to share fees with nonlawyers under these circumstances, but only if the nonlawyer performs professional services that assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer.

• Amendments to the Comments to Model Rule 1.7 (Conflict of Interest: Current Clients) that are intended to permit lawyers and clients to agree to be bound by the conflict of interest rules of a particular jurisdiction.

More details are available here:

Model Rule 1.6:

Model Rule 1.7:
Outsourcing

The Commission concluded that lawyers need more guidance on their ethical obligations when engaged in outsourcing. Thus, the Commission is proposing amendments that would identify the factors that lawyers need to consider when retaining lawyers or nonlawyers outside the firm to assist on a client’s matter (i.e., outsourcing legal and non-legal work). In particular, the Commission is proposing:

- **New Comments to Model Rule 1.1 (Competence)** to make clear that lawyers must make reasonable efforts to ensure that the work outsourced to lawyers outside the firm is performed competently and contributes to the overall competent and ethical representation of the client. A new Comment identifies the relevant factors to consider when assessing whether those efforts have been reasonable. The Comment also provides that, ordinarily, a lawyer should obtain a client’s informed consent before retaining a nonfirm lawyer to assist on a client’s matter. The changes also provide guidance when clients direct or suggest that lawyers use particular lawyers in another firm to perform certain tasks.

- **Amendments to the title of Model Rule 5.3 (changing it from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer Assistance”) as well as its Comments to underscore that lawyers should make reasonable efforts to ensure that nonlawyers outside the firm provide their services in a manner that is compatible with the lawyer’s own professional obligations, including the lawyer’s obligation to protect client information. The changes also alert lawyers that they have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers. The changes also provide guidance when clients direct or suggest that the lawyer use particular service providers.

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1 The draft currently available on the Commission’s website reflects that this proposal would take the form of a new Model Rule 5.5(d)(3). At its October 2011 meeting, the Commission decided to pursue this proposal as a stand-alone Model Rule on Practice Pending Admission rather than as an amendment to Model Rule 5.5. The proposed new Model Rule would be mentioned by cross-reference in Model Rule 5.5. A new version of this proposal will be released for comment by the end of March 2012.
• Adding language to the Comment of Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice) to make clear that lawyers cannot engage in outsourcing in a manner that would facilitate the unauthorized practice of law.

More details are available here: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_outsourcing_revised_resolution_and_report_posting.authcheckdam.pdf

Alternative Litigation Financing

The Commission believes that the most effective way to address the many nuanced issues arising from new forms of litigation financing is to issue a White Paper that can be used as a resource by the profession. The Commission will file the White Paper as an Informational Report with the ABA House of Delegates at the February 2012 ABA Midyear Meeting. The White Paper offers guidance on conflicts of interest resulting from the lawyer's involvement in a funding transaction; obligations relating to the duty of confidentiality and the attorney-client privilege; competence in advising clients with respect to alternative litigation financing; and rules regulating the exercise of the lawyer's independent judgment.

The Informational Report is available here: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf

Alternative Law Practice Structures

Alternative law practice structures are proliferating outside the U.S., and the Commission has considered whether to propose amendments to Model Rule 5.4 (Professional Independence of a Lawyer) to allow U.S. lawyers to utilize similar structures. The Commission rejected proposals to amend the Model Rules to permit: (a) publicly traded law firms, (b) outside nonlawyer ownership of or investment in law firms, and (c) multidisciplinary practices (i.e., law firms that offer both legal and non-legal services separately, but in a single entity).

The Commission has released a discussion draft that seeks feedback regarding a limited form of court-regulated, nonlawyer ownership in a law firm. Following the model in place in the District of Columbia for more than twenty years, the sole purpose of such a law firm must be the delivery of legal services, and the services provided by nonlawyers must be limited to assisting the lawyers in the delivery of those legal services. The lawyers would be responsible for assuring that the conduct of the nonlawyers is consistent with the lawyers’ obligations under the Model Rules. Nonlawyer owners would not have their own clients or offer nonlegal services to clients independent of the legal services provided to clients of the firm. The model is not multidisciplinary practice by another name.

The discussion draft contains additional restrictions beyond those imposed in the District of Columbia. For example, lawyers would have to maintain the controlling financial interest and voting rights in the law firm. Also, before a nonlawyer is permitted to have a financial interest in a law firm, the lawyers with financial interests in the firm would have to investigate the
nonlawyer’s professional reputation for integrity. The investigation would be analogous to a character and fitness inquiry, and the firm would have to maintain a record of that investigation and its results.

For the Commission’s proposals relating to choice of law issues arising from jurisdictional inconsistencies relating to nonlawyer ownership, see the entry above concerning “Uniformity, Conflicts of Interest, and Choice of Law.”

The discussion draft is available here: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf

Inbound Foreign Lawyers

The Commission is proposing changes to the Model Rules concerning pro hac vice admission, multijurisdictional practice, and registration of in-house counsel that would authorize, and place limitations on, the practice of foreign lawyers within the United States. In particular, the Commission is proposing the following:

- Amendments to Model Rule 5.5 (Multijurisdictional Practice) that would incorporate the provisions of the 2002 ABA Model Rule for Temporary Practice by Foreign Lawyers in order to encourage increased implementation of this longstanding ABA policy by state supreme courts. The relocation of these provisions to Model Rule 5.5 creates no new practice rights for foreign lawyers.

- Amendments that would include foreign lawyers within the ABA Model Rule on Pro Hac Vice Admission, with appropriate regulatory safeguards. Notably, the power to permit a foreign lawyer such limited practice authorization (and the power to revoke that authorization) would be within the discretion of the trial judge. The trial judge would be required to review the foreign lawyer’s professional background and training, and a U.S. lawyer must be of record in the matter and fully responsible to the court and the client for the proceeding. Many courts, including the United States Supreme Court, already permit this type of pro hac vice admission for foreign lawyers.

- Amendments that would include foreign lawyers within the scope of Model Rule 5.5(d)(1). As a result, foreign lawyers (like U.S. lawyers) would be permitted to work as in-house counsel in a jurisdiction where they are not admitted, provided such services are limited to the employer and its organizational affiliates. The Commission also proposes amending the ABA Model Rule for Registration of In-House Counsel so that foreign lawyers are expressly included. This amendment ensures that foreign lawyers can be more easily identified, monitored, and regulated.
More details are available here:

ABA Model Rule on Pro Hac Vice Admission:

ABA Model Rule for Registration of In-House Counsel:
http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_foreign_lawyers_and_in_house_registration_resolution_report.authcheckdam.pdf

ABA Model Rule 5.5:
http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_foreign_lawyers_and_model_rule_5_5_resolution_report.authcheckdam.pdf

Rankings

The Commission was asked to examine lawyer and law firm ratings and rankings. In response, the Commission submitted an Informational Report to the House of Delegates in August 2011, which concluded that no changes to the Model Rules are necessary. The Report, however, suggested that the profession and public would benefit from a Formal Ethics Opinion from the ABA Standing Committee on Ethics and Professional Responsibility that provides additional guidance to lawyers on how they should address their confidentiality obligations when asked for information from ranking entities and on how lawyers can use ratings and rankings in manner that is truthful and not misleading.

Referrals to Other ABA Entities

In addition to proposing changes to the Model Rules, the Commission has made various referrals to other ABA entities that are better equipped to address certain issues:

- To the Center for Professional Responsibility to work with relevant entities within the Association to develop two dynamic websites relating to (a) outsourcing and (b) confidentiality-related ethics issues arising from lawyers’ use of technology.

- To the Task Force on International Trade in Legal Services to study ways in which the ABA can facilitate with its international counterparts resolution of inconsistencies and lack of clarity regarding which rules of professional conduct apply in international arbitrations.

- To the Standing Committee on Professional Discipline the study of pro-active practice management based regulation of firms, as distinct from individual lawyers.

- To the Standing Committee on Client Protection a request that the Committee develop a Model Rule relating to lawyers’ obligations to retain client files.

- To the Standing Committee on Ethics and Professional Responsibility the following issues that may benefit from the development and issuance of Formal Ethics Opinions:
1. As noted above, with respect to lawyer and law firm rating and rankings, guidance on how to respond to requests for information from providers, given confidentiality-related concerns arising under Rule 1.6, and to further explicate how lawyers may use ratings or rankings in ways that are not misleading.

2. Further explanation or interpretation of the term “predominant effect” in Model Rule 8.5 on choice of law.

3. Greater guidance on how to resolve inconsistencies among jurisdictions with regard to their rules governing conflicts of interest.

4. More clarity regarding the limits of a lawyer’s multijurisdictional practice authority under Model Rule 5.5(c)(4).

5. A variety of issues arising from lawyers’ use of social media to conduct investigations, the meaning of Model Rule 7.1’s prohibition against “false or misleading” communications, the ethics of online social or professional networking between lawyers and judges, and the meaning of a “legal fee” as applied to new forms of online marketing arrangements.

6. More guidance on when client consent is needed to engage in outsourcing.

White Papers

As noted above, there are several questions that the Commission believes are best addressed in White Papers to draw the profession’s attention to the complex ethical issues surrounding a particular issue, including:

- A White Paper on the multiple ethical issues arising out of alternative litigation financing arrangements. (This paper is described above in the entry regarding the Commission’s work in the area of “Alternative Litigation Financing.”)

- A White Paper regarding the constitutional limitations on lawyer advertising rules in the Internet context.

- A White Paper regarding forms of alternative law practice structures not recommended by the Commission for adoption in the U.S. at this time, but noting that new developments may prompt reconsideration of this issue in the future, especially in light of changes in client needs and experiences with such practices elsewhere.
Issues in Lawyer Mobility

Robert A Creamer*

1 The New Reality of Lawyer Mobility

A generation ago, most law firms were a relatively stable work environment. Lawyers typically spent their entire career with the same firm they joined after law school. Today many lawyers are likely to change firms at least once, sometimes more often, during their careers. The movement of lawyers among firms raises numerous ethics, liability, and practical issues.

Mergers and lateral hires can provide an attractive means to achieve strategic goals, such as geographic or practice area expansion. Yet, lateral lawyers have caused significant losses to law firms when claims have been asserted against new firm lawyers for conduct predating the merger or hire. In many instances where laterals have proven to be an expensive mistake, they were hired based on anticipated future billings, with little investigation of the competence, integrity, and health of the new lawyer or the background of the clients the lateral sought to bring to the firm.

All of the prehire and posthire processes described below, such as conflicts checking and due diligence, apply to the hire of a single or small group of laterals and to merger situations. But because a larger number of lawyers, and usually a larger number of clients, are involved in a merger situation, the processes for firms that are merging normally will be more complicated and take longer. Sometimes there is pressure to shortcut or even omit aspects of them. It is important that firms resist this pressure and subject all lateral lawyers and clients to all of the usual due diligence and conflicts checking procedures. In addition, firms contemplating a merger will need to consider whether they have similar tolerances for risk and whether their cultures and loss prevention policies, procedures, and systems will meld successfully.

2 Due Diligence Regarding Candidates and Their Clients

Claims experience teaches that a careful investigative process can provide significant protection against many problems caused by lateral lawyers. Law firms should develop a standard, centralized due diligence system that includes the following: obtaining detailed background information from the candidate, usually by means of a questionnaire or application; independently verifying that information; conducting other appropriate background research; obtaining and checking references; and reviewing representative samples of the candidate’s work product. Firms should also thoroughly vet any clients and matters that lateral lawyers bring with them.

2.1 Lateral Partner Questionnaire or Application

Most firms ask lateral candidates to complete a detailed questionnaire or application that requests their employment history, clients, and potential conflicts. Firms should ask candidates to attach a current curriculum vitae, if one has not been previously provided, and an authorization for the firm to obtain copies of the candidate’s law school and any graduate school transcripts. The hiring committee should carefully review all of the information provided on the questionnaire, paying particular attention to the reasons that the candidate provides for leaving his or her current position. For example, if the candidate is returning to private practice from government service, the firm should ascertain whether the candidate’s previous law firm (or other previous employer) is reluctant to rehire the candidate and, if so, why.

2.2 Independent Verification and Research

Where feasible, the hiring firm should verify information provided by the candidate and conduct other independent research, as appropriate. Lateral candidates, eager for a job, may exaggerate or even
fabricate their credentials. Law firms have occasionally discovered that one of their lawyers never
graduated from law school, sometimes after the individual had been working at the firm for many years.
In other instances, firms have been surprised to learn that lawyers did not have a valid law license.

To avoid these situations, firms should confirm important items on the candidate’s *curriculum
vitae*, especially that the candidate has obtained a law degree and that his or her bar membership is in
good standing. Also, verify any claims to a high class rank in law school, and other honors such as law
review. To do this, firms should ask the candidate to authorize them to obtain copies of his or her final
transcripts from law school and any other graduate school. Also research the candidate’s disciplinary and
malpractice history, including sanctions under Federal Rule 11 or similar rules.

Some firms ask partner candidates to submit a personal financial statement and/or recent federal
and state income tax returns in confidence to the hiring committee. The committee can then determine
whether the financial data is compatible with the candidate’s claims of past earnings.

In some situations, such as when the candidate is not well known to the firm, firms may want to
obtain a credit check or background investigation on the candidate. Before doing so, firms will need to
research their obligations under the federal Fair Credit Reporting Act and any applicable state statutes. At
a minimum, they will need to provide the individual a written statement disclosing that a report may be
obtained and obtain the individual’s written authorization and release.

For general information about the candidate, firms might consider checking the following Internet
resources: Google; the PACER database; the SEC database; LexisNexis and Westlaw; state court and
state bar disciplinary authority databases; the lateral candidate’s current firm’s Web site; and other
professional blogs and Web sites. Lawyers at the hiring firm who previously worked on matters the
candidate was involved in or who otherwise know the candidate are also good resources.

### 2.3 References

Firms should ask lateral partner candidates to provide a list of personal and professional
references and, following receipt, interview the references about the candidate. To avoid an invasion of
privacy or similar claim, firms should obtain the applicant’s written consent before checking references.
The written consent should authorize the firm to check the applicant’s references and should require the
applicant to affirm that he or she releases the firm from any liability in connection with the reference
check. A firm should also consider having the applicant release the persons providing the references from
liability. The firm may then inform those persons of this release when it contacts them about the
candidate, which may encourage them to be more candid.

Consider suggesting the following as appropriate potential references:

1. Current professional colleagues;
2. If the candidate has switched firms before, partners or associates at firms prior to the current firm,
   and any other previous legal employers;
3. Former opposing counsel;
4. If the candidate is a member of the governing body of an organization, other members of that
governing body; and
5. Other lawyers in the candidate’s community.

Because liability exposure can arise from contacting a candidate’s clients too early in the hiring
process, firms should inform candidates that current clients are *not* suitable references.
2.4 Sample Work Product

Normally, firms should request representative samples of lateral candidates’ recent work product (redacted to protect confidential and attorney-client privileged information), such as briefs, depositions, trial transcripts, opinion letters, contracts, and legal articles. After confirming that it is solely or primarily the candidate’s work product, a partner in the same practice area as the candidate should assess the quality of the work and provide a written evaluation to the hiring committee.

2.5 Clients and Matters

If the candidate plans to bring clients to the firm, it is essential that each client and each matter be vetted in the same way that the firm would evaluate any other prospective clients with respect to integrity, financial responsibility, and malpractice risk. If any client or matter does not satisfy the firm’s standards, the firm should have a frank discussion with the lateral candidate about transferring that client or matter to another lawyer at the lateral’s old firm or another law firm.

Firms should take care during the due diligence process concerning solicitation of the lateral’s clients and other lawyers and staff from the lateral’s firm, as well as how much financial information is sought regarding the lateral’s clients. It is risky for lateral lawyers to solicit clients, other lawyers, and staff to move to their new firm before they have announced their resignation from their old firm. It is even more dangerous for the new firm to be involved in such solicitations. It is also risky to obtain confidential business information belonging to the prospective lateral’s firm.

3 Conflicts of Interest

Before hiring a lateral lawyer, a firm must check for conflicts that may arise due to the new association. Under the conflicts imputation rules, the firm cannot be involved in a representation that conflicts with any of the lateral’s current or prior representations. Absent consent or the ability to screen the conflicted lawyer, the firm may be required to withdraw from or turn down any such current or prospective engagement. The following discussion focuses on issues that may occur in the conflicts checking process.

3.1 Current Matters

To identify potential current conflicts, the hiring firm should ask the lateral candidate to list all matters on which the candidate is currently working at his or her firm, identifying the clients and other involved parties. The hiring firm should then run the clients and other involved parties through its conflicts database, paying particular attention to current matters that the candidate anticipates bringing to the firm.

As a supplemental check, the hiring firm should ask the candidate about matters in which his or her firm is adverse to the hiring firm. To do this, the hiring firm must first identify all of its current matters in which an adverse party is represented by the candidate’s firm. In many firms, this is done in two ways: (1) by checking the firm’s litigation docket; and (2) by e-mailing all firm lawyers asking if they are aware of any matters (including nonlitigation matters) where the candidate’s firm is representing a party adverse to a firm client. The hiring firm then should ask the candidate if he or she has had any involvement with, or has any confidential information regarding, any of the matters. The candidate should be reminded that this inquiry is not limited to clients the candidate represented or to matters on which he or she worked. Rather it covers clients about whom the candidate learned information in any manner, such as in consultations, in practice group meetings, or even in casual conversations with colleagues.

Several ethics opinions support the use of this conflicts checking methodology. ABA Formal Opinion 09-455 (Oct. 8, 2009) addresses the nature and extent of permissible disclosure for conflicts checking purposes. Initially the opinion explains that a literal reading of Model Rule 1.6(a) might imply
that the disclosure of a client’s identity, even to allow the hiring firm to check for conflicts, is a
disciplinary violation. Nevertheless, balancing the countervailing need to check for conflicts, the opinion
concludes that, in most situations, a lawyer joining a new firm can disclose the identity of the lawyer’s
clients and the issues involved in the lawyer’s matters to the extent necessary to complete the conflicts
check. See also Restatement Third, The Law Governing Lawyers § 60, Comment c(i) (2000) (interpreting
Model Rule 1.6(a) to preclude disclosure of basic information for conflicts check goes beyond proper
interpretation). However, the opinion warns that information may not be disclosed if doing so would
compromise the attorney-client privilege or would likely prejudice the current or former client.

The opinion offers additional guidance regarding the conflicts checking procedure. According to
the opinion, the firm and the moving lawyer should first attempt to detect situations that may prevent a
proposed move before disclosing client-specific confidential information. For example, the firm or the
moving lawyer may decide to end negotiations if they represent antagonistic client groups, such as
landlords and tenants, or if the moving lawyer represents competitors of the firm’s clients. When
information is disclosed, neither the moving lawyer nor the firm may use it for any purpose other than the
conflicts check. If it is necessary to disclose information beyond the persons and issues involved in a
matter to complete the conflicts check, the lawyer should consider seeking the informed consent of the
affected client. Another option is to retain an intermediary lawyer to receive and analyze conflicts
information in confidence. The opinion concludes that a moving lawyer and the new firm should not
disclose confidential information before it is reasonably necessary to do so, that is, not at the initial stages
of the negotiation, but only after there have been substantive discussions about the moving lawyer joining
the firm.

The District of Columbia Bar provided more specific guidance regarding how to conduct a
conflicts check in Opinion 312 (Apr. 2002). The opinion offers the following guidelines:

1. Generally, a moving lawyer will be able to reveal his or her clients’ names and the general subject
matters of the representations. Usually this information will enable the new firm to perform an
adequate conflicts analysis.

2. The hiring firm should conduct a survey to determine all current matters being handled where the
adverse party is represented by the firm where the lateral is currently employed. The list of names
should be shown to the lateral lawyer so the lawyer can determine if he or she has any
confidential client information or representational involvement with respect to those matters.

3. In instances where the lawyer cannot reveal a client’s name, the lawyer should disclose the
subject matter or issue involved in the representation. This information may be adequate for the
new firm to determine that there are no conflicts.

4. If, on the other hand, the subject matter of the representation is confidential, the lawyer should
reveal the client’s name. This alone may enable the new firm to determine that no conflict exists.

5. If the lawyer cannot reveal the client’s name, the lawyer should identify the client’s adversaries.
If the firm does not represent them, it may be able to determine that there are no conflicts issues.

6. In highly sensitive situations, where the lawyer cannot reveal a client’s identity or the subject
matter of a representation, the lawyer should consider providing a list of his or her clients and all
adverse parties, perhaps in alphabetical order so as not to reveal any confidences. This may
enable the new firm to determine that there are no conflicts issues.

New York Opinion 720 (Aug. 27, 1999) goes further. It states that the hiring firm has the burden
to instruct a lateral lawyer not to disclose client “confidences” or “secrets” (as those terms were defined in
the New York Code of Professional Responsibility) when responding to conflicts inquiries. If a client’s
identity or the nature of the representation is confidential, the lateral lawyer should seek the client’s
permission to disclose the information. If the client refuses permission, the new firm should ask the moving lawyer to attempt to determine if there are any conflicts based on the lawyer’s knowledge.

In most instances, if the hiring firm and the moving lawyer follow the suggestions in ABA Formal Opinion 09-455, and the state ethics opinions, if applicable, the firm should be able to determine whether hiring the lawyer will create any conflicts problems. If the firm identifies potential conflicts, it must address them and seek consents where appropriate. In the rare circumstance where the moving lawyer cannot provide sufficient information for the firm to do an adequate conflicts check and the moving lawyer is also unable to determine conclusively that no conflicts issues exist, the firm may have to forgo hiring the lawyer, at least until a thorough conflicts analysis can be performed. See also Boston Opinion 2004-1 (May 20, 2004); Tremblay, “Migrating Lawyers and the Ethics of Conflicts Checking,” 19 Geo. J. Legal Ethics 489 (Spring 2006).

3.2 Prior Matters

Firms also must obtain information from a lateral candidate about any prior, completed representations where the candidate still possesses confidential information about the former client. That situation could lead to a disqualification motion against a firm by the lateral’s former client. Thus, under normal circumstances, the hiring firm also should ask for the identity of clients for whom the candidate has worked in the past.

Some firms limit the scope of this inquiry, reasoning that it is overly burdensome to ask a candidate to provide this information going back many years or even decades. There are no clear-cut rules on how far back in time the conflicts check should go, and firms take different approaches to this issue. Although New York Opinion 720 addresses the issue, it provides little concrete guidance. Laterals should be encouraged to exercise good judgment in thinking about all prior representations that should be included in the search, especially if they involved highly confidential information.

Firms also should ask about the nature of the work the candidate performed for each former client. If the lawyer’s work on a prior matter was only peripheral or insubstantial or unrelated to an adverse matter at the new firm, it might not create a conflict. Several courts have held that the new firm will not be disqualified if the moving lawyer’s work was limited in scope or purpose. See, e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975) (no disqualification where moving lawyer’s work involved only brief discussions on a procedural matter or research on a specific point of law); Bank Brussels Lambert v. Chase Manhattan Bank, N.A., 1996 U.S. Dist. LEXIS 18849, 1996 WL 944011 (S.D.N.Y. Dec. 19, 1996) (moving lawyer was not a strategy maker).

Courts have disqualified firms because a lateral lawyer had confidential information about an adverse party that the lawyer never represented, but learned some other way, such as by participation in a joint defense arrangement. Firms should ask whether candidates have participated in any joint defense arrangements on behalf of any clients, and if so, the identity of the other participants (law firms and clients) and then run those names through the firm’s conflicts database. As an added precaution, some firms also ask a comprehensive, general question: whether the candidate has acquired any other confidential information about any of the candidate’s current or former clients that, if made known to the hiring firm, might create a conflict.

3.3 Personal Interests

Firms must also investigate any personal interest conflicts the lateral candidate might bring to the firm. To do this, they should ask the candidate whether he or she: (1) sits on any boards or has other outside or fiduciary positions; (2) has engaged in any business transactions with clients of either the candidate’s firm or the hiring firm (excluding nominal interests in publicly traded clients and standard commercial transactions for products or services that the client generally markets to others, such as
banking or brokerage services); (3) has any other significant ownership interest in public or private companies; or (4) has served as a mediator, judge, or arbitrator.

3.4 Discussing Employment with Adverse Firm

ABA Formal Opinion 96-400 (Jan. 24, 1996) explores the impact of the rules of professional conduct on lawyers seeking employment with an adverse firm or party. One important conclusion is that a lawyer who is actively engaged in a representation must seek the client's consent to continue the employment negotiations "ordinarily before he participates in a substantive discussion of his experience, clients or business potential or the terms" of the proposed new association. The opinion also concludes that the prospective employer will have a conflict requiring client consent or other appropriate resolution if the new lawyer would cause a disqualification or a material limitation of the prospective employer's representation of a client.

There are at least three other bar opinions on this subject. New York City Opinion 1991-1 (Apr. 30, 1991) advised that disclosure obligations arose "no later than when an offer of conflicting employment has been extended to the lawyer and has not been promptly declined." District of Columbia Opinion 210 (Apr. 17, 1990) and Nassau County, New York Informal Opinion 86-52 (Dec. 1, 1986) reached similar conclusions.

Restatement § 125, Comment d, clearly describes the issue and the obligations of lawyers seeking employment with other firms:

\[d.\ A\ lawyer\ seeking\ employment\ with\ an\ opposing\ party\ or\ law\ firm.\ This\ Section\ applies\ when\ a\ lawyer\ seeks\ to\ discuss\ the\ possibility\ of\ the\ lawyer’s\ future\ employment\ with\ an\ adversary\ or\ an\ adversary’s\ law\ firm.\ The\ conflict\ arises\ whether\ the\ discussions\ about\ future\ employment\ are\ initiated\ by\ the\ lawyer\ or\ by\ the\ other\ side.\ If\ discussion\ of\ employment\ has\ become\ concrete\ and\ the\ interest\ in\ such\ employment\ is\ mutual,\ the\ lawyer\ must\ promptly\ inform\ the\ client.\ Without\ effective\ client\ consent\ (see\ §\ 122),\ the\ lawyer\ must\ terminate\ all\ further\ discussions\ concerning\ the\ employment,\ or\ withdraw\ from\ representing\ the\ client\ (see\ §\ 32\ (2)\ &\ (3)).\ The\ same\ protocol\ is\ required\ with\ respect\ to\ a\ merger\ of\ law\ firms\ or\ similar\ change\ (see\ §\ 123).\]

See also Illustration 4 to Restatement § 125, Comment d.

As noted in Restatement § 125, Comment d above, the disclosure obligations of lawyers seeking employment with other firms apply equally when two law firms are contemplating a merger. Thus, if the firms are opposing counsel in any matter, they must advise their clients at an early point in their negotiations that they are discussing merging their firms. In In re Eastern Sugar Antitrust Litigation, 697 F.2d 524 (3d Cir. 1982), the court held that disclosure of the possibility of a merger between two opposing firms was required to be made to the trial court not later than the time when relatively formal discussions began. The court held that the punishment for failure to make a timely disclosure was forfeiture of the fees accrued after the date on which the disclosure should have been made. That case had been virtually concluded by the time the conflict was brought to the trial court’s attention, so the obvious “punishment” of disqualification was not an issue.

Two cases raise the specter of civil malpractice damages in this context. In McCafferty v. Musat, 817 P.2d 1039 (Colo. App. 1991), the court upheld a jury verdict of more than $800,000 against a lawyer who allegedly hurried a personal injury client into a bad settlement because the lawyer wanted to join the defendant’s law firm. In Stanley v. Richmond, 35 Cal. App. 4th 1070 (1995), the court held in a similar situation that the case should go to the jury and that the jury could award emotional distress damages in addition to compensatory damages. In both cases, the lawyers told their clients about their pending moves before the settlements, but in each case the court found that the client had a cause of action for being hurried into a bad settlement. In Stanley, the client was a practicing lawyer.
4 Lawyers Departing from a Firm

As noted above, lawyers are changing firms with increasing frequency, both leaving as well as joining law firms. Several issues commonly arise with respect to departing lawyers, including the proper disposition of client files and the potential solicitation of clients and firm personnel by departing lawyers.

4.1 Transferring Client Files and Other Documents

When a lawyer changes firms, issues invariably arise regarding client files and other documents. The primary concern is usually what client files and other documents the lawyer may take to the new firm. Other issues that arise are whether the firm may hold files until all fees and costs have been paid and what procedures the firm should follow when transferring files.

4.1.1 Files and Documents Departing Lawyers May Take

The documents a departing lawyer may take to a new firm is an important issue. Some clearly belong to the former firm, and the lawyer should not be allowed access to them. If the lawyer takes or copies files that do not belong to the lawyer, that conduct could constitute dishonesty or professional misconduct in violation of Model Rule 8.4. See In re Cupples, 952 S.W.2d 226 (Mo. 1997) (en banc). See also District of Columbia Opinion 273. In Attorney Grievance Commission of Maryland v. Potter, 844 A.2d 367 (Md. 2004), the Court of Appeals suspended for 90 days an associate who unilaterally removed the paper files and deleted the electronic files of two clients he took to the new firm. The hearing officer determined that the associate was acting in the clients’ best interests and had not committed a violation, but the Court rejected that reasoning, holding that the conduct was criminal.

Questions also arise regarding both the rights of the departing lawyer and the firm to the following types of documents: (1) client files; (2) pleadings, memoranda, and forms prepared by other lawyers; and (3) client lists, fee information, and other business information.

Client Files. In general, both paper and electronic client files follow the client. That is, if the client leaves with the departing lawyer, the client files should go with the lawyer. See Model Rule 1.16(d); District of Columbia Opinion 273; Utah Opinion 132 (Aug. 26, 1993). See also New Hampshire Opinion 2005-06/3 (Jan. 2006); Illinois Opinion 01-01 (July 2001) (firm must turn over former client’s computer files). Conversely, if the client stays with the firm, the client files also stay with the firm. A lawyer who leaves should also be allowed access to closed files of firm clients for whom the departed lawyer had provided services while employed at the firm. Illinois Opinion 95-2 (July 14, 1995). There are, however, exceptions to the general rule.

The first possible exception involves other lawyers’ work product. Lawyers remaining at the firm may have done substantial work for the departing clients. Their notes, research memoranda, and other work product may be contained in the client files. Whether the firm can remove remaining lawyers’ work product depends upon who “owns” it. The resolution of this issue is a matter of state law. In the majority of states, the rule is that with limited exceptions, the files in a matter, including lawyer work product, belong to the client. See, e.g., Iowa Supreme Court Attorney Disciplinary Board v. Gottschalk, 729 N.W.2d 812 (Iowa 2007); Swift, Currie, McGhee & Hiers v. Henry, 581 S.E.2d 37 (Ga. 2003); In re Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP, 689 N.E.2d 879 (N.Y. 1997); Alaska Opinion 2003-3 (May 6, 2003); Colorado Opinion 104 (Apr. 17, 1999). See also Arizona Opinion 98-07 (June 1998) (declined to decide ownership, but determined lawyer has ethical duty to allow client access to files). Restatement § 46 takes an approach that has the same result as the majority of cases. It provides that the lawyer is obligated to deliver to the client documents that the client reasonably needs, and that the client has the right to inspect and copy any documents relating to the representation.

Majority rule states usually recognize limited exceptions to the principle that lawyer work product belongs to the client. Generally, a firm need not turn over to the client documents that would
violate a duty owed to a third party not to disclose confidential information. See In re Sage Realty Corp., 689 N.E.2d at 883; Restatement § 46, Comment c. Nor need a firm turn over documents that are intended for internal office use, such as client assessments. Lippe v. Bairnco Corp., 1998 U.S. Dist. LEXIS 20589, 1998 WL 901741 (S.D.N.Y. Dec. 28, 1998). In Lippe, the court construed the internal use exception broadly, finding that lawyer notes, research memoranda, and a research outline need not be given to the client because they were internal documents prepared to assist lawyers in giving advice to clients.

A minority of states follow the "end product" doctrine, i.e., the end product of the lawyer's work (e.g., pleadings and contracts) belongs to the client, but the lawyer owns the work product containing the lawyer's mental impressions, research, and analysis. See, e.g., Corrigan v. Armstrong, Teasdale, Schlaflly, Davis & Dicus, 824 S.W.2d 92 (Mo. Ct. App. 1992); Illinois Opinion 94-13 (Jan. 1995); North Carolina Opinion RPC 178 (revised) (Oct. 21, 1994); Rhode Island Opinion 92-88 (Mar. 15, 1993).

In summary, lawyers in majority rule states must turn over all client files of departing clients, subject to the exceptions described above. Lawyers practicing in states that follow the end product approach probably can retain documents in client files that are work product of lawyers remaining with the firm. Lawyers in end product states should be wary, however. The Restatement and the more recent authorities reject the end-product theory, and the trend is toward restricting the documents a firm can withhold from departing client files.

Sometimes departing lawyers are reluctant, because of storage costs or otherwise, to take closed files of clients that are leaving with them. But the firm should insist that the client's closed files go back to the client or to the departing lawyer's new firm, except for materials that the firm believes that it needs to retain in original or copy form. The firm also should advise the client that if the client does not agree, the firm will destroy the closed files without further notice. If that occurs, the firm should destroy the files pursuant to its records management policy. This procedure further establishes that the client relationship has ended. Of course, before any files are transferred, they should be reviewed for any professional liability concerns and culled where appropriate.

Research, Pleadings, and Forms. ABA Formal Opinion 99-414 concluded that a departing lawyer may take any research memoranda, pleadings, and forms that the lawyer drafted. If these documents were drafted by other firm lawyers for clients other than those of the departing lawyer, the lawyer probably needs permission from the firm to take them.

Troublesome issues arise regarding these types of documents. For example, it is often difficult to determine who actually drafted a pleading or form, or the document may be the product of numerous lawyers' work, some of whom are leaving the firm and some of whom are staying. Other times, a departing lawyer may request copies of pleadings the lawyer arguably has a right to take, but the firm strongly suspects the real motive is to obtain copies of the firm's forms. These difficult situations should be evaluated on a case-by-case basis with the firm's ethics or risk management committee.

Business Information. The rules of professional conduct do not address the lawyer's right to client lists, fee schedules, and other business information. Rather, this subject is governed by property, trade secret, or tort law principles. Under these principles, this type of information probably belongs to the firm, and the departing lawyer has no right to take it. See generally R.W. Hillman, "The Property Wars of Law Firms: Of Client Lists, Trade Secrets and the Fiduciary Duties of Law Partners," 30 Fla. St. U. L. Rev. 767 (2003); R.W. Hillman, Hillman on Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups (2d. ed. 1998 & Supp. 2010) at § 3.5.

Several courts have indicated that law firm client lists may constitute trade secrets that should not be taken or used by departing lawyers. The Ohio Supreme Court held that a 63-page client list taken by an associate when she left the Fred Siegel firm was a trade secret if the firm had taken reasonable steps to protect its confidentiality. See Fred Siegel Co. v. Arter & Hadden., 707 N.E.2d 853 (Ohio 1999). The
Siegel firm sued the associate and her new firm, Arter & Hadden, for tortious interference with contract and misappropriation of trade secrets after they allegedly used the client list to solicit many of the Siegel firm's clients. The Ohio Supreme Court affirmed a reversal of summary judgment for the defendant law firm and remanded for a determination, as an issue of fact, whether the Siegel firm had taken reasonable precautions to protect the secrecy of its client list. Compare Early, Ludwick & Sweeney, LLC v. Steele, 1998 Conn. Super. LEXIS 2256, 1998 WL 516156 (Aug. 7, 1998) (under the particular facts, client list was not firm's trade secret).

The wrongful taking of personnel information rather than client lists was the focus of a suit filed by Breed, Abbott & Morgan (Breed Abbott) against two former partners who left that firm and joined Chadbourne & Parke (Chadbourne). Gibbs v. Breed, Abbott & Morgan, 693 N.Y.S.2d 426 (Sup. Ct. 1999), aff'd in part, modified in part, and rev'd in part, 710 N.Y.S.2d 578 (N.Y. 2000). Prior to leaving, the departing partners sent Chadbourne salary and other personnel information relating to Breed Abbott lawyers and staff, which Chadbourne then used to recruit them. When they left, the partners took with them their chronological correspondence files. In September 1998, a New York trial judge ruled that the two departing partners breached their fiduciary duty to their former partners and assessed nearly $2 million in damages against them. The Court of Appeals agreed that the departing partners breached their fiduciary duty by sending confidential information about Breed Abbott employees to Chadbourne while they were still Breed Abbott partners. However, it reversed the trial court's finding regarding the partners' taking of chronological files, finding that taking chronological files was a common practice for departing lawyers and did not constitute a breach of fiduciary duty. The Court of Appeals also vacated the damage award and remanded the case for a determination whether the partners' limited breach of fiduciary duty was a substantial cause of Breed Abbott's damages.

### 4.1.2 Holding Client Files to Secure Fees


Professional conduct rules and the authorities that interpret them have addressed the ethical implications of retaining liens. Model Rule 1.8(i)(1) permits a firm to obtain a lien to secure its fees or expenses. Model Rule 1.16(d), however, requires a law firm that is terminating a relationship to "take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled ... ." But Model Rule 1.16(d) also states that the lawyer may retain such papers to the "extent permitted by other law." States have dealt with these somewhat conflicting ethical principles in different ways.

A number of states have either adopted a limited version of Model Rule 1.8(i) or have interpreted it narrowly. District of Columbia Rule of Professional Conduct 1.8(i), for example, allows a retaining lien only to secure a departing lawyer's work product provided that the client can pay and will not suffer irreparable harm. Even that rule has been construed narrowly. See District of Columbia Opinion 250 (Oct. 18, 1994). Similarly, Rule 1.16(e) of the Massachusetts Rules of Professional Conduct provides for a retaining lien for work product only to the extent the client will not be unfairly prejudiced. North Dakota
has gone so far as to adopt a rule that prohibits retaining liens entirely. North Dakota Rule 1.19 states: “A lawyer shall not assert a retaining lien against a client’s files, papers, or property,” including electronically stored items.

In addition, disciplinary boards and ethics committees in several states have either rejected or severely limited the use of retaining liens. See, e.g., Hawaii Opinion 28 (revised) (June 28, 2001) (until retaining liens are explicitly recognized by law, imposition of one would be an ethics violation); Alaska Opinion 2004-1 (Jan. 15, 2004) (lawyer may not withhold expert’s report if client would be prejudiced). Restatement § 43 permits a law firm to withhold documents prepared by the firm only if “nondelivery would not unreasonably harm the client.”

4.1.3 File Transfer Procedures

Firms should have defined procedures for transferring files and should follow those procedures carefully. A firm should require written direction from the client to transfer files to a departing lawyer. The firm should then review the files to the extent practicable to determine whether some documents should be withheld or copied by the firm. The firm probably has the right to retain copies of documents that it is turning over to the departing lawyer. See, e.g., Quantitative Financial Strategies Inc. v. Morgan Lewis & Bockius LLP, 55 Pa. D. & C. 4th 265 (Ct. C. P. 2002); Alaska Opinion 2005-2 (2005); District of Columbia Opinion 273; Restatement § 46. Before turning files over, the firm should consider seeking a written agreement from the departing lawyer and the client that the files will be preserved for a specified period (e.g., 10 years). The agreement should also provide that the departing lawyer and the client will make the files available to the firm for review and copying at the firm’s request.

Firms should require a departing lawyer who wishes to take originals or copies (in paper or electronic form) of any other materials with client-identifying information, or any other nonpublic materials prepared while the lawyer was providing services at the firm, to provide the practice group leader or a designee a complete list of all such documents and materials. The list should either attach copies of the documents or should be prepared with sufficient specificity for the department head or the designee to make a meaningful review and evaluation of the request (including identifying numbers of documents on the computer system).

The firm should maintain a detailed index of all documents and files it turns over to departing lawyers, and should obtain and retain appropriate receipts. There may be issues regarding the costs of copying client files. The firm generally cannot charge clients for copying portions of their files for its own use. See, e.g., Quantitative Financial Strategies Inc., 55 Pa. D. & C. 4th at 278-79; District of Columbia Opinion 273; Pennsylvania Opinion 96-157 (revised) (Nov. 20, 1996). But it may be able to charge the client for assembling files and transporting them to the departing lawyer. See In re Sage Realty Corp., 689 N.E.2d at 883; Restatement § 46, Comment e.

All these procedural issues should be addressed in a firm’s document management and retention policy. If each firm lawyer is required to certify annually that he or she has read and will abide by all firm policies, any departing lawyer arguably has agreed to the firm’s policy regarding document retention.

4.2 Solicitation of Clients by Departing Lawyers

The extent to which departing lawyers may actively solicit clients to move with them generally depends upon two factors: (1) whether they have notified the firm of their planned departure; and (2) whether they continue to work at the firm. (“Actively solicit” in this context means trying to persuade the client to leave the lawyer’s present firm and become a client of the lawyer’s new firm.)

Prior to Notifying Firm. Departing lawyers who solicit clients before notifying their firm of their intent to resign act at their peril. The few opinions that have considered the issue agree that solicitation during this period is impermissible. In Graubard Mollen Dannett & Horowitz v. Moskovitz,
653 N.E.2d 1179 (N.Y. 1995), for example, the firm sued a departing partner for breach of fiduciary duty because he had solicited firm clients before resigning from the firm. The New York Court of Appeals held that a partner’s prerogative solicitation of clients for personal gain is actionable. See also Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358 (III. 1998) (client contacts may breach fiduciary duties owed to other partners in the firm or cause other tort liability to the firm); Dowd & Dowd, Ltd. v. Gleason, 816 N.E.2d 754 (III. App. Ct. 2004) (affirming $2.6 million judgment against departed partners).

If a lawyer nevertheless decides to notify clients at this time of a planned departure, he or she should provide only the bare details of the new affiliation (e.g., name, address, and telephone number of the new firm and the date of change) and whether the lawyer is willing to continue the representation. According to ABA Formal Opinion 99-414, the client also should be told that it has the right to choose counsel. At a later date, the lawyer needs to provide the client with more information so that it can make an informed decision regarding its representation. At this stage, however, if there is any communication with clients, it should be as brief as possible to avoid a charge of impermissible solicitation.

**After Notice but before Departure.** Between the time the lawyer notifies the firm of a planned departure and the actual departure date, some case law indicates that the departing lawyer still should not actively solicit clients, particularly where unfair competition is present. In Vowell & Meelheim, P.C. v. Beddow, Erben & Bowen, P.A., 679 So. 2d 637 (Ala. 1996), the defendants had arranged meetings to solicit clients after they had notified their firm they were resigning but before their actual departure. Other lawyers in the firm were not informed of the meetings. The court held this constituted a breach of the departing lawyers’ fiduciary duty to their current partners.

Likewise, in Meehan v. Shaughnessy, 535 N.E.2d 1255 (Mass. 1989), the court found that solicitation of clients by departing lawyers, after giving notice but prior to departure, constituted a breach of fiduciary duty: “By sending a one-side announcement, ... so soon after notice of their departure, [the departing lawyers] excluded their partners from effectively presenting their services as an alternative to those of [the departing lawyers].” 535 N.E.2d at 1265. See also Wenzel v. Hopper & Galliher P.C., 779 N.E.2d 30 (Ind. Ct. App. 2002) (departing lawyer sent fax to major firm client); Dowd & Dowd, Ltd., 693 N.E.2d 358, discussed above (departing lawyers met with the firm’s largest client on the same day that they resigned). Although not deciding the issue, District of Columbia Opinion 273 warns that active solicitation during this period could violate the lawyer’s obligations under partnership law, corporate law, and common law. Accord Pennsylvania/Philadelphia Joint Opinion 99-100 (clients should not be urged either to remain with the firm or to go with the departing lawyer).

In contrast, Restatement § 9(3) approves departing lawyer solicitation of clients during this period. The Restatement requires, as a condition to solicitation, that the lawyer first inform the firm that he or she intends to contact clients. Professor Hillman agrees that the departing lawyer may solicit clients after notifying the firm and before the departure date as long as the solicitation occurs long enough after the announcement to allow the firm to compete, the solicitation is not done in secret, and the client is advised that it is free to choose counsel. See Hillman, Lawyer Mobility at § 4.8.3.2.

Even under the Restatement approach, there are still limitations on what a departing lawyer may say. Model Rule 7.1 prohibits a lawyer from comparing his or her services with those of another lawyer. Accordingly, a departing lawyer should make no disparaging remarks about the lawyer’s current firm or make any comparison between the new firm and the current firm. See Pennsylvania/Philadelphia Joint Opinion 99-100; Wisconsin Opinion E-97-2. Likewise, the firm should not disparage the departing lawyer. See, e.g., Pennsylvania Opinion 98-124 (Dec. 7, 1998).

**After the Lawyer Has Left the Firm.** Absent an agreement to the contrary, a lawyer who has left a firm usually can solicit his or her own former clients. See ABA Informal Opinion 1457 (Apr. 29, 1980); Restatement § 9, Comment i. Cf. Jenkins v. Smith, 535 S.E.2d 521 (Ga. Ct. App. 2000) (lawyer not liable for appropriating a business opportunity at his prior firm). But see Adler, Barish, Daniels, Levin
and Creskoff v. Epstein, 393 A.2d 1175 (Pa. 1978), where the court reinstated an injunction prohibiting departing lawyers who had left the firm from interfering with the firm’s existing contractual relationships with clients. A distinguishing fact in Adler was that one of the departed lawyers used firm resources to solicit former clients. See also Texas Opinion 563 (Oct. 2005), which concluded that a lawyer who left a law firm after having worked on an hourly billed matter for a client did not violate the Texas rules of professional conduct by soliciting that client with an offer to continue the representation under a contingent fee (assuming full disclosure as to the benefits and possible detriment of that arrangement). The opinion noted, however, that it was not considering the issue of potential liability for such conduct under common law.

Many state professional conduct rules prohibit a lawyer from soliciting in person, by telephone, or by “real-time electronic contact” a prospective client with whom the lawyer has no “family, close personal, or prior professional relationship.” See Model Rule 7.3(a). A lawyer does not have a “prior professional relationship” with clients of the former firm for whom the lawyer did no work. Thus, the lawyer can solicit those clients only to the extent state rules of professional conduct allow the lawyer to solicit any other prospective client with whom the lawyer has no prior relationship. The Model Rules provide that such persons (who are not lawyers) can be solicited only by written, recorded, or electronic communication. See Model Rule 7.3(a). Indeed, it is common practice for lawyers who have changed firms to send announcements of their new affiliation. The Model Rules appear to authorize this practice. See Model Rule 7.3, Comment [7]. See also ABA Formal Opinion 99-414; Hilb, Rogal & Hamilton Insurance Services of Orange County, Inc. v. Robb, 33 Cal. App. 4th 1812 (1995).

4.3 Solicitation of Other Firm Personnel by Departing Lawyers

Rules of professional conduct and opinions typically do not address the issue of a departing lawyer’s solicitation of employees and staff. Such conduct is governed by common law tort principles, but case law addressing the subject is sparse. Usually, it is permissible for fellow partners to discuss leaving a firm, to make plans to leave together, and to make logistical arrangements. Cf. Meehan v. Shaughnessy, 535 N.E.2d 1255. If their conduct goes beyond that, however, and involves more aggressive acts such as recruiting employees and staff, departing partners may be liable.

The situation in Gibbs v. Breed, Abbott & Morgan, discussed above, involved the solicitation of other lawyers and staff by departing partners. Before leaving Breed Abbott, the two departing partners sent Chadbourne a memo containing salary and other personnel information about associates and other employees in Breed Abbott’s trust and estates department. Chadbourne used the information to recruit most of that department from Breed Abbott. The court found that the departing partners’ recruitment of Breed Abbott personnel while they were still members of the firm constituted an “egregious” breach of the departing partners’ fiduciary duty to the other partners.

Similarly, a few cases have held that a lawyer’s solicitation of firm employees together with client solicitation prior to the lawyer’s departure constitutes a breach of the lawyer’s fiduciary duty to the other partners. See, e.g., Dowd & Dowd, cited above. Professor Hillman agrees that soliciting firm employees before actual departure probably constitutes a breach of the lawyer’s fiduciary duty to the remaining partners. Hillman, “Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms,” Symposium Issue, 55 Wash. & Lee L. Rev. 997, 1030 (1998). Hillman concludes that departing partners should never recruit staff prior to giving notice to the firm. During the period between notice to the firm and actual withdrawal, he also advises against such solicitation with one limited exception: allowing solicitation of employees to the extent necessary to service clients and then only if the firm is notified in advance. Although this exception seems logical, it appears to be untested in the courts.

Because associates are employees who do not have the same fiduciary relationship to a firm as the firm’s partners, the law applicable to departing associates may be different. In Kopka, Landau &
Pinkus v. Hansen, 874 N.E.2d 1065 (Ind. Ct. App. 2007), the court rejected all claims asserted by a firm against its former associate who, while still at the firm, asked other associates and staff whether they were interested in joining his new firm. The court found that this activity was “mere preparation” to compete rather than active and direct competition because the associate did not “actually” offer employment to his fellow employees until after he departed.

Once a lawyer has left a firm, he or she normally can solicit employees of the former firm. See Pennsylvania/Philadelphia Joint Opinion 99-100. After leaving the firm, the lawyer’s fiduciary duties to former partners have ended. See Hillman, 55 Wash. & Lee L. Rev. at 1032. If the departed lawyer uses information or resources of the former firm to solicit employees or if the solicitation is part of a scheme to cripple or destroy the former firm, however, the firm may have a cause of action against the departing lawyer and the new firm. For example, in Reeves v. Hanlon, 95 P.3d 513 (Cal. 2004), the court upheld a claim for intentional interference with prospective economic advantage against two lawyers who hired employees away from their former firm. Even though the two lawyers did not begin their solicitation until after they had resigned from the firm, their “campaign against the ... firm” also included destruction of computer files, misuse of confidential information, and other allegedly unethical conduct.

5. Bibliography


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AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 09-455
Disclosure of Conflicts Information When Lawyers Move Between Law Firms

October 8, 2009

When a lawyer moves between law firms, both the moving lawyer and the prospective new firm have a duty to detect and resolve conflicts of interest. Although Rule 1.6(a) generally protects conflicts information (typically the "persons and issues involved" in a matter), disclosure of conflicts information during the process of lawyers moving between firms is ordinarily permissible, subject to limitations. Any disclosure of conflicts information should be no greater than reasonably necessary to accomplish the purpose of detecting and resolving conflicts and must not compromise the attorney-client privilege or otherwise prejudice a client or former client. A lawyer or law firm receiving conflicts information may not reveal such information or use it for purposes other than detecting and resolving conflicts of interest. Disclosure normally should not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association.¹

Many lawyers change law firm associations during their careers. New York’s highest court noted more than a decade ago that the “revolving door” is a modern-day law firm fixture.² Usually these changes are voluntary, but often they are not. The Model Rules of Professional Conduct recognize lawyer mobility. Comment [5] to Rule 1.9, “Lawyers Moving Between Firms,” states that the rule on duties to former clients should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel or unreasonably hamper lawyers from forming new associations and accepting new clients. The February 2009 amendment of Rule 1.10(a) to permit screening of lawyers moving between firms to prevent imputed disqualification of the new firm is grounded on that premise. The importance of clients being free to choose counsel after a change of association is also identified in Comment [1] to Rule 5.6.

The Need for Conflicts Analysis

When a lawyer moves between law firms, the moving lawyer and the new firm each have an obligation to protect their respective clients and former clients against harm from conflicts of interest. A moving lawyer whose current clients may wish to become clients of the new firm must determine whether the new firm would have disqualifying conflicts of interest in representing those clients.³ The prospective new firm has a corresponding duty to determine the conflicts in its current representations that could arise if the moving lawyer actually joins the firm. Comment [3] to Rule 1.7 advises lawyers to adopt reasonable procedures, appropriate for the size and type of firm and practice, “to determine in both litigation and non-litigation matters the persons and issues involved” to ascertain whether proposed new matters are permitted under the conflicts rules. Comment [2] to Rule 5.1(a) includes policies and procedures designed to “detect and resolve” conflicts of interest among those measures that law firm managers must establish to give reasonable assurance that all lawyers in the firm conform to the Rules.

The obligation to detect and resolve conflicts of interest derives from the common law as well as the lawyer ethics rules.⁴ When lawyers move between firms, early detection and resolution of conflicts of interest is also prudent risk management. “A common and often serious problem for law firms is the conflict of interest involving a newly hired lawyer ... and his or her former clients or adversaries. Accordingly ... it is essential to conduct prior conflict screening as thoroughly as possible before making hiring decisions.”⁵ Other authorities have deemed it essential in order to facilitate the necessary conflicts screening to include client identification and subject matter in the new firm’s conflicts database for all former clients of lawyers joining the law firm.⁶

¹ This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.
³ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 99-414 (September 8, 1999) (Ethical Obligations When a Lawyer Changes Firms) n.12
⁴ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121, cmt. g (2000), and RICHARD E. FLANN, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES § 3.9 (2003).
⁵ ANTHONY E. DAVIS AND PETER R. JARVIS, RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS 109 (2d ed. 2007).
Tension between Confidentiality and Conflicts Analysis

Despite the need for both a lawyer considering a move and the prospective new firm to detect and resolve conflicts of interest, some commentators have expressed concern that the Model Rules do not specifically permit disclosure of the information required for conflicts analysis.7 This concern arises from the definition of information covered by Rule 1.6(a), which is “all information relating to the representation, whatever its source.”8 Thus, the persons and issues involved in a matter generally are protected by Rule 1.6 and ordinarily may not be disclosed unless an exception to the Rule applies or the affected client gives informed consent.9

Disclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6. The exception in Rule 1.6(a) for disclosures “impliedly authorized in order to carry out the representation” typically is limited to disclosures that serve the interests of the client. Examples cited in Comment [5] to Rule 1.6 include facts that must be admitted in litigation or a disclosure that facilitates a satisfactory conclusion to a matter, disclosures clearly necessary to advance a client’s representation. Another example was recognized in ABA Formal Opinion 98-411,10 which found limited disclosure outside a law firm in a lawyer-to-lawyer consultation impliedly authorized “when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer’s experience or expertise for the benefit of the consulting lawyer’s client.” This interpretation is consistent with general agency law: an agent’s implied authority is limited to acts “necessary or incidental” to achieving the principal’s objectives.11 There may well be instances where client representations are advanced by lawyers moving between firms, but most such moves appear to take place for the sake of the lawyer rather than advancement of the client’s representation. Absent a demonstrable benefit to a client’s representation from the disclosure of conflicts information, it is unlikely that the disclosure would be “impliedly authorized” within the generally understood and accepted meaning of that exception.

A second stated exception to Rule 1.6(a) that might arguably allow disclosure of conflicts information incident to lawyers moving between firms is Rule 1.6(b)(6), which permits disclosure of information “the lawyer reasonably believes necessary … to comply with other law.” However, Comment [12] to Rule 1.6 seems to limit “other law” to law other than the Rules. Compliance with Rule 1.7 would therefore not seem to fall within the exception. Comment [12] also notes that the disclosure must be “required” by the other law. Because the movement of lawyers between firms is not mandated by some external law, it is unlikely that disclosure of conflicts information to comply with Rule 1.7 qualifies as required by other law outside the Rules. Finally, as explained in Comment [12], when disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. Such a discussion at the time conflicts information is provided often would not be practicable.

Obtaining clients’ informed consent, as defined in Rule 1.0(c), before a lawyer explores a potential move could resolve the tension between the broad scope of Rule 1.6(a) and the need to disclose conflicts information, but there are serious practical difficulties in doing so. Many contemplated moves are never consummated. In the common situation where a lawyer interviews more than one prospective new firm, multiple consents would be required. Consent of all former clients, as well as all current clients, also would be necessary. Further, seeking prior informed consent likely would involve giving notice to the lawyer’s current firm,12 with unpredictable and possibly

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8 Rule 1.6 cmt. 3.
9 See, e.g., Comment [4] to Rule 1.6 (use of hypothetical to discuss representation permissible so long as there is no reasonable likelihood that listener could ascertain identity of client or situation involved); ABA Formal Op. 96-399 (Jan. 18, 1996) (Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to their Existing and Future Clients When Such Funding is Reduced and When Remaining Funding is Subject to Restrictive Conditions), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 384-85 (ABA 2000) (lawyers may be unable to comply with proposed condition of Legal Services Corporation funding to disclose identity of all clients); and ABA Formal Op. 01-421 (February 16, 2001) (Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions) (insurance defense lawyer may not disclose billing records relating to insured’s representation to third-party auditor designated by insurer without insured’s informed consent).
11 See RESTATEMENT (THIRD) OF AGENCY § 2.02(1) (2006).
12 See ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS § 2.2.4 (2d ed. 2009 Supp.).
adverse consequences. Routinely requiring prior informed consent to disclose conflicts information would give any client or former client the power to prevent a lawyer from seeking a new association with no incentive for a client or former client to give such consent unless the client plans to follow the lawyer to the new firm. Nevertheless, as noted below, there may be unusual situations where the persons and issues involved are so sensitive that a moving lawyer may need to seek informed client consent or take alternative protective measures before disclosing that information.

**Permissive Disclosure of Conflicts Information**

In most situations involving lawyers moving between firms, however, lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for conflicts analysis. The Model Rules are "rules of reason" to be "interpreted with reference to the purposes of legal representation and of the law itself."\(^{14}\) Interpreting Rule 1.6(a) to prohibit any disclosure of the information needed to detect and resolve conflicts of interest when lawyers move between firms would render impossible compliance with Rules 1.7, 1.9, and 1.10, and prejudice clients by failing to avoid conflicts of interest. Such an interpretation would preclude lawyers moving between firms from conforming with the conflicts rules.

The need to disclose conflicts information has been recognized when lawyers change firms as well as in other contexts. As noted above, a moving lawyer with a current client that may wish to become a client of the new firm "must ensure that her new firm would have no disqualifying conflict of interest.\(^{15}\) In order to do so, she may need to disclose to the new firm certain limited information relating to this representation."\(^{15}\) Providing guidelines for employing temporary lawyers in compliance with the Rules, ABA Formal Opinion 88-356 advises: "The second firm should make appropriate inquiry [of the temporary lawyer] and should not hire the temporary lawyer or use the temporary lawyer on a matter if doing so would disqualify the firm from continuing its representation of a client on a pending matter."\(^{16}\) ABA Formal Opinion 99-415 gives guidance regarding representations adverse to an organization by its former in-house lawyer, and advises in-house lawyers to maintain logs describing those matters on which they worked because determination by the new firm of whether there was a conflict of interest with the former employer required "an inquiry into the responsibilities of the lawyer" during the former employment.\(^{17}\) Further, the February 2009 revision of Rule 1.10(a) that permits screening of lawyers moving between firms to avoid imputing the disqualification of the moving lawyer to the new firm becomes relevant only if a former client conflict of the moving lawyer has been recognized by the new firm, presumably on the basis of information obtained from the moving lawyer. These opinions and amended Rule 1.10(a) clearly acknowledge that disclosure of conflicts information is permitted to facilitate compliance with the obligation to deal with conflicts of interest.

The importance of a lawyer's compliance with the Rules has justified limited disclosure of protected information in other circumstances. Rule 1.6(b) was amended in 2002 to clarify that disclosures reasonably necessary to secure legal advice about the lawyer's compliance with the Rules are proper even when not impliedly authorized under the stated exception to 1.6(a) because of the overriding importance of compliance with the Rules.\(^{18}\)

As discussed above, before a moving lawyer joins a new firm, the Model Rules and the common law require the lawyer and the firm to detect and resolve conflicts of interest to protect their clients and former clients, even if only one party to the move undertakes the actual conflicts analysis. Conflicts analysis cannot be accomplished without sharing conflicts information generally about the persons and issues involved in a matter. Because conflicts information is needed to detect and resolve conflicts of interest when lawyers move between firms, as a general matter and subject to the limitations stated below, disclosure of conflicts information otherwise protected by Rule 1.6 should be considered permissible as necessary to comply with the Rules.

\(^{13}\) For a discussion of when a lawyer changing firms must give notice to clients for whom the lawyer has active matters, see ABA Formal Op. 99-414, supra note 3.

\(^{14}\) See, Paragraph [14].


\(^{17}\) ABA Formal Op. 99-415 (Sept. 8, 1999) (Representation Adverse to Organization by Former In-House Lawyer).

\(^{18}\) See, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 (ABA 2006) at 125. See also Comment [9] to Rule 1.6 (even when not impliedly authorized, paragraph (b)(4) permits disclosure to secure legal advice because of importance of compliance with Rules).
09-455 Formal Opinion

This conclusion is consistent, although not congruent, with a comment to the current ethics rules of one state and at least four bar association opinions. Comment [5A] to Colorado Rule 1.6 (which defines protected information substantially the same as Model Rule 1.6) states that a lawyer moving or contemplating a move from one firm to another may disclose client identity and the basic nature of the representation to insure compliance with the conflicts rules. Boston Bar Association Opinion 2004-1 concluded that without implicit authorization to share limited conflicts information, the requirement of Rule 1.7 to check for conflicts of interest as well as the protection of lawyer mobility and a client’s right to choose a lawyer under Rule 5.6 could not be reconciled. Opinions from jurisdictions that did not adopt the Model Rules definition of protected information, but rather retained the 1969 Model Code of Professional Responsibility formulation of confidences and secrets, reached similar results.

Limitations on Disclosure

Permissive disclosure of conflicts information otherwise protected by Rule 1.6(a) incident to the process of lawyers moving between firms is limited in scope. Consistent with Comment [14] to Rule 1.6, any disclosure of conflicts information when lawyers move between firms should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest. As noted in Comment [3] to Rule 1.7, conflicts information typically includes the persons and issues involved in the relevant matter, and disclosure of that information would be permitted. In some cases, conflicts of interest that would likely frustrate a contemplated move can be discovered even before disclosure of client-specific information is necessary. For example, if it is recognized that moving lawyer’s current firm and the prospective new firm are adverse in numerous existing matters or regularly represent commonly antagonistic groups (e.g., landlords and tenants or management and unions), then discussions regarding a potential move probably would proceed no further. In other cases, simply comparing client lists or the general nature of the practices of the moving lawyer and the prospective new firm will often reveal the absence or presence of potential conflicts without the need for additional disclosure; initial disclosures of conflicts information thus can often be limited to names of clients or areas of practice. In any case, if information beyond the persons and issues involved appears necessary for conflicts analysis, alternative measures such as those discussed below should be considered.

Another important limitation is that disclosing conflicts information must not compromise the attorney-client privilege or otherwise prejudice a client or former client. There are matters, albeit rare, in which the identity of the client or the nature of the representation or both are protected by the attorney-client privilege. There are also situations (e.g., clients planning a hostile takeover, contemplating a divorce, or appearing before a grand jury) in which disclosure of non-privileged information to the prospective new firm of the persons and issues involved would likely prejudice the client or former client.

In some situations, resolving whether a lawyer’s move to a new firm would result in a conflict of interest requires fact-intensive analysis of information beyond just the persons and issues involved in a representation. Such an analysis will often be required in determining whether there is a “substantial relationship” between two matters for purposes of Rule 1.9. In such cases, the firm may be able to resolve the question based on information available from sources other than the moving lawyer. If not, the moving lawyer must either seek prior client consent, be screened from the current representation pursuant to Rule 1.10(a)(2), forgo the move, or persuade the prospective firm to undertake an alternative method of detecting and resolving the conflicts of interest issue consistent with the stated exceptions to Rule 1.6.

19 Boston Bar Ass’n Eth. Comm. Op. 2004-1 (May 20, 2005) ("The Do’s and Don’ts of Revealing ‘Conflict-checking Information’"). Massachusetts Rule 1.6(a) protects only “confidential information relating to representation of a client.”
21 See ABA Formal Op. 98-411, supra footnote 9 and accompanying text (consulting lawyer in lawyer-to-lawyer consultation impliedly authorized to disclose certain information relating to the representation without client consent, but may not waive attorney-client privilege or otherwise prejudice client).
An alternative suggested by some commentators is retention by the moving lawyer, the prospective new firm, or both, of an independent or intermediary lawyer to receive and analyze conflicts information in confidence. This approach should not compromise any privilege nor frustrate the reasonable expectations of a client. It also conforms to Rule 1.6(b)(4), which expressly permits disclosure of protected information to secure legal advice about a lawyer's compliance with the Rules. The intermediary lawyer then may advise one or both, without disclosing any facts to the other, of the intermediary lawyer’s conclusion on the resolution of, or the inability to resolve, any conflicts of interest that may have been detected. Procedures involving use of intermediary lawyers when lawyers move between firms have been described by Professors Tremblay, and Wald, as well as by Professors Hazard and Hodes. If a client has instructed the moving lawyer not to reveal particular information to any other person, including other firm lawyers, that information cannot properly be imparted to the intermediary lawyer.

In every case, a lawyer or law firm receiving conflicts information has a duty not to reveal that information. Use of conflicts information by the receiving lawyer or firm should be limited to the detection and resolution of conflicts of interest, and dissemination of conflicts information should be restricted to those persons assigned to or involved in the conflicts analysis with respect to a particular lawyer.

Timing of Disclosure

Timing is also important. Conflicts information should not be disclosed until reasonably necessary, but the process by which firms decide to offer lateral lawyers positions varies widely among firms and usually differs within firms according to the age and experience level of the lawyer under consideration. Many firms might not ask conflicts information of younger lawyers until making an offer of employment, which will be contingent on resolution of conflicts. For partner-level lawyers, the process is more complicated. As a consequence, conflicts issues may need to be detected and resolved at a relatively early stage.

In any event, negotiations between the moving lawyer and the prospective new firm should have moved beyond the initial phase and progressed to the stage where a conflicts analysis is reasonably necessary, which typically will not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association. In another context, ABA Formal Op. 96-400 explored at length the issue of when a lawyer considering potential employment with an adverse firm must consult with and seek consent of the involved client. The analysis there concluded that participation in substantive discussions by the moving lawyer and the prospective employer best identified the point at which such consideration needed to occur. Thus, conflicts information normally should not be disclosed when conversations concerning potential employment are initiated, but only after substantive discussions have taken place.

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33 19 Geo. J. Legal Ethics at 544.
34 31 J. Legal Prof. at 227.
37 See, e.g., Roberts & Schaefer Co. v. San-Con, 898 F. Supp. 356, 363 (S.D.W.Va. 1995) ("Lawyers and law firms must consider and address the effects of mergers and new associations on their clients well in advance of when such events occur.").

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Technology

Tie Down That Wi-Fi: Security in Public Requires Vigilance

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By Dennis Kennedy

Illustration by James Steinberg

Not much these days beats the appeal of free public Wi-Fi. With our mobile devices, it’s actually disappointing when we can’t jump on the Internet whenever we’d like. But security experts like to remind us that all is not idyllic in the public Wi-Fi landscape. Security presenters at conferences seem to enjoy demonstrating just how easy it is to locate and invade computers connected to the Wi-Fi in the room.

Given the nature of the information lawyers have on their devices and might need to access over the Internet, taking security precautions in a public Wi-Fi setting is especially important for lawyers and their clients.

Keep in mind that security protection is an evolving process and not just a one-time set-and-forget step. In large part, your goal is to deter “opportunity criminals” by making your computer a tougher target than all of the other computers where you are.

Here are some basic tips to make you less of a target when using public Wi-Fi:

1. Get your shields up. You want to understand how vulnerable your computer is—right now, after you take steps to improve security and on an ongoing basis. For many years the easiest way to determine that has been to run the diagnostics at Shields Up. This project of computer security expert Steve Gibson will scan and report on your system’s vulnerabilities.

   The site also provides a wealth of educational materials about good security practices that can be adopted. As Gibson puts it: “Anything that can display a webpage—desktop, laptop, netbook, phone, tablet—can be tested with Shields Up.”

2. Get the firewall. Besides blocking ways outsiders can get into your computer while allowing desired activity, some firewall programs can identify or block malware from sending data out of your computer. Both Windows and Mac OSX have built-in firewall programs; you’ll want to check that they are turned on and properly configured. Some experts are critical of this basic firewall software, so many people have turned to firewall programs like ZoneAlarm PRO Firewall ($59.95 for up to three PCs, but there is a basic version for free). After you enable a firewall program, check Shields Up again and look for changes in your report.
3. Turn off file-sharing. A major vulnerability, especially on a Windows computer, comes from having sensitive files in folders where file sharing is permitted. Someone who gets to your computer can then access everything in those folders. As a general principle, you can turn off and on file-sharing for individual folders. A good idea is to have only one "public" folder where you can put files that can be shared only when they need to be shared.

4. Get malware protection. If you've read anything lately about botnet attacks, you'll know that a primary goal of malware is to allow bad actors to take over your computer and launch cyberattacks over the Internet. Good antivirus/malware protection is a must today. A sound practice is to scan for malware after you've used any public Wi-Fi network.

5. Use good security hygiene. If you will be in a public Wi-Fi setting, you need to concentrate on good security practices. Use a virtual private network if you have that option available to you. Evaluate your surroundings and the people around you.

    Download sensitive documents at your office before you go to a coffee shop. Use strong passwords. Activate security protections for social media accounts. Be hesitant to use online banking, e-commerce and other sensitive services in a public setting.

    Make sure that when you see multiple Wi-Fi networks at a location, you use the correct network and avoid any network called public Wi-Fi. Use common sense, update programs, be aware of current security issues, and follow the instructions of your IT department or consultant.

Public Wi-Fi can help lawyers in many ways, both to do their work and to be more responsive to clients. However, never assume that your computer is safe on public Wi-Fi. In fact, it's best to assume that your laptop is always a target. A few simple steps can help you be safer, but the key is to remember that good security is an ongoing process and commitment.

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The Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer’s reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. A lawyer who is concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata, or who wishes to take some action to reduce or remove the potentially harmful consequences of its dissemination, may be able to limit the likelihood of its transmission by “scrubbing” metadata from documents or by sending a different version of the document without the embedded information.

In modern legal practice, lawyers regularly receive e-mail, sometimes with attachments such as proposed contracts, from opposing counsel and other parties. Lawyers also routinely receive electronic documents that have been made available by opponents, such as archived e-mail and other documents relevant to potential transactions or to past events. Receipt may occur in the course of negotiation, due diligence review, litigation, investigations, and other circumstances.

E-mail and other electronic documents often contain “embedded” information. Such embedded information is commonly referred to as “metadata.” This opinion addresses whether the ABA Model Rules of Professional Conduct permit a lawyer to review and use embedded information contained in e-mail and other electronic documents, whether received from opposing counsel, an adverse party or an agent of an adverse party. The Committee

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1. Creation of metadata is not a new phenomenon. For example, for decades, documents saved on personal computers typically have contained embedded information recording the last date and time that the documents were saved.

2. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling.

3. This opinion assumes that the receiving lawyer did not obtain the electronic documents in a manner that was criminal, fraudulent, deceitful, or otherwise improper, for example, by making a false statement of material fact to opposing counsel or to any other third person (Model Rule 4.1(a)), using a method of obtaining evidence that violated the legal rights of a third person (Model Rule 4.4(a)), or otherwise engaging in misconduct (Model Rule 8.4). Such scenarios are beyond the scope of this opinion.
concludes that the Rules generally permit a lawyer to do so.\footnote{Comment [16] to Model Rule 1.6 states, “[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1, and 5.3.” Addressing whether the sending or producing lawyer acted competently in any given factual scenario is beyond the scope of this opinion. See also New York State Bar Ass’n Committee on Prof’l Ethics Op. 782 (Dec. 8, 2004), (E-mailing documents that may contain hidden data reflecting client confidences and secrets), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Opinion_782.htm (last visited Sep. 15, 2006) (under New York’s Code of Professional Responsibility, New York’s version of predecessor ABA Model Code of Professional Responsibility, lawyers must exercise reasonable care to prevent inappropriate disclosure of client confidences and secrets contained in metadata).}

Metadata is ubiquitous in electronic documents. For example:

- Electronic documents routinely contain as embedded information the last date and time that a document was saved, and data on when it last was accessed. Anyone who has an electronic copy of such a document usually can “right click” on it with a computer mouse (or equivalent) to see that information.

- Many computer programs automatically embed in an electronic document the name of the owner of the computer that created the document, the date and time of its creation, and the name of the person who last saved the document.\footnote{The names generally are automatically derived from the name of the owner of the computer on which the document is created or from the name associated with the user identification of the person who accessed the computer program. If a document is copied and altered, it still might contain the name of the creator of the original document. Thus, the embedded information about the creator of a document or who last saved it might or might not identify the person(s) who actually created or saved it.} Again, that information might simply be a “right click” away.

- Some word processing programs allow users, when they review and edit a document, to “redline” the changes they make in the document to identify what they added and deleted. The redlined changes might be readily visible, or they might be hidden, but even in the latter case, they often will be revealed simply by clicking on a software icon in the program.

- Some programs also allow users to embed comments in a document. The comments may or may not be flagged in some manner, and they may or may not “pop up” as a cursor is moved over their locations.

Other types of metadata may or may not be as well known and easily understandable as the foregoing examples. Moreover, more thorough or extraordinary investigative measures sometimes might permit the retrieval of embedded information that the provider of electronic documents either did not know existed, or thought was deleted.
Not all metadata, it should be noted, is of any consequence; most is probably of no import. In ordinary day-to-day circumstances, the embedded information that is found in most documents, such as when they were saved, or who the authors were, is unlikely to be of any interest, much less material to a matter. In some instances, however, such as when a party to a lawsuit is attempting to establish "who knew what when," the date and time that a critical document was created or who drafted it may be a critical piece of information. If a payment amount is being negotiated, then a redlined change or a comment in a draft agreement that suggests how much more the opposing party is willing to pay or how much less they might take likely is of the highest importance.

The Committee first notes that the Rules do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents. The most closely applicable rule, Rule 4.4(b), relates to a lawyer's receipt of inadvertently sent information. Even if transmission of "metadata" were to be regarded as inadvertent, Rule 4.4(b) is silent as to the ethical propriety of a lawyer's review or use of such information. The Rule provides only that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comment [3] to Model Rule 4.4 indicates that, unless other law requires otherwise, a lawyer who receives an inadvertently sent document ordinarily may, but is not required to, return it unread, as a matter of professional judgment.

6. As stated earlier, this opinion assumes that the receiving lawyer acted lawfully and ethically in obtaining the electronic documents.

7. The Committee does not characterize the transmittal of metadata either as inadvertent or as inadvertent, but observes that the subject may be fact specific. As noted in Formal Opinion 06-440 (May 13, 2006) (Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-382 (July 5, 1994)), there is no Model Rule that addresses the duty of a recipient of inadvertently transmitted information.

8. Comment [2] to Rule 4.4 confirms that the word "document" includes e-mail and other electronic documents. The Comment also indicates that the notification requirement exists "in order to permit [the sender] to take protective measures," and includes a recognition that applicable other law (outside of the applicable rules of professional conduct) may require the lawyer to take additional steps beyond notification.

9. Rule 4.4(b) was added to the Model Rules in 2002. The clarity of its requirements provided the basis for the Committee to withdraw two of its past formal ethics opinions. First, the Committee, in Formal Opinion 05-437 (Oct. 1, 2005) (Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368 (Nov. 10, 1992)), withdrew its Formal Opinion 92-368 (Nov. 10, 1992) (Inadvertent Disclosure of Confidential Materials). Formal Opinion 92-368 opined that a lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential under Model Rule 1.6, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer, and abide by the instructions of the sending lawyer. Second, the Committee, in Formal Opinion 06-440 (May 13, 2006) (Unsolicited...
Some authorities have addressed questions related to a lawyer's search for, or use of, metadata under the rubric of a lawyer's honesty, and have found such conduct ethically impermissible. The Committee does not share such a view, but instead reads the recent addition of Rule 4.4(b) identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information, as evidence of the intention to set no other specific restrictions on the receiving lawyer's conduct found in other Rules. Whether the receiving lawyer knows or reasonably should know that opposing counsel's sending, producing, or otherwise making available an electronic document that contains metadata was "inadvertent" within the meaning of Rule 4.4(b), and is thereby obligated to provide notice of its receipt to the sender, is a subject that is outside the scope of this opinion.

The Committee observes that counsel sending or producing electronic doc-

Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-382 (July 5, 1994), withdrew its Formal Opinion 94-382 (July 5, 1994) (Unsolicited Receipt of Privileged or Confidential Materials). Formal Opinion 94-382 addressed the obligations under the Rules of a lawyer who is offered, or is provided, by a person not authorized to offer them, materials of an adverse party that the lawyer knows to be, or on their face appear to be, subject to the attorney-client privilege or otherwise confidential under Rule 1.6.

10. The Committee notes that New York State Bar Ass'n Committee on Prof'l Ethics Op. 749 (Dec. 14, 2001) (Use of computer software to surreptitiously examine and trace e-mail and other electronic documents), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Committee_on_Professional_Ethics_Opinion_749.htm (last visited Sept. 15, 2006) took the position that under New York's Code of Professional Responsibility, a lawyer may not "intentionally use ... computer technology to surreptitiously obtain privileged or otherwise confidential information" of an opposing party. The New York committee reaffirmed that view in the opinion cited in footnote 4, supra. The Committee recognizes that Opinion 749 relies in part on language contained in present Rule 8.4(e) and (d) that prohibits engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation" or "that is prejudicial to the administration of justice." However, the Committee does not believe that a lawyer, by acting within the circumstances assumed by the instant opinion, would violate either of those paragraphs of Rule 8.4. The Committee views similarly an opinion issued for comment at the request of the Florida Bar Board of Governors by the Florida Bar Professional Ethics Committee. See Proposed Adv. Op. 06-02 (June 23, 2006), available at http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/53EDEDCC5599019138525719A006DCE11B/FILE/062%20pso.pdf?OpenElement&search=%22Florida%20%26%20opinion%20%26%20metadata%22 (last visited Sept. 15, 2006).

11. We note that this interpretation was intended by the Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission"), as reported in the Reporter's Explanantion of Changes, available at http://www.abanet.org/cpr/e2k/e2k-rule44rem.html (last visited Sept. 15, 2006), regarding this amendment.

12. One of the facts that might be relevant is whether the metadata is a privileged communication.
Committee on Ethics and Professional Responsibility

Documents may be able to limit the likelihood of transmitting metadata in electronic documents. Computer users can avoid creating some kinds of metadata in electronic documents in the first place. For example, they often can choose not to use the redlining function of a word processing program or not to embed comments in a document. Simply deleting comments might be effective to eliminate them. Computer users also can eliminate or "scrub" some kinds of embedded information in an electronic document before sending, producing, or providing it to others. Methods to avoid or eliminate embedded information have been, and no doubt will continue to be, discussed in many legal programs, practice guides, and articles, as well as in general office software publications and support web sites. The specifics of any such software are beyond the scope of this opinion.

A lawyer who is concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata also may be able to send a different version of the document without the embedded information. For example, she might send it in hard copy, create an image of the document and send only the image (this can be done by printing and scanning), or print it out and send it via facsimile.

Finally, if a lawyer is concerned about risks relating to metadata and wishes to take some action to reduce or remove the potentially harmful consequences of its dissemination, then before sending, producing, or otherwise making available any electronic documents, she may seek to negotiate a confidentiality agreement or, if in litigation, a protective order, that will allow her or her client to "pull back," or prevent the introduction of evidence based upon, the document that contains that embedded information or the information itself. Of course, if the embedded information is on a subject such as her client's willingness to settle at a particular price, then there might be no way to "pull back" that information.

13. Of course, when responding to discovery, a lawyer must not alter a document when it would be unlawful or unethical to do so, e.g., Rule 3.4(a) ("A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.")

14. For example, the 2006 ABA Techshow included a roundtable program on metadata, and a number of publications and items available on ABA web site pages of the ABA General Practice, Solo & Small Firm Division and the ABA Law Practice Management Section have addressed metadata from practical and ethical perspectives.

15. On April 12, 2006, the Supreme Court of the United States approved extensive amendments to the Federal Rules of Civil Procedure relating to discovery of electronic documents, available at http://www.uscourts.gov/rules/newrules6.html#cv0804 (last visited September 15, 2006). Among other provisions, certain of the amendments allow a producing party to pull back privileged information and work product under certain circumstances. The amendments will be effective on December 1, 2006, unless Congress enacts legislation to reject, modify, or defer them.
A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.¹

Introduction

Lawyers and clients often communicate with each other via e-mail and sometimes communicate via other electronic means such as text messaging. The confidentiality of these communications may be jeopardized in certain circumstances. For example, when the client uses an employer's computer, smartphone or other telecommunications device, or an employer's e-mail account to send or receive e-mails with counsel, the employer may obtain access to the e-mails. Employers often have policies reserving a right of access to employees' e-mail correspondence via the employer's e-mail account, computers or other devices, such as smartphones and tablet devices, from which their employees correspond. Pursuant to internal policy, the employer may be able to obtain an employee's communications from the employer's e-mail server if the employee uses a business e-mail address, or from a workplace computer or other employer-owned telecommunications device on which the e-mail is stored even if the employee has used a separate, personal e-mail account. Employers may take advantage of that opportunity in various contexts, such as when the client is engaged in an employment dispute or when the employer is monitoring employee e-mails as part of its compliance responsibilities or conducting an internal investigation relating to the client's work.² Moreover, other third parties may be able to obtain access to an employee's electronic communications by issuing a subpoena to the employer. Unlike conversations and written communications, e-mail communications may be permanently available once they are created.

The confidentiality of electronic communications between a lawyer and client may be jeopardized in other settings as well. Third parties may have access to attorney-client e-mails when the client receives or sends e-mails via a public computer, such as a library or hotel computer, or via a borrowed computer. Third parties also may be able to access confidential communications when the client uses a computer or other device available to others, such as when a client in a matrimonial dispute uses a home computer to which other family members have access.

In contexts such as these, clients may be unaware of the possibility that a third party may gain access to their personal correspondence and may fail to take necessary precautions. Therefore, the risk that third parties may obtain access to a lawyer's e-mail communications with a client raises the question of what, if any, steps a lawyer must take to prevent such access by third parties from occurring. This opinion addresses this question in the following hypothetical situation.

An employee has a computer assigned for her exclusive use in the course of her employment. The company's written internal policy provides that the company has a right of access to all employees' computers and e-mail files, including those relating to employees' personal matters. Notwithstanding this

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.
² Companies conducting internal investigations often secure and examine the e-mail communications and computer files of employees who are thought to have relevant information.
policy, employees sometimes make personal use of their computers, including for the purpose of sending personal e-mail messages from their personal or office e-mail accounts. Recently, the employee retained a lawyer to give advice about a potential claim against her employer. When the lawyer knows or reasonably should know that the employee may use a workplace device or system to communicate with the lawyer, does the lawyer have an ethical duty to warn the employee about the risks this practice entails?

Discussion

Absent an applicable exception, Rule 1.6(a) requires a lawyer to refrain from revealing "information relating to the representation of a client unless the client gives informed consent." Further, a lawyer must act competently to protect the confidentiality of clients' information. This duty, which is implicit in the obligation of Rule 1.1 to "provide competent representation to a client," is recognized in two Comments to Rule 1.6. Comment [16] observes that a lawyer must "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Comment [17] states in part: "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.... Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement."

This Committee has recognized that these provisions of the Model Rules require lawyers to take reasonable care to protect the confidentiality of client information, including information contained in e-mail communications made in the course of a representation. In ABA Op. 59-413 (1999) ("Protecting the Confidentiality of Unencrypted E-Mail"), the Committee concluded that, in general, a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating Model Rule 1.6(a) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The opinion, nevertheless, cautioned lawyers to consult with their clients and follow their clients' instructions as to the mode of transmitting highly sensitive information relating to the clients' representation. It found that particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters.

Clients may not be afforded a "reasonable expectation of privacy" when they use an employer's computer to send e-mails to their lawyers or receive e-mails from their lawyers. Judicial decisions illustrate the risk that the employer will read these e-mail communications and seek to use them to the employee's disadvantage. Under varying facts, courts have reached different conclusions about whether an employee's client-lawyer communications located on a workplace computer or system are privileged, and the law appears to be evolving. This Committee's mission does not extend to interpreting the substantive law, and

See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) (Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services) ("the obligation to "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision" requires a lawyer outsourcing legal work "to recognize and minimize the risk that any outside service provider may inadvertently -- or perhaps even inadvertently -- reveal client confidential information to adverse parties or to others who are not entitled to access ... [and to] verify that the outside service provider does not also do work for adversaries of their clients on the same or substantially related matters.")

See, e.g., Stengar v. Loving Care Agency, Inc., 990 A.2d 650, 663 (N.J. 2010) (privilege applied to e-mails with counsel using "a personal, password protected e-mail account" that were accessed on a company computer); Sims v. Lakeside Sch., No. C06-1412RSM, 2007 WL 2745367, at *2 (W.D. Wash. Sept. 20, 2007) (privilege applied to web-based e-mails to and from employee's counsel on hard drive of computer furnished by employer); National Econ. Research Assocs. v. Evans, No. 04-2618-BLS2, 21 Mass.L.Rptr. 337, 2006 WL 2440008, at *5 (Mass. Super. Aug. 3, 2006) (privilege applied to "attorney-client communications unintentionally stored in a temporary file on a company-owned computer that were made via a private, password-protected e-mail account accessed through the Internet, not the company's Intranet"); Holmes v. Petrovich Development Co., 191 Cal.App.4th 1047, 1068-72 (2011) (privilege
therefore we express no view on whether, and in what circumstances, an employee’s communications with
counsel from the employer’s workplace device or system are protected by the attorney-client privilege.
Nevertheless, we consider the ethical implications posed by the risks that these communications will be
reviewed by others and held admissible in legal proceedings. Given these risks, a lawyer should ordinarily
advise the employee-client about the importance of communicating with the lawyer in a manner that
protects the confidentiality of e-mail communications, just as a lawyer should avoid speaking face-to-face
with a client about sensitive matters if the conversation might be overheard and should warn the client
against discussing their communications with others. In particular, as soon as practical after a client-lawyer
relationship is established, a lawyer typically should instruct the employee-client to avoid using a
workplace device or system for sensitive or substantive communications, and perhaps for any attorney-
client communications, because even seemingly ministerial communications involving matters such as
scheduling can have substantive ramifications.

The time at which a lawyer has an ethical obligation under Rules 1.1 and 1.6 to provide advice of this
nature will depend on the circumstances. At the very least, in the context of representing an employee,
this ethical obligation arises when the lawyer knows or reasonably should know that the client is likely to
send or receive substantive client-lawyer communications via e-mail or other electronic means, using a
business device or system under circumstances where there is a significant risk that the communications
will be read by the employer or another third party. Considerations tending to establish an ethical duty to
protect client-lawyer confidentiality by warning the client against using a business device or system for
substantive e-mail communications with counsel include, but are not limited to, the following: (1) that the
client has engaged in, or has indicated an intent to engage in, e-mail communications with counsel; (2) that
the client is employed in a position that would provide access to a workplace device or system; (3) that,
given the circumstances, the employer or a third party has the ability to access the e-mail communications;
and (4) that, as far as the lawyer knows, the employer’s internal policy and the jurisdiction’s laws do not
clearly protect the privacy of the employee’s personal e-mail communications via a business device or
system. Unless a lawyer has reason to believe otherwise, a lawyer ordinarily should assume that an
employer’s internal policy allows for access to the employee’s e-mails sent to or from a workplace device
or system.

The situation in the above hypothetical is a clear example of where failing to warn the client about
the risks of e-mailing communications on the employer’s device can harm the client, because the
employment dispute would give the employer a significant incentive to access the employee’s workplace e-
mail and the employer’s internal policy would provide a justification for doing so. The obligation arises
once the lawyer has reason to believe that there is a significant risk that the client will conduct e-mail
communications with the lawyer using a workplace computer or other business device or via the
employer’s e-mail account. This possibility ordinarily would be known, or reasonably should be known, at
the outset of the representation. Given the nature of the representation—an employment dispute—the lawyer
is on notice that the employer may search the client’s electronic correspondence. Therefore, the lawyer
must ascertain, unless the answer is already obvious, whether there is a significant risk that the client will
use a business e-mail address for personal communications or whether the employee’s position entails
using an employer’s device. Protective measures would include the lawyer refraining from sending e-mails

inapplicable to communications with counsel using workplace computer); Scott v. Beth Israel Medical
Center, Inc., 847 N.Y.S.2d 436, 440-43 (N.Y. Sup. Ct. 2007) (privilege inapplicable to employer’s
communications with counsel via employer’s e-mail system); Long v. Marubeni Am. Corp., No.
05CV-659(GEL)(KMF), 2006 WL 2998671, at *3-4 (S.D.N.Y. Oct. 19, 2006) (e-mails created or stored in
company computers were not privileged, notwithstanding use of private password-protected e-mail
accounts); Kaufman v. SunGard Inv. Sys., No. 05-CV-1236 (JLL), 2006 WL 1307882, at *4 (D.N.J. May
10, 2006) (privilege inapplicable to communications with counsel using employer’s network).
5 For a discussion of a lawyer’s duty when receiving a third party’s e-mail communications with counsel,
see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 11-460 (2011) (Duty when Lawyer
Receives Copies of a Third Party’s E-mail Communications with Counsel).
6 This opinion principally addresses e-mail communications, which are the most common way in which
lawyers communicate electronically with clients, but it is equally applicable to other means of electronic
communications.
to the client's workplace, as distinct from personal, e-mail address,\(^7\) and cautioning the client against using a business e-mail account or using a personal e-mail account on a workplace computer or device at least for substantive e-mails with counsel.

As noted at the outset, the employment scenario is not the only one in which attorney-client electronic communications may be accessed by third parties. A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, to which a third party may gain access. The risk may vary. Whenever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client's situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.

\(^7\) Of course, if the lawyer becomes aware that a client is receiving personal e-mail on a workplace computer or other device owned or controlled by the employer, then a duty arises to caution the client not to do so, and if that caution is not heeded, to cease sending messages even to personal e-mail addresses.
FORMAL OPINION 11-460
August 4, 2011
Duty when Lawyer Receives Copies of a Third Party’s E-mail Communications with Counsel

When an employer’s lawyer receives copies of an employee’s private communications with counsel, which the employer located in the employee’s business e-mail file or on the employee’s workplace computer or other device, neither Rule 4.4(b) nor any other Rule requires the employer’s lawyer to notify opposing counsel of the receipt of the communications. However, court decisions, civil procedure rules, or other law may impose such a notification duty, which a lawyer may then be subject to discipline for violating. If the law governing potential disclosure is unclear, Rule 1.6(b)(6) allows the employer’s lawyer to disclose that the employer has retrieved the employee’s attorney-client e-mail communications to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law. If no law can reasonably be read as establishing a notification obligation, however, then the decision whether to give notice must be made by the employer-client, and the employer’s lawyer must explain the implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision.

This opinion addresses a lawyer’s ethical duty upon receiving copies of e-mails between a third party and the third party’s lawyer.1 We explore this question in the context of the following hypothetical scenario.

After an employee files a lawsuit against her employer, the employer copies the contents of her workplace computer for possible use in defending the lawsuit, and provides copies to its outside counsel. Upon review, the employer’s counsel sees that some of the employee’s e-mails bear the legend “Attorney-Client Confidential Communication.” Must the employer’s counsel notify the employee’s lawyer that the employer has accessed this correspondence?2

When an employer’s lawyer receives copies of an employee’s private communications with counsel, which the employer located in the employee’s business e-mail file or on the employee’s workplace computer or other device, the question arises whether the employer’s lawyer must notify opposing counsel pursuant to Rule 4.4(b). This Rule provides: “A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”

Rule 4.4(b) does not expressly address this situation, because e-mails between an employee and his or her counsel are not “inadvertently sent” by either of them. A “document [is] inadvertently sent” to someone when it is accidentally transmitted to an unintended recipient, as occurs when an e-mail or letter is misaddressed or when a document is accidentally attached to an e-mail or accidentally included among other documents produced in discovery. But a document is not “inadvertently sent” when it is retrieved by a third person from a public or private place where it is stored or left.

The question remains whether Rule 4.4(b) implicitly addresses this situation. In several cases, courts have found that Rule 4.4(b) or its underlying principle requires disclosure in analogous situations, such as when “confidential documents are sent intentionally and without permission.” Chamberlain Group, Inc. v. Lear Corp., 270 F.R.D. 392, 398 (N.D. Ill. 2010).3 In Stengart v. Loving Care Agency, Inc.,

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1 This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2 For a discussion of the employee’s lawyer’s obligation to take reasonable steps to prevent a situation such as this from arising, see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 11-459 (2011) (Duty to Protect the Confidentiality of E-mail Communications With One’s Client).

990 A.2d 650, 665 (N.J. 2010), the court found that the employer’s lawyer in an employment litigation violated the state’s version of Rule 4.4(b) by failing to notify the employee’s counsel that the employer had downloaded and intended to use copies of pre-suit e-mail messages exchanged between the employee and her lawyers.\(^4\)

Since Rule 4.4(b) was added to the Model Rules, this Committee twice has declined to interpret it or other rules to require notice to opposing counsel other than in situations where Rule 4.4(b) expressly addresses it.\(^5\) In ABA Formal Op. 06-442 (2006), we considered whether a lawyer could properly review and use information embedded in electronic documents (i.e., metadata) received from opposing counsel or an adverse party. We concluded, contrary to other bar association ethics committees, that the Rule did not apply. We reasoned that “the recent adoption of Rule 4.4(b) identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information was evidence of the intention to set no other specific restrictions on the receiving lawyer’s conduct.”\(^6\) Likewise, in ABA Formal Op. 06-440, this Committee found that Rule 4.4(b) does not obligate a lawyer to notify opposing counsel that the lawyer has received privileged or otherwise confidential materials from the adverse party or from someone who was not authorized to provide the materials, if the materials were not provided as “the

lawyer of receipt as matter of compliance with ethics rules).\(^7\)

The New Jersey rule provided: “[a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.” New Jersey Rule of Professional Conduct 4.4(b) (2004).

The Steuart court found that the employee “had an objectively reasonable expectation of privacy” in the e-mails based on the fact that the employee “could reasonably expect that e-mail communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them.” 990 A.2d at 655. In contrast, other decisions arising in different factual situations have found that the attorney-client privilege did not protect client-lawyer communications downloaded by an employer from a computer used by its employees. These other decisions have not suggested that the employer’s lawyer had a notification duty when the employer provided copies of the employee’s attorney-client communications to the employer’s lawyer. See, e.g., Long v. Marubeni Am. Corp., No. 05-CIV-639(GEL)(KNF), 2006 WL 2998671, at *4 (S.D.N.Y. Oct. 19, 2006); Kaufman v. SunGard Inv. Sys., No. 05-CV-1236 (JLL), 2006 WL 1307882, at *3 (D.N.J. May 9, 2006); Scott v. Beth Israel Medical Center, Inc., 847 N.Y.S.2d 436, 444 (Sup. Ct. 2007).

One might argue, for example, that the lawyer is prohibited from reading or using the e-mails by any of several other rules. These include Rule 4.4(a), which requires lawyers to refrain from using “methods of obtaining evidence that violate [a third person’s] legal rights,” and which, according to the accompanying comment, forbids “unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.” These also include Rule 8.4(c), which forbids “conduct involving dishonesty, fraud, deceit or misrepresentation,” and Rule 8.4(d), which forbids “conduct that is prejudicial to the administration of justice.”

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006) (Review and Use of Metadata). Prior to the adoption of Rule 4.4(b) in February 2002, this Committee had issued opinions addressing a lawyer’s obligations upon receiving materials of an adverse party on an unauthorized basis when the lawyer knew that the materials were privileged or confidential, and addressing a lawyer’s obligations when the opposing party inadvertently disclosed privileged or confidential materials. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-382 (1994) (Unsolicited Receipt of Privileged or Confidential Materials), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) at 233; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992) (Inadvertent Disclosure of Confidential Materials), id. at 140. The Committee concluded that the lawyer’s obligations implicitly derived from other law and from provisions such as Rule 8.4 (prohibiting “conduct involving dishonesty, fraud, deceit or misrepresentation” and conduct “prejudicial to the administration of justice”) did not expressly address these situations. Id. at 144-49, 234. However, the Committee withdrew both of these opinions following the adoption of Rule 4.4(b).

result of the sender's inadvertence.\textsuperscript{8} We noted that other law might prevent the receiving lawyer from retaining and using the materials, and that the lawyer might be subject to sanction for doing so, but concluded that this was "a matter of law beyond the scope of Rule 4.4(b).\textsuperscript{9}"

To say that Rule 4.4(b) and other rules are inapplicable is not to say that courts cannot or should not impose a disclosure obligation in this context pursuant to their supervisory or other authority. As Comment [2] to Rule 4.4(b) observes, "this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person."\textsuperscript{10} Pursuant to their supervisory authority, courts may require lawyers in litigation to notify the opposing counsel when their clients provide an opposing party's attorney-client confidential communications that were retrieved from a computer or other device owned or possessed by the client. Alternatively, the civil procedure rules governing discovery in the litigation may require the employer to notify the employee that it has gained possession of the employee's attorney-client communications. Insofar as courts recognize a legal duty in this situation, as the court in Stegurt has done, a lawyer may be subject to discipline, not just litigation sanction, for knowingly violating it.\textsuperscript{11} However, the Model Rules do not independently impose an ethical duty to notify opposing counsel of the receipt of private, potentially privileged e-mail communications between the opposing party and his or her counsel.

When the law governing potential disclosure is unclear, the lawyer need not risk violating a legal or ethical obligation. The fact that the employer-client has obtained copies of the employee's e-mails is "information relating to the representation of [the] client" that must be kept confidential under Rule 1.6(a) unless there is an applicable exception to the confidentiality obligation or the client gives "informed consent" to disclosure. Rule 1.6(b)(6) permits a lawyer to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to comply with other law or a court order." Rule 1.6(b)(6) allows the employer's lawyer to disclose that the employer has retrieved the employee's attorney-client e-mail communications to the extent he or she reasonably believes it is necessary to do so to comply with the relevant law, even if the legal obligation is not free from doubt. On the other hand, if no law can reasonably be read as establishing a reporting obligation, then the decision whether to give notice must be made by the employer-client. Even when there is no clear notification obligation, it often will be in the employer-client's best interest to give notice and obtain a judicial ruling as to the admissibility of the employee's attorney-client communications before attempting to use them and, if possible, before the employer's lawyer reviews them. This course minimizes the risk of disqualification or other sanction if the court ultimately concludes that the opposing party's communications with counsel are privileged and inadmissible. The employer's lawyer must explain these and other implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision. See Rules 1.0(e) (Terminology, "informed consent"). 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"), and 1.6(a) ("lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [the exceptions under Rule 1.6(b)]").

\textsuperscript{8} Supra n. 7.

\textsuperscript{9} Id. A recent article suggests that Rule 1.15(d) imposes a notification duty in the analogous situation in which a lawyer comes into possession of physical documents that appear to have been wrongly procured from another party. Brian S. Paughan & Douglas R. Richmond, "Model Rule 1.15: The Elegant Solution to the Problem of Purloined Documents," 26 ABA/BNA LAW. MAN. ADV. CONDUCT 623 (Oct. 13, 2010). Rule 1.15(d) provides, in pertinent part: "Upon receiving ... property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." The provision arises out of the lawyer's fiduciary duty to safeguard money and property belonging to another and entrusted to the lawyer. Regardless of whether this rule may apply when stolen physical items come into a lawyer's possession, we do not believe it applies when an organizational client gives its lawyer copies of documents that were on a computer in the client's lawful possession for the lawyer's potential use in litigation. What is at stake is not the third party's proprietary interest in the copies of e-mails but the third party's confidentiality interest, which Rule 1.15(d) does not address.

\textsuperscript{10} Accord ABA Formal Op. 06-440.

\textsuperscript{11} See, e.g., Rule 3.4(e)("A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.").
The views expressed herein have not been approved by the House of Delegates or the Board of
Governors of the American Bar Association and, accordingly, should not be construed as
representing the policy of the American Bar Association.

American Bar Association
Commission on Ethics 20/20
Resolution

RESOLVED: That the American Bar Association amends Model Rule 1.0
(Terminology) of the ABA Model Rules of Professional Conduct as follows (insertions
underlined, deletions struck-through):

Rule 1.0 Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the
fact in question to be true. A person's belief may be inferred from circumstances.
(b) "Confirmed in writing," when used in reference to the informed consent of a
person, denotes informed consent that is given in writing by the person or a writing
that a lawyer promptly transmits to the person confirming an oral informed
consent. See paragraph (e) for the definition of "informed consent." If it is not
feasible to obtain or transmit the writing at the time the person gives informed
consent, then the lawyer must obtain or transmit it within a reasonable time
thereafter.
(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership,
professional corporation, sole proprietorship or other association authorized to
practice law; or lawyers employed in a legal services organization or the legal
department of a corporation or other organization.
(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the
substantive or procedural law of the applicable jurisdiction and has a purpose to
deceive.
(e) "Informed consent" denotes the agreement by a person to a proposed course of
conduct after the lawyer has communicated adequate information and explanation
about the material risks of and reasonably available alternatives to the proposed
course of conduct.
(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in
question. A person's knowledge may be inferred from circumstances.
(g) "Partner" denotes a member of a partnership, a shareholder in a law firm
organized as a professional corporation, or a member of an association authorized
to practice law.
(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer
denotes the conduct of a reasonably prudent and competent lawyer.
(i) "Reasonable belief" or "reasonably believes" when used in reference to a
lawyer denotes that the lawyer believes the matter in question and that the
circumstances are such that the belief is reasonable.
(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

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

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

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

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

COMMENT

Confirmed in Writing

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

Firm

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

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law
department of a corporation represents a subsidiary or an affiliated corporation, as well as
the corporation by which the members of the department are directly employed. A similar
question can arise concerning an unincorporated association and its local affiliates.
[4] Similar questions can also arise with respect to lawyers in legal aid and legal services
organizations. Depending upon the structure of the organization, the entire organization
or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

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

Informed Consent

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

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

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

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

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

FURTHER RESOLVED: That the American Bar Association amends Model Rule 1.1 (Competence) of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck-through):

Rule 1.1 Competence

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

COMMENT

Legal Knowledge and Skill

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

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

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

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

Thoroughness and Preparation

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

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of
changes in the law and its practice, including the benefits and risks associated with
technology, engage in continuing study and education and comply with all continuing
legal education requirements to which the lawyer is subject.

FURTHER RESOLVED: That the American Bar Association amends Model Rule
1.4 (Communication) of the ABA Model Rules of Professional Conduct as follows
(insertions underlined, deletions struck-through):

Rule 1.4 Communication

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which
the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's
objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct
when the lawyer knows that the client expects assistance not permitted by the Rules
of Professional Conduct or other law.

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

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

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

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

[4] A lawyer's regular communication with clients will minimize the occasions on which
a client will need to request information concerning the representation. When a client
makes a reasonable request for information, however, paragraph (a)(4) requires prompt
compliance with the request, or if a prompt response is not feasible, that the lawyer, or a
member of the lawyer's staff, acknowledge receipt of the request and advise the client
when a response may be expected. Client telephone calls should be promptly returned or
acknowledged. Lawyers should promptly respond to or acknowledge client
communications.

Explaining Matters
[5] The client should have sufficient information to participate intelligently in decisions
concerning the objectives of the representation and the means by which they are to be
pursued, to the extent the client is willing and able to do so. Adequacy of communication
depends in part on the kind of advice or assistance that is involved. For example, when
there is time to explain a proposal made in a negotiation, the lawyer should review all
important provisions with the client before proceeding to an agreement. In litigation a
lawyer should explain the general strategy and prospects of success and ordinarily should
consult the client on tactics that are likely to result in significant expense or to injure or
coeerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial
or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill
reasonable client expectations for information consistent with the duty to act in the
client's best interests, and the client's overall requirements as to the character of
representation. In certain circumstances, such as when a lawyer asks a client to consent to
a representation affected by a conflict of interest, the client must give informed consent,
as defined in Rule 1.0(e).
[6] Ordinarily, the information to be provided is that appropriate for a client who is a
comprehending and responsible adult. However, fully informing the client according to
this standard may be impracticable, for example, where the client is a child or suffers
from diminished capacity. See Rule 1.14. When the client is an organization or group, it
is often impossible or inappropriate to inform every one of its members about its legal
affairs; ordinarily, the lawyer should address communications to the appropriate officials
of the organization. See Rule 1.13. Where many routine matters are involved, a system of
limited or occasional reporting may be arranged with the client.

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

FURTHER RESOLVED: That the American Bar Association amends Model Rule
1.6 (Duty of Confidentiality) of the ABA Model Rules of Professional Conduct as
follows (insertions underlined, deletions struck-through):

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client
unless the client gives informed consent, the disclosure is impliedly authorized in
order to carry out the representation or the disclosure is permitted by paragraph
(b).
(b) A lawyer may reveal information relating to the representation of a client to the
extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain
to result in substantial injury to the financial interests or property of another and in
furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or
property of another that is reasonably certain to result or has resulted from the
client's commission of a crime or fraud in furtherance of which the client has used
the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between
the lawyer and the client, to establish a defense to a criminal charge or civil claim
against the lawyer based upon conduct in which the client was involved, or to
respond to allegations in any proceeding concerning the lawyer's representation of
the client; or
(6) to comply with other law or a court order.
(c) A lawyer shall make reasonable efforts to prevent the unintended disclosure of,
or unauthorized access to, information relating to the representation of a client.

COMMENT
[1] This Rule governs the disclosure by a lawyer of information relating to the
representation of a client during the lawyer's representation of the client. See Rule 1.18
for the lawyer's duties with respect to information provided to the lawyer by a
prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating
to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for
the lawyer's duties with respect to the use of such information to the disadvantage of
clients and former clients.
[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the
client's informed consent, the lawyer must not reveal information relating to the
representation. See Rule 1.0(c) for the definition of informed consent. This contributes to
the trust that is the hallmark of the client-lawyer relationship. The client is thereby
encouraged to seek legal assistance and to communicate fully and frankly with the lawyer
even as to embarrassing or legally damaging subject matter. The lawyer needs this
information to represent the client effectively and, if necessary, to advise the client to
refrain from wrongful conduct. Almost without exception, clients come to lawyers in
order to determine their rights and what is, in the complex of laws and regulations,
deemed to be legal and correct. Based upon experience, lawyers know that almost all
clients follow the advice given, and the law is upheld.
[3] The principle of client-lawyer confidentiality is given effect by related bodies of law:
the attorney-client privilege, the work-product doctrine and the rule of confidentiality
established in professional ethics. The attorney-client privilege and work-product
document apply in judicial and other proceedings in which a lawyer may be called as a
witness or otherwise required to produce evidence concerning a client. The rule of client-
lawyer confidentiality applies in situations other than those where evidence is sought
from the lawyer through compulsion of law. The confidentiality rule, for example,
applies not only to matters communicated in confidence by the client but also to all
information relating to the representation, whatever its source. A lawyer may not disclose
such information except as authorized or required by the Rules of Professional Conduct
or other law. See also Scope.
[4] Paragraph (a) prohibits a lawyer from revealing information relating to the
representation of a client. This prohibition also applies to disclosures by a lawyer that do
not in themselves reveal protected information but could reasonably lead to the discovery
of such information by a third person. A lawyer's use of a hypothetical to discuss issues
relating to the representation is permissible so long as there is no reasonable likelihood
that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

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

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to
preserve the confidentiality of information relating to the representation of their clients,
the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the
overriding value of life and physical integrity and permits disclosure reasonably
necessary to prevent reasonably certain death or substantial bodily harm. Such harm is
reasonably certain to occur if it will be suffered imminently or if there is a present and
substantial threat that a person will suffer such harm at a later date if the lawyer fails to
take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has
accidentally discharged toxic waste into a town's water supply may reveal this
information to the authorities if there is a present and substantial risk that a person who
drinks the water will contract a life-threatening or debilitating disease and the lawyer's
disclosure is necessary to eliminate the threat or reduce the number of victims.

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

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

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

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

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services
rendered in an action to collect it. This aspect of the rule expresses the principle that the
beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

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

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

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

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

Acting Competently to Preserve Confidentiality

[16] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer’s supervision or monitoring. See Rules 1.1, 5.1 and 5.3. Factors to be considered in determining the reasonableness of the lawyer’s efforts include the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forego security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

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

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

FURTHER RESOLVED: That the American Bar Association amends Model Rule 4.4 (Respect for Rights of Third Persons) of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck through):

Rule 4.4 Respect for Rights of Third Persons

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

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was not intended to be disclosed to the lawyer inadvertently sent shall promptly notify the sender.

COMMENT

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

[2] Paragraph (b) recognizes that lawyers sometimes receive a documents or electronically stored information that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document or electronically stored information was not intended to be disclosed to the lawyer, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information—original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been wrongfully inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes paper documents, email, and other forms of electronically stored information, including electronic documents and the hidden data about the information contained in those documents (commonly referred to as “metadata”), that are email or other electronic modes of transmission subject to being read or put into readable form. Receipt of electronic information containing “metadata” does not, standing alone, create a duty under this Rule.

[3] Some lawyers may choose to return a document or electronically stored information unread, for example, when the lawyer learns before receiving it the document that it was
not intended by the sender to be received by the lawyer inadvertently-sent-to-the-wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.
ABA Commission on Ethics 20/20 Revised Proposal—Technology and Confidentiality
September 19, 2011

The views expressed herein have not been approved by the House of Delegates or the Board of
Governors of the American Bar Association and, accordingly, should not be construed as
representing the policy of the American Bar Association.

REPORT

Introduction

Advances in technology have enabled lawyers in all practice settings to provide more
efficient and effective legal services. Some forms of technology, however, present certain risks,
particularly with regard to clients’ confidential information. One of the ABA Commission on
Ethics 20/20’s objectives has been to develop guidance for lawyers regarding their ethical
obligations to protect this information when using technology.

To develop appropriate recommendations in this area, the Commission studied how
lawyers use various forms of technology and the current state of data security measures. In
particular, the Commission conducted significant research about and heard testimony from
providers of law practice-related technology, lawyers who advise other lawyers on their use of
technology, and lawyers who regularly use different types of technology in their practices.¹ The
Commission released an Issues Paper identifying a wide range of confidentiality-related issues
and received and reviewed numerous comments from technology providers as well as lawyers in
a range of practice settings. Finally, the Commission’s Technology Working Group included
participants from the Law Practice Management Section, the Litigation Section, the Standing
Committee on Ethics and Professional Responsibility, and the Young Lawyer’s Division. They
made important contributions to the Working Group’s understanding of the issues and the
development of the Resolutions accompanying this Report.

As a result of these efforts, the Commission developed two proposals. First, it has asked
that the ABA Center for Professional Responsibility work with relevant entities within the
Association to create a centralized user-friendly website that contains continuously updated and
detailed information about confidentiality-related ethics issues arising from lawyers’ use of
technology, including the latest data security standards. The ABA’s Legal Technology Resource
Center and Law Practice Management Section’s eLawyering Task Force have developed
excellent technology-related resources, but those resources exist in different places on the ABA
website. The Commission found that lawyers are seeking a website that serves as a centralized
and continuously updated resource on these issues.

The Commission believes that the information contained on this website should be
presented in such a way that lawyers who may not have extensive knowledge about technology
and associated ethics issues can easily understand the information. For example, this resource
should identify the key issues that lawyers should consider when using technology in their

¹ Among other resources, the Commission examined the ABA Legal Technology Resource Center’s Legal
Technology Survey Report, which contains extensive information about how lawyers use technology. The 2011
Report is available at:
ABA Commission on Ethics 20/20 Revised Proposal—Technology and Confidentiality
September 19, 2011

practices and, at the same time, highlight additional cutting-edge and more sophisticated topics. The website also should include regularly updated information about security standards, including the identification of standards-setting organizations, so that lawyers can more easily determine whether the technology that they employ is compliant with those standards. In sum, the Commission concluded that this web-based resource is critical given that rule-based guidance and ethics opinions are insufficiently nimble to address the constantly changing nature of technology and the regularly evolving security risks associated with that technology.

The Commission is also proposing to amend several Model Rules of Professional Conduct and their Comments. Unlike the proposed website, which can be regularly updated in light of new technology and changing security concerns, the black letter Rule and Comment-based proposals necessarily offer more general guidance that are not tied to the use of any particular form of technology.\(^2\)

The Commission identified four areas that would benefit from this guidance. First, the Commission concluded that technology has raised new issues for law firms that employ screens pursuant to Model Rules 1.10, 1.11, 1.12, and 1.18. In particular, the Commission concluded that it is important to make clear that a screen must necessarily include protections against the sharing of both tangible as well as electronic information. Thus, the Commission is proposing an amendment to address this point in Comment [9] of Model Rule 1.0 (Terminology), which concerns the definition of a screen under Model Rule 1.0(k).

Second, the Commission concluded that competent lawyers must have some awareness of basic features of technology. To make this point, the Commission is recommending an amendment to Comment [6] of Model Rule 1.1 (Competence) that would emphasize that, in order to stay abreast of changes in the law and its practice, lawyers need to have a basic understanding of technology's benefits and risks.

Third, the Commission is proposing a change to the last sentence of Comment [4] to Model Rule 1.4, which currently says that, “[c]lient telephone calls should be promptly returned or acknowledged.” The Commission proposes to replace that admonition with the following language: “Lawyers should promptly respond to or acknowledge client communications.” Although not related to a lawyer’s confidentiality obligations, the Commission nevertheless concluded that this language more accurately describes a lawyer’s obligations in light of the increasing number of ways in which clients use technology to communicate with lawyers, such as by email.

Fourth, the Commission is proposing to add a new paragraph to the black letter provisions of Model Rule 1.6 (Confidentiality of Information). Proposed new Model Rule 1.6(c) would make clear that a lawyer has an ethical duty to take reasonable measures to protect a client’s confidential information from unintended disclosure and unauthorized access. This duty is already implicit in Model Rule 1.6 and is described in several existing Comments, but the Commission concluded that, in light of the pervasive use of technology to store and transmit

\(^2\) The Commission will also ask the ABA’s Standing Committee on Ethics and Professional Responsibility to develop Formal Opinions on particular confidentiality-related issues relating to technology that cannot be suitably addressed in the Model Rules or their Comments.
confidential client information, this obligation should be stated explicitly in the black letter of Model Rule 1.6.

Finally, the Commission is proposing new language to clarify the scope of Model Rule 4.4(b), which concerns a lawyer’s obligations upon receiving confidential information that was not intended for the lawyer. The current provision describes the receipt of “documents” containing privileged information, but privileged information can be disclosed in various forms, including in emails, hard drives, and data embedded in electronic documents. Thus, the Commission concluded that Rule 4.4(b) should be amended to reflect this broader understanding.

The Commission concluded that these clarifying amendments are necessary to make lawyers more aware of their confidentiality-related obligations when taking advantage of technology’s many benefits. These proposals are set out in the Resolutions that accompany this Report and are described in more detail below.

I. Model Rule 1.0(k) (Terminology; Screening)

Model Rule 1.0 is the Terminology Section of the Model Rules. Model Rule 1.0(k) describes the procedures for an effective screen to avoid the imputation of a conflict of interest under Model Rules 1.10, 1.11, 1.12, and 1.18. Comment [9] elaborates on this definition and notes that one important feature of a screen is to limit the screened lawyer’s access to any information that relates to the matter giving rise to the conflict.

Advances in technology have made client information more accessible to the whole firm, so the process of limiting access to this information should require more than placing relevant physical documents in an inaccessible location; it should require appropriate treatment of electronic information as well. Although this requirement is arguably encompassed within the existing version of Rule 1.0(k) and Comment [9], the Commission concluded and heard that greater clarity and specificity is needed. To that end, the Commission is proposing that Comment [9] explicitly note that, when a screen is put in place, it should apply to information that is in electronic, as well as tangible, form.

II. Model Rule 1.1 (Competence)

Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] specifies that, to remain competent, lawyers need to “keep abreast of changes in the law and its practice.” The Commission concluded that, in order to keep abreast of changes in law practice, lawyers necessarily need to understand basic features of technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today’s environment without knowing how to use email or to create or edit an electronic document.

Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that the addition of the phrase “including the benefits and risks associated with technology” would offer greater clarity regarding a lawyer’s obligations in this area and emphasize the importance of technology to
modern law practice. The proposed amendment does not impose any new obligations on lawyers. Rather, the amendment is intended to emphasize that a lawyer should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer’s general ethical duty to remain competent.

III. Model Rule 1.4 (Communication)

Model Rule 1.4 describes a lawyer’s duty to communicate with clients, and the last sentence of Comment [4] to Model Rule 1.4 currently instructs lawyers that “[c]lient telephone calls should be promptly returned or acknowledged.” Clients, however, now communicate with lawyers in an increasing number of ways, including by email, so a lawyer’s obligation to respond to such communications exists regardless of the medium that is used. Accordingly, the Commission proposes to replace the last sentence of Comment [4] with the following language: “Lawyers should promptly respond to or acknowledge client communications.” The Commission concluded that this language more accurately describes a lawyer’s obligations in light of changes in technology and evolving methods of communication.

IV. Model Rule 1.6 (Duty of Confidentiality)

Currently, Model Rule 1.6(a) states that a lawyer has a duty not to reveal a client’s confidential information, except for the circumstances described in Model Rule 1.6(b). The Rule, however, does not indicate what ethical obligations lawyers have to prevent such a revelation. Although this obligation is described in Comments [16] and [17], the Commission concluded that technology has made this duty sufficiently important that it should be elevated to black letter status in the form of the proposed Model Rule 1.6(c).

The idea of explaining a lawyer’s duty to safeguard information within the black letter of the Rule is not new. The proposed Model Rule 1.6(c) builds on a similar provision in New York, which itself has its roots in DR 4-101(D) of the old Model Code of Professional Responsibility. DR 4-101(D) had provided as follows:

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

The Commission concluded that a similar provision should appear in Model Rule 1.6 given the various confidentiality concerns associated with electronically stored information.

To be clear, the proposal should not be understood to mean that a lawyer engages in professional misconduct every time a client’s confidences are inadvertently disclosed or subject to unauthorized access. The reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state explicitly in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not and cannot prevent every disclosure or unauthorized access.
ABA Commission on Ethics 20/20 Revised Proposal—Technology and Confidentiality
September 19, 2011

The Commission decided that technology is changing too rapidly to offer detailed
guidance as to the specific precautions that a lawyer should take, and that a lawyer’s obligations
will necessarily change as technology evolves and as new risks and security procedures become
available. Nevertheless, the Commission is proposing new language to Comment [16] to
identify several factors that lawyers should consider when determining whether their efforts in
this regard have been reasonable, including the sensitivity of the information, the likelihood of
disclosure if additional safeguards are not employed, the cost of employing additional
safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards
adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important
piece of software excessively difficult to use).

The new Comment language also makes clear that a client might require the lawyer to
implement special security measures not required by the Rule or may give informed consent to
the use of security measures that would otherwise be prohibited by the Rule. A nearly identical
observation appears in Comment [17] in the context of security measures that lawyers might
have to employ when transmitting confidential information. The Commission concluded that a
similar thought should be expressed in the context of Comment [16], which pertains to the
storage of such information.

Finally, the Commission’s research revealed that there has been a dramatic growth in
federal, state, and international laws and regulations relating to data privacy. The Commission
found that this body of law increasingly applies to lawyers and law firms, and that lawyers need
to be aware of these additional obligations. Thus, the Commission is proposing to add a sentence
to the end of Comment [16] and Comment [17] that would remind lawyers that other laws and
regulations impose confidentiality-related obligations beyond those that are identified in the
Model Rules of Professional Conduct. Other Comments in the Model Rules instruct lawyers to
consult law outside of the ethics rules, and the Commission concluded that a lawyer’s duty of
confidentiality is another area where other legal obligations have become sufficiently important
and common that a lawyer should be expressly reminded to consider those obligations, both
when storing confidential information (Comment [16]) and when transmitting it (Comment [17]).

V. Model Rule 4.4 (Respect for Rights of Third Persons)

Technology has increased the risk that confidential information will be inadvertently
disclosed, and Model Rule 4.4(b) addresses one particular ethics issue associated with this risk.
Namely, it provides that, if lawyers receive documents that they know or reasonably should
know were not intended for them, they must notify the sender.

The Commission concluded that the word “document” is inadequate to express the
various ways in which information can be unintentionally disclosed. For example, confidential
information can now be disclosed in emails, flash drives, and data embedded in electronic
documents (i.e., metadata). To make clear that the Rule applies to those situations, the
Commission has proposed that the word “document” be replaced with the phrase that is
commonly used in the context of discovery—“document or electronically stored information.”
In addition to clarifying that Rule 4.4(b) extends to various forms of electronic information, Comment [2] expressly states that metadata is included within the scope of the Rule, at least when the receiving lawyer knows or has reason to believe that the metadata was not intended to be disclosed. The Comment makes clear that the mere existence of metadata in a document does not give rise to a duty under this Rule, but if a lawyer discovers that an electronic document contains confidential metadata, that discovery may implicate the Rule's reporting requirement.

ABA Formal Opinion 06-442 addressed the related issue of whether lawyers should even be permitted to look at a sending party's electronic metadata. That Opinion concluded that there is no ethical prohibition against doing so. Several state bar association ethics opinions, however, have reached the opposite conclusion and have said that lawyers should typically not be permitted to look at an opposing party's metadata. Implicit in the Commission's recommendation is that lawyers will, in fact, be permitted to look at metadata, at least under certain circumstances. For example, even in states that prohibit lawyers from looking at metadata, lawyers are permitted to do so with the opponent's permission. The Commission's proposal recognizes that, when reviewing metadata with permission (or otherwise), a lawyer might discover particular metadata that the lawyer knows the sending lawyer did not intend to include. The Commission's proposed amendments are designed to ensure that, under these circumstances, Rule 4.4(b)'s notification requirement is triggered.

Finally, the Commission is proposing to replace the word "Inadvertent" with the phrase "not intended to be disclosed to the lawyer." The purpose of the change is to recognize that a lawyer might send a document intentionally, but mistakenly send it to the wrong party. Under those circumstances, the document or electronically stored information is sent intentionally, not inadvertently. Nevertheless, the lawyer who receives the document or electronically stored information erroneously would still have a duty under Rule 4.4(b) to report the error to the sender.

VI. Conclusion

Technology can increase the quality of legal services, reduce the cost of legal services to existing clients, and enable lawyers to represent clients who might not otherwise have been able to afford those services. Lawyers, however, need to understand that technology can pose certain risks to clients' confidential information and that reasonable safeguards are ethically required. The Commission's proposals are designed to help lawyers understand these risks so that they can take appropriate and reasonable measures when taking advantage of technology's many benefits. The Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolutions.
The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

American Bar Association
Commission on Ethics 20/20
Resolution

RESOLVED: That the American Bar Association adopts the proposed amendments to Rules 1.18, 7.2, and 7.3 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck-through):

Rule 1.18 Duties to Prospective Client

(a) A person who discusses communicates with a lawyer about the possibility of forming a client-lawyer relationship and has a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with learned information from a prospective client shall not use or reveal that information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

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

(ii) written notice is promptly given to the prospective client.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer’s custody, or rely on the lawyer’s advice. A lawyer’s discussions communications with a prospective client usually are limited in time
and depth and leave both the prospective client and the lawyer free (and sometimes
required) to proceed no further. Hence, prospective clients should receive some but not
all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection
under this Rule. A person who communicates information unilaterally to a lawyer,
without any reasonable expectation that the lawyer is willing to consider the possibility of
forming a client-lawyer relationship, is not a “prospective client” within the meaning of
paragraph (a). Moreover, a person who communicates with a lawyer for the purpose of
disqualifying the lawyer is not a “prospective client.”

[3] When a person initiates a communication with a lawyer, the reasonableness of the
person’s expectations that the lawyer is willing to consider forming a client-lawyer
relationship may depend on a number of factors, including whether the lawyer
encouraged or solicited inquiries about a proposed representation; whether the lawyer
previously represented or declined to represent the person; whether the person, prior to
communicating with the lawyer, encountered any warnings or cautionary statements that
were intended to limit, condition, waive, or disclaim the lawyer’s obligations; whether
those warnings or cautionary statements were clear and reasonably understandable; and
whether the lawyer acted or communicated in a manner that was contrary to the warnings
or cautionary statements. For example, if a lawyer’s website encourages a website visitor
to submit a personal inquiry about a proposed representation and the website fails to
include any cautionary language, the person submitting the information could become a
prospective client. In contrast, if a lawyer’s website does not expressly encourage or
solicit inquiries about a proposed representation and merely offers general information
about legal topics or information about the lawyer or the lawyer’s firm, such as the
lawyer’s contact information, experience, and areas of practice, this information alone is
typically insufficient to create a reasonable expectation that the lawyer is willing to
consider forming a client-lawyer relationship.

[34] It is often necessary for a prospective client to reveal information to the lawyer
during an initial consultation prior to the decision about formation of a client-lawyer
relationship. The lawyer often must learn such information to determine whether there is
a conflict of interest with an existing client and whether the matter is one that the lawyer
is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that
information, except as permitted by Rule 1.9, even if the client or lawyer decides not to
proceed with the representation. The duty exists regardless of how brief the initial
conference may be.

[45] In order to avoid acquiring disqualifying information from a prospective client, a
lawyer considering whether or not to undertake a new matter should limit the initial
interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or
other reason for non-representation exists, the lawyer should so inform the prospective
client or decline the representation. If the prospective client wishes to retain the lawyer,
and if consent is possible under Rule 1.7, then consent from all affected present or former
clients must be obtained before accepting the representation.

[56] A lawyer may condition conversations on a prospective client on
the person's informed consent that no information disclosed during the consultation communications will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(c) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[62] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[78] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(I) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[82] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[910] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer’s duties when a prospective client entrusts valuables or papers to the lawyer’s care, see Rule 1.15.

FURTHER RESOLVED: That the American Bar Association amends Model Rule 7.2 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck-through):

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
(3) pay for a law practice in accordance with Rule 1.17; and
ABA Commission on Ethics 20/20 Revised Proposal – Technology and Client Development
September 19, 2011

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
(i) the reciprocal referral agreement is not exclusive, and
(ii) the client is informed of the existence and nature of the agreement.
(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

COMMENT

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

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

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now one of among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public.

Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

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

[5] Lawyers are not permitted to pay others for channeling—professional—work recommending the lawyer’s services. A communication contains a recommendation if it endorse or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, Internet-based pop-up advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications to potential clients are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, the lawyer must ensure that the lead generator discloses that the lawyer has paid a fee in exchange for the lead and that the lead generator does not state or imply that it has analyzed the potential client’s legal problems when determining which lawyer should receive the referral. See also Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association’s Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals
ABA Commission on Ethics 20/20 Revised Proposal – Technology and Client Development
September 19, 2011

from a lawyer referral service must act reasonably to assure that the activities of the plan
or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal
service plans and lawyer referral services may communicate with prospective clients, but
such communication must be in conformity with these Rules. Thus, advertising must not
be false or misleading, as would be the case if the communications of a group advertising
program or a group legal services plan would mislead prospective clients to think that it
was a lawyer referral service sponsored by a state agency or bar association. Nor could
the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer
professional, in return for the undertaking of that person to refer clients or customers to
the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's
professional judgment as to making referrals or as to providing substantive legal services.
See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives
referrals from a lawyer or nonlawyer professional must not pay anything solely for the
referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer
clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral
agreement is not exclusive and the client is informed of the referral agreement. Conflicts
of interest created by such agreements are governed by Rule 1.7. Reciprocal referral
agreements should not be of indefinite duration and should be reviewed periodically to
determine whether they comply with these Rules. This Rule does not restrict referrals or
divisions of revenues or net income among lawyers within firms comprised of multiple
entities.

FURTHER RESOLVED: That the American Bar Association amends Model Rule 7.3 of
the ABA Model Rules of Professional Conduct as follows (insertions underlined,
deletions struck-through):

Rule 7.3 Direct Contact With Potential Prospective Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact, solicit
professional employment from a potential prospective client when a significant motive
for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or
(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a potential prospective client
by written, recorded or electronic communication or by in-person, telephone or real-time
electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the potential prospective-client has made known to the lawyer a desire not to
be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting
professional employment from a potential prospective client known to be in need of legal
services in a particular matter shall include the words "Advertising Material" on the
outside envelope, if any, and at the beginning and ending of any recorded or electronic
communication, unless the recipient of the communication is a person specified in
paragraphs (a)(1) or (a)(2).
(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a
prepaid or group legal service plan operated by an organization not owned or directed by
the lawyer that uses in-person or telephone contact to solicit memberships or
subscriptions for the plan from persons who are not known to need legal services in a
particular matter covered by the plan.

COMMENT

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a
specific potential client and that offers to provide, or can reasonably be understood as
offering to provide, legal services. In contrast, a lawyer's communication typically does
not constitute a solicitation if it is directed to the general public, such as through a
billboard, an Internet banner advertisement, a website or a television commercial, or if it
is in response to a request for information or is automatically generated in response to
Internet searches.

[42] There is a potential for abuse when a solicitation involves inherent in direct in-
person, live telephone or real-time electronic contact by a lawyer with a potential
prospective client known to need legal services. These forms of contact between a lawyer
and a prospective client subject the potential client to the private importuning
of the trained advocate in a direct interpersonal encounter. The potential prospective
client, who may already feel overwhelmed by the circumstances giving rise to the need
for legal services, may find it difficult fully to evaluate all available alternatives with
reasoned judgment and appropriate self-interest in the face of the lawyer's presence and
insistence upon being retained immediately. The situation is fraught with the possibility
of undue influence, intimidation, and over-reaching.

[23] This potential for abuse inherent in direct in-person, live telephone or real-time
electronic solicitation of prospective clients justifies its prohibition, particularly since
lawyers have advertising and written and recorded communications permitted under Rule
7.2 offer alternative means of conveying necessary information to those who may be in
need of legal services. Advertising and written and recorded In particular,
communications, can which may be mailed or autodated or transmitted by email or
other electronic means that do not involve real-time contact and do not violate other law
governing solicitations. These forms of communications and solicitations make it
possible for the public a prospective client to be informed about the need for legal
services, and about the qualifications of available lawyers and law firms, without
subjecting the potential—prospective client to direct in-person, telephone or real-time
electronic persuasion that may overwhelm the potential client's judgment.

[34] The use of general advertising and written, recorded or electronic communications to
transmit information from lawyer to potential client prospective client, rather than direct
in-person, live telephone or real-time electronic contact, will help to assure that the
information flows cleanly as well as freely. The contents of advertisements and
communications permitted under Rule 7.2 can be permanently recorded so that they
cannot be disputed and may be shared with others who know the lawyer. This potential
for informal review is itself likely to help guard against statements and claims that might
constitute false and misleading communications, in violation of Rule 7.1. The contents of
direct-in-person, live telephone or real-time electronic conversations between a lawyer
and a prospective client contact can be disputed and may not be subject to third-party
scrutiny. Consequently, they are much more likely to approach (and occasionally cross)
the dividing line between accurate representations and those that are false and
misleading.

[45] There is far less likelihood that a lawyer would engage in abusive practices against
an individual who is a former client, or with whom the lawyer has close personal or
family relationship, or in situations in which the lawyer is motivated by considerations
other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the
person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the
requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is
not intended to prohibit a lawyer from participating in constitutionally protected activities
of public or charitable legal-service organizations or bona fide political, social, civic,
fraternal, employee or trade organizations whose purposes include providing or
recommending legal services to its members or beneficiaries.

[56] But even permitted forms of solicitation can be abused. Thus, any solicitation which
contains information which is false or misleading within the meaning of Rule 7.1, which
involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which
involves contact with a prospective client who has made known to the lawyer a desire not
to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited.
Moreover, if after sending a letter or other communication to a client as permitted by
Rule 7.2 the lawyer receives no response, any further effort to communicate with the
potential prospective client may violate the provisions of Rule 7.3(b).

[67] This Rule is not intended to prohibit a lawyer from contacting representatives of
organizations or groups that may be interested in establishing a group or prepaid legal
plan for their members, insureds, beneficiaries or other third parties for the purpose of
informing such entities of the availability of and details concerning the plan or
arrangement which the lawyer or lawyer's firm is willing to offer. This form of
communication is not directed to people who are seeking legal services for themselves, a
prospective client. Rather, it is usually addressed to an individual acting in a fiduciary
capacity seeking a supplier of legal services for others who may, if they choose, become
potential prospective clients of the lawyer. Under these circumstances, the activity which
the lawyer undertakes in communicating with such representatives and the type of
information transmitted to the individual are functionally similar to and serve the same
purpose as advertising permitted under Rule 7.2.

[78] The requirement in Rule 7.3(c) that certain communications be marked "Advertising
Material" does not apply to communications sent in response to requests of potential
clients or their spokespersons or sponsors. General announcements by lawyers, including
changes in personnel or office location, do not constitute communications soliciting
professional employment from a client known to be in need of legal services within the
Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b).
ABA Commission on Ethics 20/20 Revised Proposal – Technology and Client Development
September 19, 2011

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

REPORT

I. Introduction

Lawyers regularly use the Internet to disseminate information about the law and legal services as well as to attract new clients. In general, this development has had the salutary effect of educating the public about the existence of legal rights and options, the availability of particular types of legal services and their cost, and the background of specific lawyers. One of the goals of the ABA Commission on Ethics 20/20 has been to ensure that lawyers continue to provide this valuable information in a manner that is consistent with their ethical obligations.

To develop appropriate recommendations in this area, the Commission researched and studied how lawyers use various forms of marketing-related technology and whether these forms of marketing have had any adverse effect on the public or clients. To this end, the Commission’s Technology Working Group included participants from the Law Practice Management Section, Standing Committee on Delivery of Legal Services, Litigation Section, Standing Committee on Ethics and Professional Responsibility, and the Young Lawyers Division. They made important contributions to the Working Group’s understanding of the issues and the development of the Resolutions accompanying this Report. Moreover, the Commission released an Issues Paper identifying a wide range of marketing-related ethics issues and received numerous responses. The Commission also received and reviewed recent surveys on lawyers’ use of technology; reviewed relevant marketing websites; studied litigation and disciplinary proceedings relating to Internet-based client leads; and reviewed information from the ABA Science and Technology Law Section, the Law Practice Management Section’s E-Lawyering Task Force, and the Standing Committee on the Delivery of Legal Services. The Commission also heard testimony from providers of marketing-related technology as well as from lawyers who use those forms of technology.

As a result of these efforts, the Commission concluded that no new restrictions on lawyer advertising are required. For example, the Commission concluded that Rule 7.1’s prohibition against false and misleading communications is readily applicable to online advertising and other forms of electronic communications that are used to attract new clients. Thus, the Commission concluded that there is no need to develop new or different restrictions with regard to those communications. The Commission determined, however, that some Rules – specifically Rules 1.18 (Duties to Prospective Clients), 7.2 (Advertising), and 7.3 (Direct Contact with Prospective Clients) – have unclear
implications for new forms of marketing and that lawyers would benefit from several clarifying amendments to those Rules.¹

First, the Commission is proposing amendments to Model Rule 1.18 (Duties to Prospective Clients) that would clarify when electronic communications give rise to a prospective client-lawyer relationship. In particular, the proposed amendments identify several precautions that lawyers should take to prevent the inadvertent creation of such a relationship and to ensure that the public does not misunderstand the consequences of communicating electronically with a lawyer.

Second, the Commission is proposing amendments to the Comments to Model Rule 7.2 (Advertising). The Commission found that there is considerable confusion concerning the kinds of Internet-based client development tools that lawyers are permitted to use, especially because of an ambiguity regarding the prohibition against paying others for a “recommendation.” The Commission proposes to clarify in a Comment that a recommendation exists only when someone endorses or vouches for a lawyer’s credentials, abilities, or qualities. Additional language in the same Comment would make clear that payments for “lead generation,” including online lead generation, are permissible as long as the generator of the lead does not recommend (according to the new definition) the lawyer’s services and the payment is consistent with Rule 1.5(e) (division of fees) and Rule 5.4 (Professional Independence of a Lawyer).

Finally, the Commission is proposing amendments to Model Rule 7.3 (Direct Contact with Prospective Clients) that would clarify when a lawyer’s online communications constitute “solicitations” and are governed by the Rule. For example, a new Comment would clarify that communications in response to a request for information, such as requests for proposals and advertisements generated in response to Internet searches, are not “solicitations.”

II. Proposed Amendments to Model Rule 1.18 (Prospective Clients)

Model Rule 1.18 was proposed by the ABA Commission on Evaluation of the Model Rules of Professional Conduct (Ethics 2000 Commission) and was adopted by the ABA House of Delegates in 2002. The purpose of the Rule was to identify a lawyer’s duties to prospective clients.

¹ In a separate informational report, the Commission will recommend the development of a White Paper to address the constitutional limitations on lawyer advertising rules in the Internet context. The Commission concluded that such a paper would be desirable in light of recent court decisions holding that some states have imposed unconstitutional restrictions on lawyers’ marketing-related communications. The White Paper will explain the constitutional issues at stake and encourage jurisdictions to develop regulations that are more uniform and constitutionally defensible. The Commission also concluded that Rule 7.1 (Communications Concerning a Lawyer’s Services), if read literally, could apply to lawyers’ communications about their services even when those communications appear on lawyers’ personal networking sites and are accessible only to close friends or family. Thus, the White Paper would also address these concerns. The Commission also has identified several topics that are not amenable to treatment in the Model Rules, but that might be more usefully addressed in the form of ethics opinions from the Standing Committee on Ethics and Professional Responsibility.
Critical to the application of Rule 1.18 is the definition of a “prospective client.” The Commission concluded that the definition must be sufficiently flexible to address the increasing volume of electronic communications that lawyers now receive from people who seek legal services. In a recently released Formal Opinion, the ABA Standing Committee on Ethics and Professional Responsibility identified the circumstances under which these communications might give rise to a prospective client-lawyer relationship,\(^2\) and the Commission concluded that lawyers would benefit from a codification of some elements of that Formal Opinion.

First, the Commission concluded that paragraph (a) of Model Rule 1.18 should be revised to include a more detailed definition of a “prospective client.” In particular, the proposed new language defines a “prospective client” as someone who has “a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship.” The Commission concluded that this language, which is similar to language that currently appears in Comment [2], more accurately characterizes the applicable standard and is more capable of application to electronic communications.

The proposed change of the word “discusses” to “communicates” in paragraph (a) has a similar purpose: it is intended to make clear that a prospective client-lawyer relationship can arise even when an oral discussion between a lawyer and client has not taken place. The word “communicates” makes this point more clearly than the word “discusses” in that “communicates” more accurately describes current methods of discourse and anticipates future methods of interaction between lawyers and potential clients. It also more effectively alerts lawyers to the possible concerns associated with electronic communications.

For similar reasons, the Commission proposes to replace the phrase “had discussions with a prospective client” in paragraph (b) with the phrase “learned information from a prospective client.” The Commission is proposing conceptually similar changes in Comments [5] and [6].

Comment [3] elaborates on the new definition by identifying a number of factors by which to assess whether someone has become a prospective client. The Commission concluded that this new Comment language will help to ensure that lawyers and the public understand the potential consequences of communicating electronically and give lawyers more guidance on how to avoid creating unintended client-lawyer relationships.

Finally, the Commission proposes to add a sentence at the end of Comment [2] that makes clear that a person is not owed any duties under Rule 1.18 if that person contacts a lawyer for the purpose of disqualifying the lawyer from representing an

opponent. Many ethics opinions have recognized that lawyers owe no duties to those who engage in this sort of behavior, which is commonly referred to as “taint shopping.”

In fact, some states have incorporated this concept into their own versions of Rule 1.18. See, e.g., New York R. Prof. C. 1.18(e)(2). The Commission concluded that the concept deserved expression in Comment [2] given the ease with which technology makes “taint shopping” possible.

III. Proposed Amendments to Model Rule 7.2 (Advertising)

Model Rule 7.2(b) currently prohibits a lawyer from giving anything of value for recommending the lawyer’s services. The Rule, however, creates exceptions that permit a lawyer to pay for the “reasonable costs” of advertising and the “usual charges” of non-profit or state-qualified lawyer referral services. In practical effect, the Rule has been interpreted to mean that a lawyer may divide client fees with non-profit or approved referral services, but may only pay set costs to advertising programs, such as the cost of a television commercial or a newspaper advertisement.

Prior to the Internet, this dichotomy between advertising and lawyer referral services was not difficult to understand. For example, payments to television stations to run a commercial or payments to a phone book company to run a Yellow Pages advertisement were clearly permissible, whereas sharing fees with a for-profit referral service was clearly impermissible.

The Internet has blurred these lines, and it is highly likely that continued technological innovation will make the lines even less clear. For example, new marketing methods have emerged, such as those provided by Legal Match, Total Attorneys, Groupon, and Martindale-Hubbell’s Lawyers.com that do not fit neatly into existing categories. Although the particular models vary, lawyers often pay these companies a fee for each client lead that the company generates. The existing version of Rule 7.2 does not clearly resolve whether these payments constitute an impermissible fee to “recommend” the lawyer’s services.

These ambiguities also arise when lawyers use social networking sites to market their practices. For example, one firm recently distributed free t-shirts containing the law firm’s name; the firm then offered a chance to win a prize to everyone who posted a photo of themselves on Facebook that showed them wearing the firm’s t-shirt. The firm arguably gave people something “of value” (the shirt and the opportunity to win a prize)

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4 A related question is whether such fees would be considered an impermissible form of fee sharing under Rule 5.4. There is considerable case law and numerous ethics opinions that define a “legal fee” for purposes of Rule 5.4, and the Commission concluded that no additional guidance is necessary to address the issue. See, e.g., State Bar of Ariz. Ethics Op. 00-10 (2000); Va. State Bar Ethics Op. 1712 (1998); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 88-356 (1988).
for "recommending the lawyer's services" and thus might be viewed as running afoul of the existing version of Rule 7.2.

To determine how to treat new forms of marketing, the Commission examined the original purpose of the restrictions contained in Model Rule 7.2(b). One important goal was to prohibit payments to other people to develop clients in a manner that the lawyer was not permitted to employ. For example, the Rule prohibits a lawyer to pay "runners" to engage in in-person solicitation.

The legitimate concerns associated with the use of "runners," however, are not apparent when lawyers use pay-per-lead services or other Internet-based marketing tools, such as those referenced above. In particular, those services typically do not use methods that run afoul of existing rules of professional conduct. For example, these services do not usually use in-person solicitation or employ false or misleading communications. If they did, lawyers could be disciplined for using those services. Accordingly, the Commission concluded that it should propose clarifying language regarding Rule 7.2's scope in this regard.

A. The Commission's Proposal

The Commission proposes to retain the prohibition against paying others for recommending the lawyer's services, but to clarify what that prohibition means. In particular, the Commission proposes to add new language to Comment [5] that defines the term "recommending." This new and clearer definition would enable lawyers to identify more clearly the circumstances under which their payments for lead generation services, such as a "pay-per-click" and "pay-per-lead" services, are permissible.

The proposed Comment language also makes clear that, even if a lead generation service does not "recommend" the lawyer, the lawyer must not make any payments to a lead generator if the payment would violate Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer). Moreover, the proposed Comment language emphasizes that a lawyer must ensure that the lead generator's communications to potential clients are consistent with Rule 7.1 (communications concerning a lawyer's services). In particular, the lawyer must ensure that the lead generator discloses that the lawyer has paid a fee in exchange for the lead. Moreover, the lead generator should not state or imply that the lead generator has analyzed the potential client's legal problems when determining which lawyer should receive the referral. These requirements are intended to prevent any misunderstanding as to the reason why the lead generator has identified a particular lawyer.

The new definition also would have clearer implications for other forms of Internet-based marketing methods. For example, the "free t-shirt" promotion mentioned above would likely be permissible because the individuals wearing the t-shirts could not reasonably be understood as a "recommendation" (i.e., it is not reasonably understood as an endorsement of the law firm's credentials, abilities, or qualities).
B. Alternative Approaches Considered

The Commission considered alternative approaches to amending Rule 7.2 and paid particular attention to one that would have had more significant implications than the approach that the Commission is proposing. In particular, the Commission considered eliminating Rule 7.2(b)'s prohibition against paying nonlawyers for recommendations. Such a change would enable lawyers to pay for such recommendations as long as the nonlawyers' methods are consistent with the lawyer's own ethical obligations. For example, a lawyer under this alternative approach would be permitted to pay a for-profit referral service for recommending the lawyer, but only if the service does not employ any methods that the lawyer could not employ (e.g., it does not use misleading communications or engage in in-person solicitations) and only if any fee paid to the service is consistent with Rule 1.5(e) (i.e., the payment is for the recommendation and not a portion of the fee that the lawyer earned) and Rule 5.4 (the recommender does not have the ability to control the way in which the lawyer represents the client). The Commission learned that the District of Columbia has adopted a somewhat similar approach.\(^5\)

This alternative approach would retain the historical restrictions on paying others to engage in unethical conduct (such as paying "runners" to engage in in-person solicitation), but free lawyers to use new and innovative forms of marketing. For example, for-profit lawyer referral services would be able to recommend to potential clients the lawyers who are particularly well-suited to provide the specific services that the potential clients are seeking, including offering a description of the lawyers' qualifications and the cost of their services relative to other lawyers who offer similar services. Arguably, such a for-profit referral service would be able to match potential clients with appropriate lawyers more effectively and efficiently than not-for-profit models and thus make legal services more accessible and affordable.\(^6\)

The Commission nevertheless decided to retain the restriction on paying others for a recommendation. Concerns were raised that, by removing the restriction, for-profit entities would develop undue influence over the channeling of professional work, even if they do not have the expertise to do so. Moreover, there was concern that such entities might wield inappropriate influence over lawyers who want to be recommended, despite the restrictions contained in Rule 5.4. For these reasons, the Commission's current

\(^5\)D.C. Rules of Prof'l Conduct 7.1(b)(2) ("A lawyer shall not give anything of value to a person (other than the lawyer's partner or employee) for recommending the lawyer's services through in-person contact"); D.C. Bar Ethics Op. 342 (2007).

\(^6\) The proposal also would be consistent with the Commission's proposed approach to outsourcing under Rule 5.3. In particular, proposed Comment [4] to that Rule provides that, "[w]hen using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations." The premise of that proposal is consistent with the idea that lawyers should be permitted to pay others to perform services on the lawyer's behalf as long as the services are performed in a manner that is consistent with the lawyer's own professional obligations.
proposal retains the current prohibition against paying for a recommendation, but clarifies what counts as a “recommendation.”

IV. Proposed Amendments to Model Rule 7.3 (Direct Contact with Prospective Clients)

Rule 7.3 regulates a lawyer’s direct contacts with potential clients. Paragraph (a) prohibits most kinds of in-person, live telephone, and real-time electronic solicitations, but the Rule permits (and regulates) other forms of solicitations, such as those sent by direct mail and email.

The Commission concluded that lawyers would benefit from a clearer definition of what kinds of communications constitute a “solicitation” and thus fall within the scope of Rule 7.3. In the early days of the Internet, little such guidance was needed. Ethics opinions had concluded that emails constituted a solicitation and were governed by Rule 7.3, but that less targeted forms of advertising (such as websites) were not governed by the Rule. Today, however, lawyers can post information on their social or professional networking pages (which function like websites), but can control the viewers and enter into conversations via those pages (like email). Similarly, some websites allow lawyers and potential clients to interact, sometimes in “real-time” and sometimes not. The Commission was advised that lawyers are uncertain as to whether these new forms of Internet-based activities fall within Rule 7.3.

The Commission concluded that, to address this ambiguity, lawyers need a clearer definition of a “solicitation.” A new proposed Comment [1] would explain that a lawyer’s communications constitute a solicitation when the lawyer “offers to provide, or can be reasonably understood to be offering to provide, legal services to a specific potential client.” The phrase “reasonably understood to be offering to provide” is intended to ensure that lawyers are governed by the Rule, even if their communications do not contain a formal offer of representation, but are nevertheless clearly intended for that purpose. For example, if a lawyer approaches potential clients at their homes and describes various legal services, the lawyer’s communications constitute a “solicitation”, even if the lawyer does not formally offer to provide those services, as long as a reasonable person would interpret the lawyer’s communications as an offer to provide those services.

The second sentence is designed to clarify that responses to requests for information and advertisements that are not directed to specific people are not “solicitations.” For example, the sentence makes clear that advertisements that are automatically generated in response to an Internet search are not solicitations. Because those advertisements are generated in response to Internet research, they are more analogous to a lawyer’s response to a request for information (which is not a solicitation).

7 Such communications, however, may be governed by other rules, including Rule 7.1 (communications concerning a lawyer’s services).
ABA Commission on Ethics 20/20 Revised Proposal – Technology and Client Development
September 19, 2011

than an unsolicited and targeted letter to a potential client who is known to be in need of a particular legal service (which is a solicitation). These examples are intended to clarify when a lawyer’s activities constitute a solicitation and are thus governed by Rule 7.3.

The Commission concluded that additional elaboration on this point also would be useful in renumbered Comment [3]. In particular, technology has enabled various kinds of online interactions between lawyers and potential clients. The clarifying language makes clear that lawyers do not violate paragraph (a) if they are responding to a request for information, which can occur in many settings, including online.

The Commission’s research also revealed that “autodialing” (or “robo-calling”) is now unlawful in many situations. See, e.g., 47 U.S.C. 227(b). As a result, the Commission proposes to delete the reference to “autodialing” in renumbered Comment [3] and to remind lawyers that other law often governs a lawyer’s conduct in this area.

Finally, the Commission’s proposal addresses a matter of terminology. With the creation of Rule 1.18 in 2002, the phrase “prospective client” refers to a potential client who has actually shared information with a lawyer. Rule 7.3 clearly intends to cover contacts with all possible future clients, not just those who have had some contact with lawyers and have become “prospective clients” under Rule 1.18. (See the description of Model Rule 1.18 earlier in this Report.) Accordingly, the Commission proposes to replace the word “prospective” with the word “potential” throughout Rule 7.3 and its Comments.

V. Conclusion

Technology has enabled lawyers to communicate about themselves and their services more easily and efficiently, and it has enabled the public to learn necessary information about lawyers, their credentials, and the particular legal services those lawyers provide as well as the cost of those services. Lawyers, however, need to ensure that these communications satisfy existing ethical obligations. The Commission’s proposals are designed to give lawyers more guidance regarding these obligations in the context of various new client development tools.
ABA Commission on Ethics 20-20: Initial Draft Proposal for Comment
Choice of Law-Alternative Law Practice Structures
December 2, 2011

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

American Bar Association
Commission on Ethics 20/20
Resolution

RESOLVED: That the American Bar Association amends Rule 1.5 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck-through):

Rule 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

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

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

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

(4) the amount involved and the results obtained;

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

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

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the
36 lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted
37 from the recovery; and whether such expenses are to be deducted before or after the contingent
38 fee is calculated. The agreement must clearly notify the client of any expenses for which the
39 client will be liable whether or not the client is the prevailing party. Upon conclusion of a
40 contingent fee matter, the lawyer shall provide the client with a written statement stating the
41 outcome of the matter and, if there is a recovery, showing the remittance to the client and the
42 method of its determination.
43
44 (d) A lawyer shall not enter into an arrangement for, charge, or collect:
45
46   (1) any fee in a domestic relations matter, the payment or amount of which is contingent
47       upon the securing of a divorce or upon the amount of alimony or support, or property
48       settlement in lieu thereof; or
49
50   (2) a contingent fee for representing a defendant in a criminal case.
51
52 (e) A division of a fee between lawyers who are not in the same firm or between law firms may
53 be made only if:
54
55   (1) the division is in proportion to the services performed by each lawyer or law firm or
56       each lawyer or firm assumes joint responsibility for the representation;
57
58   (2) the client agrees to the arrangement, including the share each lawyer or law firm will
59       receive, and the agreement is confirmed in writing; and
60
61   (3) the total fee is reasonable.
62
63 COMMENT
64
65 Reasonableness of Fee and Expenses
66 [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances.
67 The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each
68 instance. Paragraph (a) also requires that expenses for which the client will be charged must be
69 reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such
70 as copying, or for other expenses incurred in-house, such as telephone charges, either by
71 charging a reasonable amount to which the client has agreed in advance or by charging an
72 amount that reasonably reflects the cost incurred by the lawyer.
73
74 Basis or Rate of Fee
75 [2] When the lawyer has regularly represented a client, they ordinarily will have evolved an
76 understanding concerning the basis or rate of the fee and the expenses for which the client will
77 be responsible. In a new client-lawyer relationship, however, an understanding as to fees and
78 expenses must be promptly established. Generally, it is desirable to furnish the client with at
79 least a simple memorandum or copy of the lawyer’s customary fee arrangements that states the
80 general nature of the legal services to be provided, the basis, rate or total amount of the fee and
whether and to what extent the client will be responsible for any costs, expenses or
disbursements in the course of the representation. A written statement concerning the terms of
the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph
(a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is
reasonable to charge any form of contingent fee, a lawyer must consider the factors that are
relevant under the circumstances. Applicable law may impose limitations on contingent fees,
such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an
alternative basis for the fee. Applicable law also may apply to situations other than a contingent
fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

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

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

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations
matter when payment is contingent upon the securing of a divorce or upon the amount of
alimony or support or property settlement to be obtained. This provision does not preclude a
contract for a contingent fee for legal representation in connection with the recovery of post-
judgment balances due under support, alimony or other financial orders because such contracts
do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who
are not in the same firm. A division of fee facilitates association of more than one lawyer in a
matter in which neither alone could serve the client as well, and most often is used when the fee
is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (c)
permits the lawyers to divide a fee either on the basis of the proportion of services they render or
if each lawyer assumes responsibility for the representation as a whole. In addition, the client
must agree to the arrangement, including the share that each lawyer is to receive, and the
agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed
by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for
the representation entails financial and ethical responsibility for the representation as if the
lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom
the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (c) permits the division of a fee with a law firm in which a nonlawyer is a partner
or has an ownership interest. But see Rule 8.4(a) (prohibiting a lawyer from “knowingly
assist[ing]” another to violate the Rule of Professional Conduct). The Rule does not prohibit or
regulate division of fees to be received in the future for work done when lawyers were previously
associated in a law firm.

Disputes over Fees

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

FURTHER RESOLVED: That the American Bar Association amends Model Rule 5.4 of
the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions
struck through):

Rule 5.4 Professional Independence of a Lawyer

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

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

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

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

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that
employed, retained or recommended employment of the lawyer in the matter.

(5) a lawyer may share legal fees with a nonlawyer in the lawyer’s firm in a manner that
is not otherwise permissible under this Rule, but only if the nonlawyer performs
(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

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

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

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

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

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

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[3] Paragraph (a)(5) recognizes that the Rule regarding fee sharing with nonlawyers varies among jurisdictions, both within and outside the United States. As a result, a lawyer may be asked to share fees with nonlawyers in the same firm when that form of fee sharing is not permitted under the rules of the jurisdiction that apply to that lawyer, but permitted under the rules of the jurisdiction that apply to the permissibility of fee sharing with the nonlawyer. Under these circumstances, Rule 8.5(b)(2) (Choice of Law) states that the Rule to be applied is the Rule of the jurisdiction where "the lawyer's conduct occurred" or had its "predominant effect," even if the lawyer is not admitted in that jurisdiction. Under this test, if a nonlawyer works exclusively with lawyers and serves clients in an office located in a jurisdiction that permits nonlawyer partnership or ownership interests, Rule 8.5(b)(2) ordinarily permits the firm's lawyers,
including those lawyers located in jurisdictions that do not permit such partnerships or ownership
interests, to share fees with the nonlawyer because the predominant effect of the fee sharing will
be in the jurisdiction that allows it. To determine whether a lawyer can divide fees with a
different firm in which a nonlawyer is a partner or has an ownership interest, see Rule 1.5,
Comment [8].
The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

REPORT


To develop appropriate recommendations in this area, the Commission’s Uniformity, Choice of Law, and Conflicts of Interest Working Group included participants from the Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Client Protection, the Standing Committee on Professional Discipline, and the National Organization of Bar Counsel. They made important contributions to the Working Group’s understanding of the issues and the development of the Resolutions accompanying this Report. Moreover, the Commission released an Issues Paper identifying a wide range of choice of law problems and received numerous responses. The Commission also heard testimony from lawyers in various practicing settings and organizations regarding these issues. Based on responses to the Issues Paper and other comments received, it became clear to the Commission that additional guidance to lawyers regarding this subject is needed. As a result, the Commission is proposing two amendments to the Model Rules of Professional Conduct.

First, the Commission is proposing to amend Model Rule 1.5(e) (Fees) as well as its Comment [8]. Rule 1.5(e) provides that, under certain circumstances, two or more law firms may divide a legal fee that is generated from a particular legal matter. A choice of law problem arises if the fee-dividing firms are governed by different rules regarding the permissibility of nonlawyer ownership. In particular, one firm might be governed by a version of Model Rule 5.4 (Professional Independence of a Lawyer) that does not permit nonlawyer partners or owners, and
the other firm might be permitted to have nonlawyer partners or owners under its applicable Rules of Professional Conduct. The question is whether the law firm that is not permitted to have nonlawyer owners or partners can ethically divide a legal fee with a law firm that has such nonlawyer partners or owners. Based upon the realities of interstate and international law practice, and for the reasons explained in this Report, the Commission concluded that the fee division should be permissible.

Second, the Commission is proposing to amend Model Rule 5.4 to address a conceptually similar problem. A law firm may have offices in multiple jurisdictions, and only some of those jurisdictions may permit lawyers to share fees with nonlawyers within the same firm (i.e., intra-firm fee sharing). The question is whether the lawyers who are practicing in an office where nonlawyer fee sharing is impermissible can share fees with nonlawyers in the same firm who are located in a different jurisdiction where such fee sharing is permissible. The Commission concluded that a lawyer should be permitted to share fees with nonlawyers under these circumstances, but only if the nonlawyer performs professional services that assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer.

The Commission believes that both of these amendments will help lawyers navigate the difficult choice of law problems that are arising due to increasingly inconsistent rules worldwide regarding the sharing of fees with nonlawyers, particularly due to developments abroad. The Commission concluded that these types of choice of law problems will persist, regardless of whether the ABA amends Model Rule 5.4 to permit some form of nonlawyer ownership. Even with such an amendment to the Model Rules to permit some form of nonlawyer ownership in law firms, some jurisdictions will not adopt the Model Rule or will do so only with modifications. Moreover, even if every U.S. jurisdiction prohibited sharing legal fees with nonlawyers (this is currently not the case, as noted above), many law firms with offices in the U.S. have offices in other countries that permit fee sharing with nonlawyers, thus raising the same issue. For these reasons, the Commission believes that these choice of law problems need to be addressed.

I. Rule 1.5 Proposal to Address Choice of Law Issues Associated with Inter-Firm Fee Divisions

Rule 1.5(e) provides that two or more law firms may divide a legal fee that is generated from a particular legal matter, assuming certain requirements are satisfied. The Commission’s proposal is designed to address a particular choice of law problem that has arisen due to inconsistencies among jurisdictions with regard to nonlawyer ownership.

The problem can be understood through the following example. A law firm located in the District of Columbia may have nonlawyer owners, as is permitted under Rule 5.4 of the District of Columbia Rules of Professional Conduct. In accordance with the best interests of the client, that firm may refer a legal matter to a second law firm, which is located in a jurisdiction (e.g., New York) that does not currently permit nonlawyer fee sharing. Under current Model

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Rule 1.5, the New York and District of Columbia firms may divide the legal fees that result from the District of Columbia firm’s referral, assuming the District of Columbia firm retains joint responsibility for the matter, the client agrees in writing to the arrangement, and the overall fee is reasonable. The question is whether the New York firm violates New York’s version of Rule 5.4, which prohibits fee sharing with nonlawyers, if the firm divides the fee with the District of Columbia firm, given that the District of Columbia firm has nonlawyer owners.

The Commission concluded that the New York firm should be permitted to divide fees with the District of Columbia firm under these circumstances, because the concerns underlying the prohibition in Rule 5.4 are not implicated in this context. In particular, Model Rule 5.4 is designed to insulate lawyers from the influence of nonlawyers, but there is no plausible reason to believe that the nonlawyers in the District of Columbia firm are in a position to influence the New York lawyers, who not only are in a different jurisdiction, but also practice in an entirely different firm. Thus, the Commission proposes to clarify in Comment [8] to Rule 1.5 that one law firm can divide a fee with another law firm that has nonlawyer partners or owners.

The proposed new sentence to Comment [8] ends with a cross-reference to Rule 8.4(a), which prohibits lawyers from “knowingly assist[ing]” another lawyer or firm in violating the Rules of Professional Conduct. This cross-reference is intended to remind lawyers that they cannot divide fees with another firm under circumstances that would constitute “knowingly assist[ing]” the other firm in violating the rules that apply to the permissibility of that firm’s fee sharing.

II. Rule 5.4 Proposal to Address Choice of Law Issues Associated with Intra-Firm Fee Sharing

The second choice of law problem concerns intra-firm fee sharing. A law firm may have offices in multiple jurisdictions within the U.S. or within the U.S. and internationally, and only some of those jurisdictions may permit lawyers to share fees with nonlawyers within the same firm. The question is whether the lawyers who are practicing in an office where nonlawyer fee sharing is impermissible can share fees with nonlawyers in the same firm who are governed by the rules of a jurisdiction that permits such fee sharing.

The ABA Standing Committee on Ethics and Professional Responsibility addressed this issue twenty years ago in ABA Formal Opinion 91-360, just after the District of Columbia authorized nonlawyer ownership in law firms. Formal Opinion 91-360 concluded that a lawyer licensed in both the District of Columbia and in a jurisdiction that does not permit nonlawyer fee sharing can share fees with District of Columbia-based nonlawyers, but only if the lawyer practices exclusively in the District of Columbia. If, however, the lawyer practices in a jurisdiction that prohibits intra-firm fee sharing (or is licensed solely in that jurisdiction), the

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4 The Commission’s proposed solution to this choice of law problem is consistent with the only available authority on this issue – a 2010 ethics opinion by the Philadelphia Bar Association. Phila. Bar Ass’n Prof’l Guidance Comm., Advisory Op. 2010-7 (2010).
ABA Commission on Ethics 20-20: Initial Draft Proposal for Comment
Choice of Law-Alternative Law Practice Structures
December 2, 2011

Opinion concluded that the lawyer cannot share fees with the firm’s nonlawyers.7 (For reasons that appear below, Opinion 91-360 is outdated. It relied on a version of Rule 8.5(b) that is no longer part of the Model Rules.)

Despite this limitation on fee sharing, the Opinion recognized that law firms often have offices in multiple jurisdictions and that those firms might want to take advantage of nonlawyer fee sharing in jurisdictions (like the District of Columbia) that allow it. The Opinion suggested that a firm can have nonlawyer partners or owners in those jurisdictions, but that the office has to be “fiscally and managerially separate from and independent of” any offices located in jurisdictions that prohibit nonlawyer partners and owners.8 In sum, while the firm can operate under a single name, it has to operate separately fiscally and managerially.

The Commission concluded that this attempt to segregate the firm’s finances is essentially cosmetic. First, the entire firm can have a profit-sharing arrangement that includes nonlawyers whose compensation can be based “in whole or in part” on the plan (Rule 5.4(a)(3)).9 The interests of a nonlawyer partner (or a nonlawyer owner in District of Columbia) in the plan can then easily be adjusted based on factors similar to those that define compensation schemes for lawyer partners.

Second, the nonlawyer’s participation in the District of Columbia-based profits can be adjusted to compensate the nonlawyer, who cannot directly participate in the profits generated elsewhere. For example, in dividing up the income earned solely in the District of Columbia, no rule prevents the District of Columbia office of a multistate firm from recognizing the inability of the District of Columbia nonlawyer partners to participate in the income earned in other jurisdictions and thus to increase the District of Columbia nonlawyer’s share in the District of Columbia-only income accordingly. In this sense, the Opinion’s approach produces accounting gymnastics, but it does not actually prevent fee sharing with nonlawyers.

Rather than have firms continue to engage in separate bookkeeping, the Commission believes that the realities of 21st century legal practice require a more candid approach to this issue. That is to allow explicitly what Formal Opinion 91-360 has essentially permitted in practice for more than twenty years: the firm-wide sharing of fees, including with the firm’s office that has nonlawyer partners and owners, but only if the nonlawyer performs professional services that assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer. (The phrase “assist the firm in providing legal services to its clients” is intended to preclude lawyers from engaging in intra-firm fee sharing where one office of the firm has nonlawyer passive equity investors.10)

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7 Id.
8 Id. at 12.
10 The Commission is not proposing a similar restriction on inter-firm fee divisions under Rule 1.5, because the Commission concluded that there is no risk to professional independence when a lawyer divides fees with a different law firm that has passive equity investors. In particular, there is no plausible basis to believe that the nonlawyer equity investors of a law firm will be in a position to influence lawyers who not only are in a different jurisdiction, but also practice in an entirely different firm.
ABA Commission on Ethics 20-20: Initial Draft Proposal for Comment
Choice of Law-Alternative Law Practice Structures
December 2, 2011

The Commission also took issue with the assertion in Formal Opinion 91-360 that a jurisdiction that prohibits nonlawyer fee sharing has a “substantial and legitimate interest” in prohibiting nonlawyer fee sharing in another jurisdiction.\(^{11}\) Relying on Rule 8.5, the Opinion explained that a jurisdiction might be legitimately concerned that nonlawyers in another jurisdiction might interfere with the professional independence of all of the lawyers in the firm, wherever they might be.\(^{12}\) The Commission concluded that the Opinion’s analysis in this regard may be outdated for two reasons.

First, the Opinion was written at a time when the choice of law provisions in Rule 8.5 were very different from, and considerably less helpful than, the provisions that exist today. In 1991, when Opinion 91-360 was published, Rule 8.5 provided only that “[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.”\(^{13}\) Comment [3] to the 1991 version of the Rule provided little additional guidance: “Where a lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation.”\(^{14}\)

On the recommendation of the Standing Committee on Ethics and Professional Responsibility, Rule 8.5 was amended in 1993, to provide that for conduct not in connection with a matter pending before a tribunal, “(i) if the lawyer is licensed to practice only in this jurisdiction the rules to be applied shall be the rules of this jurisdiction, and (ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.”\(^{15}\)

Significantly, in 2002, on the recommendation of the Commission on Multijurisdictional Practice, Rule 8.5 was amended again. This amendment eliminated the focus on the place of licensure or practice and now provides that, as to conduct not in connection with a matter pending before a tribunal, “the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.”\(^{16}\) Thus, as amended in 2002, Rule 8.5(b)(2) prescribes a very different choice of law analysis for determining which rules govern conduct not connected to any matter pending before a tribunal. Today, Rule 8.5(b)(2) makes it clear that licensure and practice are not controlling for choice of law purposes; rather, the focus is on the rules of the jurisdiction in which the “conduct occurred” or in which the “predominant effect” of the conduct is felt.

\(^{11}\) Supra note 6, at 2-3.
\(^{12}\) Id.
\(^{13}\) MODEL RULES PROF’L CONDUCT ANN. 639 (2011).
\(^{14}\) Id.
\(^{16}\) See MODEL RULES OF PROF’L CONDUCT R. 8.5 (2011).
For these reasons, the Commission concluded that the analysis in the Opinion is now outdated. In particular, as to “a matter of firm organization,” the “conduct occur[s]” or has its “predominant effect” in the jurisdiction in which the nonlawyer is admitted to the partnership or the office from which the nonlawyer principally works. For example, if a nonlawyer is admitted to partnership in the District of Columbia office of a firm and works principally with lawyers and serves clients in the District of Columbia office, Rule 8.5(b)(2) would permit the firm's lawyers located outside the District of Columbia to share fees with the nonlawyer, even if those lawyers were licensed in jurisdictions that do not permit such partnerships or ownership interests, because the “predominant effect” of the fee sharing is in the District of Columbia.

Second, the Commission found no empirical basis for the Opinion’s assumption that nonlawyer partners and owners might assert inappropriate influence over lawyers who are located in another jurisdiction. Today, there exists empirical information that the Standing Committee did not have. Specifically, the District of Columbia, although prohibiting multidisciplinary practices and outside nonlawyer ownership interests in law firms, has permitted limited forms of nonlawyer ownership in law firms. The lawyers working in such District of Columbia firms have been permitted to share legal fees with those nonlawyers for more than two decades, and the Commission’s research has uncovered no evidence that nonlawyers have exercised inappropriate influence over lawyers in the same firm, even when they are in the same physical office. Thus, there is no reason to think nonlawyers located primarily in one jurisdiction, subject to its rules, will be able or inclined to attempt to interfere with the exercise of independent judgment by lawyers practicing in another jurisdiction. To be clear, if there were evidence that those lawyers permitted nonlawyers to exercise inappropriate influence over the lawyers’ exercise of independent judgment in the representation of clients, disciplinary action against those lawyers would be appropriate, whether the nonlawyers were located in the same office as the lawyers or in different offices.

One concern expressed during the Commission’s deliberations was that the Commission’s proposal would allow a law firm to accomplish through the “back door” what it cannot accomplish through the “front door.” That is, the proposal would allow a lawyer who cannot otherwise share fees with nonlawyers to engage in such fee sharing simply by becoming associated with a firm that has an office in a jurisdiction that permits nonlawyer fee sharing.

In fact, the Commission’s proposal is intended to recognize that a jurisdiction can simultaneously conclude that some forms of nonlawyer fee sharing create undue risks to professional independence, while at the same time conclude that those risks are substantially mitigated if the nonlawyers are located in a different jurisdiction where nonlawyer ownership is permissible and appropriately regulated. The Commission’s proposal rests on the idea that these two views are compatible and that nonlawyer fee sharing should therefore be permissible when the nonlawyer performs professional services that assist the firm in providing legal services to its clients and when that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer.

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17 Supra note 6, at 3 n.3.
18 Supra note 2, at 4.
Conclusion

The Commission’s proposals are intended to help lawyers and law firms resolve choice of law problems that have arisen due to inconsistencies among jurisdictions with regard to the question of dividing and sharing fees with firms that are permitted to have nonlawyer owners. The Commission believes that its proposals protect a lawyer’s professional independence while giving appropriate deference to jurisdictions that have decided to permit some form of nonlawyer partnership or ownership in law firms. Accordingly, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolutions.
Model Rules of Professional Conduct

Client-Lawyer Relationship
Rule 1.7 Conflict Of Interest: Current Clients

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

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

Rule 1.7 Conflict Of Interest: Current Clients – Comment

Identifying Conflicts of Interest: Directly Adverse

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

Client-Lawyer Relationship
Rule 1.9 Duties To Former Clients

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

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

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

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

unless the former client gives informed consent, confirmed in writing.

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

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

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

Rule 1.9 Duties To Former Clients – Comment

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

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

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

**Lawyers Moving Between Firms**

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.
[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

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

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

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

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

Client-Lawyer Relationship
Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer’s association with a prior firm, and

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

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

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

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

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

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.
Rule 1.10 Imputation Of Conflicts Of Interest: General Rule – Comment

Definition of “Firm”

[1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10(b).

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

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

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer for formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).
[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer’s prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client’s material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client’s material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

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

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

Law Firms And Associations
Rule 5.4 Professional Independence Of A Lawyer

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

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

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

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

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

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

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

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

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

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

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

Rule 5.4 Professional Independence Of A Lawyer - Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.
[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).
Model Rules of Professional Conduct

Law Firms And Associations
Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.
Model Rules of Professional Conduct

Maintaining The Integrity Of The Profession
Rule 8.5 Disciplinary Authority; Choice Of Law

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

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

Rule 8.5 Disciplinary Authority; Choice Of Law – Comment

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer’s conduct may involve significant contacts with more than one jurisdiction.

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

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.
[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

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

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.
October 7, 2011

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

REPORT

The American Bar Association’s Commission on Ethics 20/20 has heard about and studied the choice of law problems that arise when an ethics issue implicates multiple jurisdictions with inconsistent rules of professional conduct. The problems are particularly acute in jurisdictions with inconsistent conflict of interest rules. This Report describes the Commission’s proposals to address these problems.

To develop appropriate recommendations in this area, the Commission researched and studied common conflicts-related choice of law problems. To assist in these efforts, the Commission’s Uniformity, Choice of Law, and Conflicts of Interest Working Group included participants from the Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Client Protection, the Standing Committee on Professional Discipline, and the National Organization of Bar Counsel. They made important contributions to the Working Group’s understanding of the issues and the development of the Resolutions accompanying this Report. Moreover, the Commission released an Issues Paper identifying a wide range of conflicts-related choice of law problems and received numerous responses. The Commission also heard testimony from lawyers in various practicing settings and organizations regarding these issues.

As a result of these efforts, the Commission is proposing that, subject to several limitations, lawyers and clients should have the freedom to agree that their relationship will be governed by a particular jurisdiction’s rules of professional conduct relating to conflicts of interest. This proposal recognizes that Rule 8.5(b) does not and cannot provide bright line assurance regarding this issue. The Commission concluded that an agreement to be governed by the rules of a particular jurisdiction can help provide clients and lawyers with increased certainty and reduce some of the choice of law problems that may arise due to inconsistencies among jurisdictions’ conflict of interest rules. To this end, the Commission is proposing a new Comment [23] to Rule 1.7, which would describe the circumstances under which such agreements are permissible.

The Commission also will recommend that the Standing Committee on Ethics and Professional Responsibility draft a Formal Opinion that would provide greater guidance on how to resolve conflicts-related inconsistencies in the absence of the kinds of agreements anticipated by proposed Comment [23]. The Commission considered a number of methods for offering this guidance within the Model Rules of Professional Conduct itself, but ultimately determined that the resolution of conflicts-related inconsistencies requires a fact-based inquiry that is not amenable to Model Rules treatment. Although Rule 8.5 offers some guidance in this regard, the Commission concluded that the Rule contains many ambiguities that could be usefully clarified in a Formal Opinion. The Commission believes that a Formal Opinion on this topic, in combination with the proposed amendment to Comment [23] to Rule 1.7, will enable lawyers,
clients, and courts to be able to predict with greater certainty which jurisdiction’s conflict rules will govern their relationships.

Proposal to Add Comment [23] to Model Rule 1.7

The Commission concluded that lawyers and clients will benefit from being able to agree at the outset of a matter that the representation will be governed by a specified jurisdiction’s conflict of interest rules.

The Commission determined that these agreements are conceptually analogous to waivers of future conflicts described in Comment [22] of Rule 1.7. In particular, Comment [22] already permits clients to agree to a broad waiver of future conflicts, so the Commission concluded that clients should also be permitted to choose to be governed by the conflict rules of a named jurisdiction, with certain qualifications discussed below. For example, a lawyer and client might agree that “Rules 1.7, 1.9, and 1.10 of the Ohio Rules of Professional Conduct will govern the lawyer’s work in this matter.” (Moreover, because of the analogy to Comment [22], the Commission concluded that the appropriate location for the new Comment language is immediately after Comment [22] in a new Comment [23].)

Proposed Comment [23] contains several important and necessary limitations. First, the client must give informed consent confirmed in writing and must have an opportunity to consult with counsel. These conditions are similar to those mentioned in the context of Comment [22] (which references the requirement in Rule 1.7(b)(4) regarding informed written consent), and the rationales for these conditions apply equally well to the proposed new Comment.

Second, proposed Comment [23] requires that the selected jurisdiction be one in which the predominant effect of, or substantial work relating to, the matter is reasonably expected to occur. This requirement is designed to ensure that there is a reasonable nexus between the selected jurisdiction and the matter. Such a nexus is frequently required when parties agree to choice of law provisions in contracts, and the Commission concluded that a nexus requirement is prudent in this context as well to ensure that the selected jurisdiction has a reasonable connection to the applicable representation.1

The final requirement recognizes that, regardless of the jurisdiction that is selected, the client cannot agree to a representation that is considered to be “non-consentable” under the rules of the jurisdiction that would otherwise govern the relationship under Rule 8.5. For example, if a particular representation would normally be governed by a jurisdiction that has adopted the Model Rules, the lawyer and client cannot agree to be bound by the rules of a jurisdiction that would allow the lawyer to undertake a representation that would be “non-consentable” under

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1 See, e.g., Restatement (Second) of Conflict of Laws § 187.
Rule 1.7(b) or to which the client cannot give informed consent as that term is defined in Rule 1.0(e).

The proposed Comment concludes with the observation that these agreements are more likely to be effective if a client is an experienced user of the legal services involved. The client’s experience is a relevant factor in Comment [22] when determining whether waivers of future conflicts are effective, and the Commission concluded that it should also be a factor when determining the effectiveness of an agreement specifying which jurisdiction’s conflict rules will govern the matter.

Conclusion

Conflicts-related choice of law problems are commonly encountered, but the Rules currently offer little guidance on how to resolve them. The Commission’s proposal is intended to provide more predictability to clients and their lawyers by permitting them to agree in advance to be bound by the conflict rules of a particular jurisdiction. For this reason, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolution.
The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

American Bar Association
Commission on Ethics 20/20

Resolution

RESOLVED: That the American Bar Association amends Model Rule 1.7 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck through):

Rule 1.7 Conflict of Interest: Current Clients

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

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

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

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

COMMENT

General Principles

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

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

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

4 If a conflict arises after representation has been undertaken, the lawyer ordinarily 
must withdraw from the representation, unless the lawyer has obtained the informed 
consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more 
than one client is involved, whether the lawyer may continue to represent any of the 
clients is determined both by the lawyer’s ability to comply with duties owed to the 
former client and by the lawyer’s ability to represent adequately the remaining client or 
clients, given the lawyer’s duties to the former client. See Rule 1.9. See also Comments 
5 and [2930].

5 Unforeseeable developments, such as changes in corporate and other 
organizational affiliations or the addition or realignment of parties in litigation, might 
create conflicts in the midst of a representation, as when a company sued by the lawyer 
on behalf of one client is bought by another client represented by the lawyer in an 
unrelated matter. Depending on the circumstances, the lawyer may have the option to 
withdraw from one of the representations in order to avoid the conflict. The lawyer must 
seek court approval where necessary and take steps to minimize harm to the clients. See 
Rule 1.16. The lawyer must continue to protect the confidences of the client from whose 
representation the lawyer has withdrawn. See Rule 1.9 (c).

Identifying Conflicts of Interest: Directly Adverse

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

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

Identifying Conflicts of Interest: Material Limitation

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

Lawyer’s Responsibilities to Former Clients and Other Third Persons

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

Personal Interest Conflicts

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

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

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

Interest of Person Paying for a Lawyer’s Service

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

Prohibited Representations

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

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

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

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

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [3031] and [3432] (effect of common representation on confidentiality).

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

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

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

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

Choice of Rule Agreements

[23] A matter may require a lawyer to perform work in multiple jurisdictions whose conflict rules differ. To ensure that a lawyer and client have the ability to reduce uncertainty and to predict which conflict rules will apply to a matter, the lawyer and client may agree that their relationship concerning the matter will be governed by the conflict rules of a specific United States or foreign jurisdiction, which may be other than the jurisdiction whose rules would apply under Rule 8.5(b) absent such agreement. Any such agreement, however, is subject to the following conditions: The client gives informed consent to the agreement, confirmed in writing; the lawyer advises the client in writing of the desirability of seeking independent counsel regarding the agreement; the client has a reasonable opportunity to consult with independent counsel regarding the agreement; the selected jurisdiction must be one in which the predominant effect of, or substantial work relating to, the matter is reasonably expected to occur; and the agreement may not result in the application of a conflict rule to which informed client consent is not permitted under the rules of the jurisdiction whose rules would otherwise govern the matter. See Rules 1.7(b) and 8.5(b). Client consent under this paragraph is more likely to be effective if the client is an experienced user of legal services.

Conflicts in Litigation

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

[254] Ordinarily a lawyer may take inconsistent legal positions in different tribunals
at different times on behalf of different clients. The mere fact that advocating a legal
position on behalf of one client might create precedent adverse to the interests of a client
represented by the lawyer in an unrelated matter does not create a conflict of interest. A
conflict of interest exists, however, if there is a significant risk that a lawyer’s action on
behalf of one client will materially limit the lawyer’s effectiveness in representing
another client in a different case; for example, when a decision favoring one client will
create a precedent likely to seriously weaken the position taken on behalf of the other
client. Factors relevant in determining whether the clients need to be advised of the risk
include: where the cases are pending, whether the issue is substantive or procedural, the
temporal relationship between the matters, the significance of the issue to the immediate
and long-term interests of the clients involved and the clients’ reasonable expectations in
retaining the lawyer. If there is significant risk of material limitation, then absent
informed consent of the affected clients, the lawyer must refuse one of the representations
or withdraw from one or both matters.

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

Nonlitigation Conflicts

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

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

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

Special Considerations in Common Representation

[3029] In considering whether to represent multiple clients in the same matter, a
lawyer should be mindful that if the common representation fails because the potentially
adverse interests cannot be reconciled, the result can be additional cost, embarrassment
and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all
of the clients if the common representation fails. In some situations, the risk of failure is
so great that multiple representation is plainly impossible. For example, a lawyer cannot
undertake common representation of clients where contentious litigation or negotiations
between them are imminent or contemplated. Moreover, because the lawyer is required to
be impartial between commonly represented clients, representation of multiple clients is
improper when it is unlikely that impartiality can be maintained. Generally, if the
relationship between the parties has already assumed antagonism, the possibility that the
clients’ interests can be adequately served by common representation is not very good.
Other relevant factors are whether the lawyer subsequently will represent both parties on
a continuing basis and whether the situation involves creating or terminating a
relationship between the parties.

[310] A particularly important factor in determining the appropriateness of common
representation is the effect on client-lawyer confidentiality and the attorney-client
privilege. With regard to the attorney-client privilege, the prevailing rule is that, as
between commonly represented clients, the privilege does not attach. Hence, it must be
assumed that if litigation eventuates between the clients, the privilege will not protect any
such communications, and the clients should be so advised.

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

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

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

Organizational Clients

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

[365] A lawyer for a corporation or other organization who is also a member of its
board of directors should determine whether the responsibilities of the two roles may
conflict. The lawyer may be called on to advise the corporation in matters involving
actions of the directors. Consideration should be given to the frequency with which such
situations may arise, the potential intensity of the conflict, the effect of the lawyer’s
resignation from the board and the possibility of the corporation’s obtaining legal advice
from another lawyer in such situations. If there is material risk that the dual role will
compromise the lawyer’s independence of professional judgment, the lawyer should not
serve as a director or should cease to act as the corporation’s lawyer when conflicts of
interest arise. The lawyer should advise the other members of the board that in some
circumstances matters discussed at board meetings while the lawyer is present in the
capacity of director might not be protected by the attorney-client privilege and that
conflict of interest considerations might require the lawyer’s recusal as a director or
might require the lawyer and the lawyer’s firm to decline representation of the
corporation in a matter.
SRA Code of Conduct 2011 forms part of Edition 2 of the Handbook, which was published and came into effect on 23 December 2011. SRA Code of Conduct 2011 was previously published as part of Edition 1 of the Handbook, which came into effect on 6 October 2011, unless otherwise noted.

Chapter 3: Conflicts of interests

This chapter deals with the proper handling of conflicts of interests, which is a critical public protection. It is important to have in place systems that enable you to identify and deal with potential conflicts.

Conflicts of interests can arise between:

1. you and current clients ("own interest conflict"); and
2. two or more current clients ("client conflict").

You can never act where there is a conflict, or a significant risk of conflict, between you and your client.

If there is a conflict, or a significant risk of a conflict, between two or more current clients, you must not act for all or both of them unless the matter falls within the scope of the limited exceptions set out at Outcomes 3.6 or 3.7. In deciding whether to act in these limited circumstances, the overriding consideration will be the best interests of each of the clients concerned and, in particular, whether the benefits to the clients of you acting for all or both of the clients outweigh the risks.

You should also bear in mind that conflicts of interests may affect your duties of confidentiality and disclosure which are dealt with in Chapter 4.

The outcomes in this chapter show how the Principles apply in the context of conflicts of interests.

Outcomes

You must achieve these outcomes:

Systems

O(3.1) you have effective systems and controls in place to enable you to identify and assess potential conflicts of interests

O(3.2) your systems and controls for identifying own interest conflicts are appropriate to the size and complexity of the firm and the nature of the work undertaken, and enable you to assess all the relevant circumstances, including whether your ability as an individual, or that of anyone within your firm, to act in the best interests of the client(s), is impaired by:

(a) any financial interest;
(b) a personal relationship;
(c) the appointment of you, or a member of your firm or family, to public office;
(d) commercial relationships; or
(e) your employment;

O(3.3) your systems and controls for identifying client conflicts are appropriate to the size and
complexity of the firm and the nature of the work undertaken, and enable you to assess all relevant circumstances, including whether:

(a) the clients' interests are different;
(b) your ability to give independent advice to the clients may be fettered;
(c) there is a need to negotiate between the clients;
(d) there is an imbalance in bargaining power between the clients; or
(e) any client is vulnerable;

Prohibition on acting in conflict situations

O(3.4) you do not act if there is an own interest conflict or a significant risk of an own interest conflict;

O(3.5) you do not act if there is a client conflict, or a significant risk of a client conflict, unless the circumstances set out in Outcomes 3.6 and 3.7 apply;

Exceptions where you may act, with appropriate safeguards, where there is a client conflict

O(3.6) where there is a client conflict and the clients have a substantially common interest in relation to a matter or a particular aspect of it, you only act if:

(a) you have explained the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks;
(b) all the clients have given informed consent in writing to you acting;
(c) you are satisfied that it is reasonable for you to act for all the clients and that it is in their best interests; and
(d) you are satisfied that the benefits to the clients of you doing so outweigh the risks;

O(3.7) where there is a client conflict and the clients are competing for the same objective, you only act if:

(a) you have explained the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks;
(b) the clients have confirmed in writing that they want you to act, in the knowledge that you act, or may act, for one or more other clients who are competing for the same objective;
(c) there is no other client conflict in relation to that matter;
(d) unless the clients specifically agree, no individual acts for, or is responsible for the supervision of work done for, more than one of the clients in that matter; and
(e) you are satisfied that it is reasonable for you to act for all the clients and that the benefits to the clients of you doing so outweigh the risks.

Indicative behaviours

Acting in the following way(s) may tend to show that you have achieved these outcomes and therefore
complied with the *Principles*:

IB(3.1) training employees and managers to identify and assess potential conflicts of interests;

IB(3.2) declining to act for clients whose interests are in direct conflict, for example claimant and defendant in litigation;

IB(3.3) declining to act for clients where you may need to negotiate on matters of substance on their behalf, for example negotiating on price between a buyer and seller of a property;

IB(3.4) declining to act where there is unequal bargaining power between the clients, for example acting for a seller and buyer where a builder is selling to a non-commercial client;

IB(3.5) declining to act for clients under Outcome 3.6 (*substantially common interest*) or Outcome 3.7 (*competing for the same objective*) where the clients cannot be represented even-handedly, or will be prejudiced by lack of separate representation;

IB(3.6) acting for clients under Outcome 3.7 (*competing for the same objective*) only where the clients are sophisticated users of legal services;

IB(3.7) acting for clients who are the lender and borrower on the grant of a mortgage of land only where:

(a) the mortgage is a standard mortgage (i.e. one provided in the normal course of the lender’s activities, where a significant part of the lender's activities consists of lending and the mortgage is on standard terms) of property to be used as the borrower's private residence;

(b) you are satisfied that it is reasonable and in the clients’ best interests for you to act; and

(c) the certificate of title required by the lender is in the form approved by the Society and the Council of Mortgage Lenders.

Acting in the following way(s) may tend to show that you have not achieved these outcomes and therefore not complied with the *Principles*:

IB(3.8) in a personal capacity, selling to or buying from, lending to or borrowing from a client, unless the client has obtained independent legal advice;

IB(3.9) advising a client to invest in a business, in which you have an interest which affects your ability to provide impartial advice;

IB(3.10) where you hold a power of attorney for a client, using that power to gain a benefit for yourself which in your professional capacity you would not have been prepared to allow to a third party;

IB(3.11) acting for two or more clients in a conflict of interests under Outcome 3.6 (*substantially common interest*) where the clients’ interests in the end result are not the same, for example one partner buying out the interest of the other partner in their joint business or a seller transferring a property to a buyer;

IB(3.12) acting for two or more clients in a conflict of interests under Outcome 3.6 (*substantially common interest*) where it is unreasonable to act because there is unequal bargaining power;

IB(3.13) acting for two buyers where there is a conflict of interests under Outcome 3.7 (*competing for the same objective*), for example where two buyers are competing for a residential
property;

**IB(3.14)** acting for a buyer (including a lessee) and seller (including a lessor) in a transaction relating to the transfer of land for value, the grant or assignment of a lease or some other interest in land for value.

**In-house practice**

Outcomes 3.4 to 3.7 apply to your *in-house practice*.

Outcomes 3.1 to 3.3 apply if you have management responsibilities.

**Overseas practice**

The outcomes in this chapter apply to your *overseas practice*. 
SRA Code of Conduct 2011 forms part of Edition 2 of the Handbook, which was published and came into effect on 23 December 2011. SRA Code of Conduct 2011 was previously published as part of Edition 1 of the Handbook, which came into effect on 6 October 2011, unless otherwise noted.

Chapter 14: Interpretation

In this Code the words shown in italics have the meanings given below:

AJA
means the Administration of Justice Act 1985;

actively participate in
means, in relation to a separate business, having any active involvement in the separate business, and includes:

(i) any direct control over the business, and any indirect control through another person such as a spouse; and

(ii) any active participation in the business or the provision of its services to customers;

appointed representative
has the meaning given in FSMA;

approved regulator
means any body listed as an approved regulator in paragraph 1 of Schedule 4 to the LSA or designated as an approved regulator by an order under paragraph 17 of that Schedule;

arrangement
in relation to financial services, fee sharing and referrals, in chapters 1, 6 and 9 of the SRA Code of Conduct, means any express or tacit agreement between you and another person, whether contractually binding or not;
assets
includes money, documents, wills, deeds, investments and other property;

authorised body
means a body that has been authorised by the SRA, to practise as a licensed body or a recognised body;

authorised non-SRA firm
means a firm which is authorised to carry on legal activities by an approved regulator other than the SRA;

body corporate
means a company, an LLP, or a partnership which is a legal person in its own right;

claim for redress
has the meaning given in section 158 of the LSA;

client
means the person for whom you act and, where the context permits, includes prospective and former clients;

client account
has the meaning given in Rule 13.2 of the SRA Accounts Rules, save that for the purposes of Part 7 (Overseas Practice) of the SRA Accounts Rules, "client account" means an account at a bank or similar institution, subject to supervision by a public authority, which is used only for the purpose of holding client money and/or trust money, and the title or designation of which indicates that the funds in the account belong to the client or clients of a solicitor or REL or are held subject to a trust;

client conflict
for the purposes of Chapter 3 of the SRA Code of Conduct means any situation where you owe separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict;
client money
has the meaning given in Rule 12 of the SRA Accounts Rules, save that for the purposes of Part 7 (Overseas Practice) of the SRA Accounts Rules, means money received or held for or on behalf of a client or trust (but excluding money which is held or received by a MDP - a licensed body providing a range of different services - in relation to those activities for which it is not regulated by the SRA);

COFA
means compliance officer for finance and administration in accordance with rule 8.5 of the SRA Authorisation Rules and in relation to a licensable body is a reference to its Head of Finance and Administration within the meaning of the LSA;

COLP
means compliance officer for legal practice in accordance with rule 8.5 of the SRA Authorisation Rules and in relation to a licensable body is a reference to its Head of Legal Practice within the meaning of the LSA;

Companies Acts
means the Companies Act 1985 and the Companies Act 2006;

company
means a company registered under the Companies Acts, an overseas company incorporated in an Establishment Directive state and registered under the Companies Act 1985 and/or the Companies Act 2006 or a societas Europaea;

competing for the same objective
for the purposes of Chapter 3 of the SRA Code of Conduct means any situation in which two or more clients are competing for an "objective" which, if attained by one client will make that "objective" unattainable to the other client or clients and "objective" means, for the purposes of Chapter 3, an asset, contract or business opportunity which one or more clients are seeking to acquire or recover through a liquidation (or some other form of insolvency process) or by means of an auction or tender process or a bid or offer which is not public;
complaint
means an oral or written expression of dissatisfaction which alleges that the complainant has suffered (or may suffer) financial loss, distress, inconvenience or other detriment;

compulsory professional indemnity insurance
means the insurance you are required to have in place under the SIIR;

conflict of interests
means any situation where:

(i) you owe separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict (a "client conflict"); or

(ii) your duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter (an "own interest conflict");

connected with
means in relation to a separate business for the purpose of Chapter 12 of the SRA Code of Conduct:

(i) having one or more partner(s), owner(s), director(s) or member(s) in common with the separate business;

(ii) being a subsidiary company of the same holding company as the separate business; or

(iii) being a subsidiary company of the separate business;

court
means any court, tribunal or enquiry of England and Wales, or a British court martial, or any court of another jurisdiction;

director
means a director of a company; and in relation to a societas Europaea includes:

(i) in a two-tier system, a member of the management organ and a member of the supervisory organ; and

(ii) in a one-tier system, a member of the administrative organ;
SRA means the Solicitors Regulation Authority, and reference to the SRA as an approved regulator or licensing authority means the SRA carrying out regulatory functions assigned to the Society as an approved regulator or licensing authority;

SRA Authorisation Rules means the SRA Authorisation Rules for Legal Services Bodies and Licensable Bodies 2011;

SRA Code of Conduct means the SRA Code of Conduct 2011;

subsidary company has the meaning given in the Companies Act 2006;

substantial ownership interest in a firm ("A") means:

(i) owning at least 10% of the shares in A;

(ii) owning at least 10% of the shares in a parent undertaking of A;

(iii) being entitled to exercise, or control the exercise of, at least 10% of the voting rights in A; or

(iv) being entitled to exercise, or control the exercise of, at least 10% of the voting rights of a parent undertaking of A;

and for the purpose of this definition, "parent undertaking" has the meaning given in the Companies Act 2006;

substantially common interest for the purposes of Chapter 3 of the SRA Code of Conduct, means a situation where there is a clear common purpose in relation to any matter or a particular aspect of it between the clients and a strong consensus on how it is to be achieved and the client conflict is peripheral to this common purpose;
The Foreign Lawyer
(Arguably) "Practicing" in the
(Model) United States

Materials prepared in conjunction
with the
Spring Meeting
of the
Business Law Section
of the
American Bar Association

What Business Lawyers Need
To Know About Ethics 20/20

Saturday, March 24, 2012

Submitted by
Simon M. Lorne
The Foreign Lawyer
(Arguably) “Practicing” in the
(Model) United States

For the most part, the Model Rules of Professional Conduct, as they presently exist, do not effectively take into consideration the circumstances in which “foreign” lawyers (i.e., in this context, lawyers who are not members of the bar of any United States jurisdiction, but are recognized as lawyers in a non-U.S. jurisdiction) may be acting within the United States (whatever “within” may be taken to mean in this era of “virtual” rather than physical presence) in a manner that could be considered practicing law. Rather, the Model Rules are written with a view first to address a principal concern with persons who are not lawyers at all (i.e., not admitted to practice law anywhere) giving legal advice or otherwise acting like lawyers and second to address the issue of what lawyers admitted in another United States jurisdiction might permissibly do in this Model Rule jurisdiction. To the extent they address the issue of non-U.S. lawyers “practicing” in a Model Rule jurisdiction it is indirectly and seemingly by way of afterthought. Put differently, from the perspective of the Model Rules, all people fall into one of three categories:

1. People who are admitted to practice law in this jurisdiction;
2. People who are not admitted to practice law in this jurisdiction but are admitted to practice law in another United States jurisdiction; and
3. Other people.

Those admitted to practice in a foreign country, but not in a United States jurisdiction, are considered not to have any meaningful qualifications.

Even less do the Model Rules and related Comments consider the circumstances under which it is likely that such a lawyer might be undertaking the activities thought to be of concern. Specifically, there may be some situations in which a non-U.S. lawyer takes up residence in the U.S. and then seeks to earn a living by doing the things he or she used to do in the non-U.S. jurisdiction. Presumably, that person should be considered on a par with any other non-admitted person providing legal services. Far more frequently, however, the cases that arise will involve (1) an employed lawyer (i.e., one employed by an organization engaged in a business other than the provision of legal services) being transported temporarily\(^1\) to the United States for the convenience of the organization, or (2) a lawyer in a law firm with offices in the U.S. and in foreign countries that temporarily redeploy the lawyer into a U.S. jurisdiction to serve its clients. In most such cases, it seems likely that the lawyer will be called upon primarily to give advice to U.S.-based clients (which may be the employing organization) about the obligations imposed by her home-country law.

The Model Rules, written as they are with a very broad brush, are not particularly susceptible to such nuanced examination. It may be, and probably is, true that most of the concerns expressed in relation to the unauthorized practice of law are wholly irrelevant to the

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\(^1\) It must be recognized that “temporarily” may be for a few hours or days, but could also be for a few years.
situation in which a German lawyer happens to be temporarily resident in Pennsylvania and is giving Pennsylvania clients advice about questions of German law or legal practice. From the perspective of the Model Rules, however, that situation is not easily, if it may be at all, distinguished from the same lawyer’s giving advice about the legal consequences of the Pennsylvania Chief Executive’s divorce (subject, of course, to the MR 1.1 requirement that a lawyer provide only that representation that is competent).

Against that background, the principal rule governing the activities of a foreign (as here considered) lawyer in a Model Rule jurisdiction is Model Rule 5.5.

Rule 5.5  
Unauthorized Practice of Law;  
Multijurisdictional Practice of Law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

   (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

   (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

   (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

   (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

   (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Consider, then, the application of Rule 5.5 to a foreign—let us say U.K.—in-house lawyer (“Lawyer”) whose corporation decides that she can usefully serve the organization by relocating to a MR state. Once relocated, what may the lawyer permissibly do (assuming she does not happen to be admitted to practice in the MR state)? Assuming that the services provided by UK lawyer as in-house counsel amount to the practice of law (which is itself a question of fact), then unless the UK lawyer is a member of another US jurisdiction (and perhaps even then) she may not act, assuming no governing treaty provisions. Apparently, she may not even provide advice as to UK law, much less US law. Note that if she were admitted in a US jurisdiction 5.5(d)(1) would permit services to the lawyer’s employer. Might there be a Commerce Clause challenge to the right of a state to so regulate the activities of the UK lawyer? (This question might be asked with respect to most of the issues raised in this context.)

Most of the provisions of 5.5 permitting “practicing” in the jurisdiction without being admitted to the bar depend on being admitted in another United States Jurisdiction. It is clear from the Comments that this is not an accidental reference:

"[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or are reasonably related to the lawyer’s practice in a [United States] jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer’s client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer’s work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law. . ."
“[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

“[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer’s officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer’s ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer’s qualifications and the quality of the lawyer’s work.”

Assume, then, that Lawyer is not relocated to the United States, but travels here with an executive of her organization to negotiate an agreement that will provide it is governed by the laws of the United Kingdom. Is the answer different? Apparently not. Nothing in the language of MR 5.5 would appear to sanction even this activity, although that seems a preposterous answer. Again, note that 5.5(c)(4) provides a different answer for a lawyer admitted in a US jurisdiction.

Well, if Lawyer can’t negotiate the agreement that is governed by the law of her home country (although the MR lawyer appears, absurdly, to be under no constraint other than Rule 1.1 in negotiating that document), may she at least negotiate an engagement letter for her client so that an MR lawyer can negotiate the document? This, too, seems to fall into the same category of prohibited activities—indeed, it is arguably worse, as presumably an engagement letter would not be a UK law document. Comment [11] might be read to sanction such an activity, were it not a Comment with reference to part (c) which is, by its terms, limited to lawyers admitted in another United States jurisdiction:

“[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.”
Would advice on the same loan document given to the UK client by the UK lawyer (sitting in London) by telephone be permissible? Apparently. Only if Lawyer is physically present in the MR jurisdiction, apparently, does the issue arise.

Naturally, in the Facebook world, the next question is whether Lawyer, no happily staying home in London, may create a website that is accessible in MR. It is hard to imagine a successful challenge to such an activity (assuming, of course, that the site, to the extent it is giving legal advice, is giving advice as to UK law, not MR law. (An interesting question might arise as to when “virtual” presence amounts to being within the state—so far there appears little or no guidance on the issue.)

Then if the website is permissible (providing advice only from a lawyer who was physically in the UK, on a website that was established in the UK to the extent a website may be considered to have a physical presence (the administrator of the site is resident in the UK, etc.) may the UK lawyer set up a a secretary in an accountant’s office in the MR jurisdiction as a convenience to clients in MR who utilize the site? Such a “presence” might be permissible under 5.5(b)(1) as not an “office” of the lawyer and not a “systematic and continuous presence,” but that is not entirely clear, and the secretary’s presence may well be impermissible. That the advice to be given relates only to UK law would assist a determination that such an office is not violative in view of Comment [4] to Rule 5.5:

“[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).”

Many of these issues are currently being addressed in Ethics 2020. As summarized by the Co-Chairs of the ABA Commission on Ethics 20/20 in their memorandum to “ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals” of December 28, 2011:

Inbound Foreign Lawyers

- The Commission is proposing changes to the Model Rules concerning pro hac vice admission, multijurisdictional practice, and registration of in-house counsel that would authorize, and place limitations on, the practice of foreign lawyers within the United States. In particular, the Commission is proposing the following:

- Amendments to Model Rule 5.5 (Multijurisdictional Practice) that would incorporate the provisions of the 2002 ABA Model Rule for Temporary Practice
by Foreign Lawyers in order to encourage increased implementation of this longstanding ABA policy by state supreme courts. The relocation of these provisions to Model Rule 5.5 creates no new practice rights for foreign lawyers.

- Amendments that would include foreign lawyers within the ABA Model Rule on Pro Hac Vice Admission, with appropriate regulatory safeguards. Notably, the power to permit a foreign lawyer such limited practice authorization (and the power to revoke that authorization) would be within the discretion of the trial judge. The trial judge would be required to review the foreign lawyer’s professional background and training, and a U.S. lawyer must be of record in the matter and fully responsible to the court and the client for the proceeding. Many courts, including the United States Supreme Court, already permit this type of pro hac vice admission for foreign lawyers.

- Amendments that would include foreign lawyers within the scope of Model Rule 5.5(d)(1). As a result, foreign lawyers (like U.S. lawyers) would be permitted to work as in-house counsel in a jurisdiction where they are not admitted, provided such services are limited to the employer and its organizational affiliates. The Commission also proposes amending the ABA Model Rule for Registration of In-House Counsel so that foreign lawyers are expressly included. This amendment ensures that foreign lawyers can be more easily identified, monitored, and regulated.

The proposed revised provision of 5.5(d)(1) would read as follows (inserts in bold face and deletions are [bracketed]):

A. A lawyer admitted to the practice of law in another United States jurisdiction, or in a foreign jurisdiction, who [is employed as a lawyer and] has a continuous presence in this jurisdiction and is employed as a lawyer by an organization as permitted pursuant to Rule 5.5(d)(1) of the Model Rules of Professional Conduct, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, shall register as in-house counsel...

For purposes of this Rule, a “foreign jurisdiction” is one with a recognized legal profession, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.

SCOPE OF AUTHORITY OF REGISTERED LAWYER:
B. A lawyer registered under this [section]Rule shall have the rights and privileges otherwise applicable to members of the bar of this jurisdiction with the following restrictions:
1. The registered lawyer is authorized to provide legal services to the entity client or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer, and for employees, officers and directors of such entities, but only on matters directly related to their work for the entity and only to the extent consistent with Rule 1.7 of the Model Rules . . . ; and
2. The registered lawyer shall not:
a. Except as otherwise permitted by the rules of this jurisdiction, appear before a court or any other tribunal . . ., or
b. Offer or provide legal services or advice to any person other than as described in paragraph B.1., or hold himself or herself out as being authorized to practice law in this jurisdiction other than as described in paragraph B.1.
Formal Opinion 08-451
Lawyer’s Obligations When Outsourcing Legal and Nonlegal Support Services

A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with “direct supervisory authority” over them.

In addition, appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside of the lawyer’s firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6. The fees charged must be reasonable and otherwise in compliance with Rule 1.5, and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5.¹

Many lawyers engage other lawyers or nonlawyers, as independent contractors, directly or through intermediaries, on a temporary or an ongoing basis, to provide various legal and nonlegal support services. Outsourced tasks range from the use of a local photocopy shop for the reproduction of documents, to the retention of a document management company for the creation and maintenance of a database for complex litigation, to the use of a third-party vendor to provide and maintain a law firm’s computer system, to the hiring of a legal research service to prepare a 50-state survey of the law on an issue of importance to a client, or even to the engagement of a group of foreign lawyers to draft patent applications or develop legal strategies and

¹. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2008. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.
prepare motion papers in U.S. litigation.

The outsourcing trend is a salutary one for our globalized economy. Labor costs vary greatly across the United States and throughout the rest of the world. Outsourcing affords lawyers the ability to reduce their costs and often the cost to the client to the extent that the individuals or entities providing the outsourced services can do so at lower rates than the lawyer’s own staff. In addition, the availability of lawyers and nonlawyers to perform discrete tasks may, in some circumstances, allow for the provision of labor-intensive legal services by lawyers who do not otherwise maintain the needed human resources on an ongoing basis. A small firm might not regularly employ the lawyers and legal assistants required to handle a large, discovery-intensive litigation effectively. Outsourcing, however, can enable that firm to represent a client in such a matter effectively and efficiently, by engaging additional lawyers to conduct depositions or to review and analyze documents, together with a temporary staff of legal assistants to provide infrastructural support.

There is nothing unethical about a lawyer outsourcing legal and nonlegal services, provided the outsourcing lawyer renders legal services to the client with the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,” as required by Rule 1.1. Comment [1] to Rule 1.1 further counsels:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

There is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary “legal knowledge, skill, thoroughness and preparation.” One lawyer may choose to do all of the work herself. Another may delegate tasks to a team of subordinate lawyers and nonlegal staff. Others may decide to outsource tasks to independent service providers that are not within their direct control. Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.

However, Rules 5.1 and 5.3 impose additional obligations on lawyers who have “direct supervisory authority” over other lawyers and nonlawyers. Rule 5.1(b) states that “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” Correlatively, Rule 5.3(b) requires lawyers who employ, retain, or associate with nonlawyers to “make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” These provisions apply regardless of
whether the other lawyer or the nonlawyer is directly affiliated with the supervising lawyer's firm.²

The challenge for an outsourcing lawyer is, therefore, to ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately. When delegating tasks to lawyers in remote locations, the physical separation between the outsourcing lawyer and those performing the work can be thousands of miles, with a time difference of several hours further complicating direct contact. Electronic communication can close this gap somewhat, but may not be sufficient to allow the lawyer to monitor the work of the lawyers and nonlawyers working for her in an effective manner.

At a minimum, a lawyer outsourcing services for ultimate provision to a client should consider conducting reference checks and investigating the background of the lawyer or nonlawyer providing the services as well as any nonlawyer intermediary involved, such as a placement agency or service provider. The lawyer also might consider interviewing the principal lawyers, if any, involved in the project, among other things assessing their educational background. When dealing with an intermediary, the lawyer may wish to inquire into its hiring practices to evaluate the quality and character of the employees likely to have access to client information. Depending on the sensitivity of the information being provided to the service provider, the lawyer should consider investigating the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures. In some instances, it may be prudent to pay a personal visit to the intermediary's facility, regardless of its location or the difficulty of travel, to get a firsthand sense of its operation and the professionalism of the lawyers and nonlawyers it is procuring.

When engaging lawyers trained in a foreign country, the outsourcing lawyer first should assess whether the system of legal education under which the lawyers were trained is comparable to that in the United States. In some nations, people can call themselves "lawyers" with only a minimal level of training. Also, the professional regulatory system should be evaluated to determine whether members of the nation's legal profession have been inculcated with core ethical principles similar to those in the United States, and whether the nation's disciplinary enforcement system is effective in policing

² Although Comment [1] to Rule 5.1 states that "[p]aragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm" (emphasis supplied), we do not believe that the drafters of the Model Rules intended to restrict the application of Rule 5.1(b) to the supervision of lawyers within "firms" as defined in Rule 1.0(c). A contrary interpretation would lead to the anomalous result that lawyers who outsource have a lower standard of care when supervising outsourced lawyers than they have with respect to lawyers within their own firm. As discussed below, the contrary is true in many respects.
its lawyers. The lack of rigorous training or effective lawyer discipline does not mean that individuals from that nation cannot be engaged to work on a particular project. What it does mean is that, in such circumstances, it will be more important than ever for the outsourcing lawyer to scrutinize the work done by the foreign lawyers – perhaps viewing them as nonlawyers – before relying upon their work in rendering legal services to the client.

Consideration also should be given to the legal landscape of the nation to which the services are being outsourced, particularly the extent that personal property, including documents, may be susceptible to seizure in judicial or administrative proceedings notwithstanding claims of client confidentiality. Similarly, the judicial system of the country in question should be evaluated to assess the risk of loss of client information or disruption of the project in the event that a dispute arises between the service provider and the lawyer and the courts do not provide prompt and effective remedies to avert prejudice to the client.

There are several additional considerations that must be taken into account under the Model Rules. First, at the outset, it may be necessary for the lawyer to provide information concerning the outsourcing relationship to the client, and perhaps to obtain the client’s informed consent to the engagement of lawyers or nonlawyers who are not directly associated with the lawyer or law firm that the client retained. In Formal Opinion 88-356, we opined that when a lawyer engaged the services of a temporary lawyer, a form of outsourcing, an obligation to advise the client of that fact and to seek the client’s consent would arise if the temporary lawyer was to perform independent work for the client without the close supervision of the hiring lawyer or another lawyer associated with her firm. Relying on Rule 1.2(a), requiring lawyers to consult with clients as to the means by which the clients’ objectives are to be pursued, Rule 1.4, relating to client communication, and Rule 7.5(d), prohibiting lawyers from implying that they practice in a partnership or other organization when that is not the fact, we concluded that clients are entitled to know who or what entity is representing them, and thus could veto the lawyer’s use of a temporary lawyer.

Relatedly, the lawyer may not make affirmative misrepresentations to the client regarding the status of lawyers and nonlawyers who are not in the lawyer’s employ under Rule 7.1, requiring truthfulness in communications regarding lawyer services, and Rule 8.4(c), prohibiting dishonesty, fraud, deceit, or misrepresentation.

We recognize that Formal Opinion 88-356 held that the client ordinarily is not entitled to notice that its legal work is being performed by a temporary lawyer. We stated that “[c]lient consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to

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the representation is inherent in the act of retaining the firm.” However, that statement was predicated on the assumption that the relationship between the firm and the temporary lawyer involved a high degree of supervision and control, so that the temporary lawyer would be tantamount to an employee, subject to discipline or even firing for misconduct. That ordinarily will not be the case in an outsourcing relationship, particularly in a relationship involving outsourcing through an intermediary that itself has the employment relationship with the lawyers or nonlawyers in question.

Thus, where the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client’s informed consent. The implied authorization of Rule 1.6(a) and its Comment thereto to share confidential information within a firm does not extend to outside entities or to individuals over whom the firm lacks effective supervision and control.

Also, the outsourcing lawyer should be mindful of the obligation to “act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.” This requires the lawyer to recognize and minimize the risk that any outside service provider may inadvertently – or perhaps even advertently – reveal client confidential information to adverse parties or to others who are not entitled to access. Written confidentiality agreements are, therefore, strongly advisable in outsourcing relationships. Likewise, to minimize the risk of potentially wrongful disclosure, the outsourcing lawyer should verify that the outside service provider does not also do work for adversaries of their clients on the same or substantially related matters; in such an instance, the outsourcing lawyer could choose another provider.

Second, the fees charged by the outsourcing lawyer must be reasonable and otherwise comply with the requirements of Rule 1.5. In Formal Opinion No. 00-420, we concluded that a law firm that engaged a contract lawyer could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client. This is not substantively different from the manner in which a conventional law firm bills for the services of its lawyers. The firm pays a lawyer a salary, provides him with employment benefits, incurs office space and other overhead costs to support him, and also earns a profit from his services; the client generally is not informed of the details of the financial relationship between

4. Rule 1.6, cmt. 16.
the law firm and the lawyer. Likewise, the lawyer is not obligated to inform the client how much the firm is paying a contract lawyer; the restraint is the overarching requirement that the fee charged for the services not be unreasonable. If the firm decides to pass those costs through to the client as a disbursement, however, no markup is permitted. In the absence of an agreement with the client authorizing a greater charge, the lawyer may bill the client only its actual cost plus a reasonable allocation of associated overhead, such as the amount the lawyer spent on any office space, support staff, equipment, and supplies for the individuals under contract. 7 The analysis is no different for other outsourced legal services, except that the overhead costs associated with the provision of such services may be minimal or nonexistent if and to the extent that the outsourced work is performed off-site without the need for infrastructural support. If that is true, the outsourced services should be billed at cost, plus a reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services.

Finally, the outsourcing lawyer must be mindful of the admonition of Rule 5.5(a) to avoid assisting others to “practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.” This Committee lacks the authority to express an opinion as to whether the provision of legal services by any particular lawyer, nonlawyer, or intermediary constitutes the unauthorized practice of law. Ordinarily, an individual who is not admitted to practice law in a particular jurisdiction may work for a lawyer who is so admitted, provided that the lawyer remains responsible for the work being performed and that the individual is not held out as being a duly admitted lawyer. We note only that if the activities of a lawyer, nonlawyer, or intermediary employed in an outsourcing capacity are held to be the unauthorized practice of law, and the outsourcing lawyer facilitated that violation of law by action or inaction, the outsourcing lawyer will have violated Rule 5.5(a).

The views expressed herein have not been approved by the House of Delegates or the Board of
Governors of the American Bar Association and, accordingly, should not be construed as
representing the policy of the American Bar Association.

Resolution

RESOLVED: That the American Bar Association amends Model Rule 1.1 of the
ABA Model Rules of Professional Conduct as follows (insertions underlined,
deletions struck-through):

Client-Lawyer Relationship

Rule 1.1 Competence

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

Comment

Legal Knowledge and Skill

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

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

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

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

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

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information. When using the services of nonfirm lawyers in providing legal services to a client, a lawyer also must reasonably believe that such services meet the standard of competence under this Rule.

[7] Where the client has chosen or suggested lawyers from other law firms to assist in the provision of legal services to the client on a particular matter, the law firms who will be assisting the client on that matter should consult with each other and the client about the allocation or scope of representation and responsibility, including the allocation of responsibility for monitoring and supervision of any nonfirm nonlawyers who will be working on the client’s matter. See Rules 1.2 and 5.3. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[6-8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

FURTHER RESOLVED: That the American Bar Association amends Model Rule 5.3 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck through):

**Law Firms And Associations**

**Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:
(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and
knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment
[21] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the Rules of Professional Conduct. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1- (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of a nonlawyer. Paragraph (c) applies to lawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

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

Nonlawyers Outside the Firm
[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the
services are provided in a manner that is compatible with the lawyer's professional
obligations. The extent of this obligation will depend upon the circumstances, including
the education, experience and reputation of the nonlawyer; the nature of the services
involved; the terms of any arrangements concerning the protection of client information;
and the legal and ethical environments of the jurisdictions in which the services will be
performed, particularly with regard to confidentiality. See also Rules 1.1 (competence),
1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a)
(professional independence of the lawyer), and 5.5(a) (unauthorized practice of law).
When retaining or directing a nonlawyer outside the firm, a lawyer should communicate
directions appropriate under the circumstances to give reasonable assurance that the
nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client has chosen or suggested a particular nonlawyer service provider
outside the firm, the lawyer or law firm ordinarily should consult with the client
concerning the allocation of responsibility for monitoring as between the client and the
lawyer or law firm. See Rule 1.2. When making such an allocation in a matter pending
before a tribunal, lawyers and parties may have additional obligations that are a matter of
law beyond the scope of these Rules.

FURTHER RESOLVED: That the American Bar Association amends Rule 5.5 of
the ABA Model Rules of Professional Conduct as follows (insertions underlined,
deletions struck through):

**Law Firms And Associations Rule 5.5 Unauthorized Practice Of Law;**
*Multijurisdictional Practice Of Law*

(a) A lawyer shall not practice law in a jurisdiction in violation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

1. except as authorized by these Rules or other law, establish an office or other
   systematic and continuous presence in this jurisdiction for the practice of law; or

2. hold out to the public or otherwise represent that the lawyer is admitted to
   practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or
    suspended from practice in any jurisdiction, may provide legal services on a temporary
    basis in this jurisdiction that:

1. are undertaken in association with a lawyer who is admitted to practice in this
   jurisdiction and who actively participates in the matter;

2. are in or reasonably related to a pending or potential proceeding before a
   tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is
   assisting, is authorized by law or order to appear in such proceeding or reasonably
   expects to be so authorized;

3. are in or reasonably related to a pending or potential arbitration, mediation, or
   other alternative dispute resolution proceeding in this or another jurisdiction, if
   the services arise out of or are reasonably related to the lawyer's practice in a
jurisdiction in which the lawyer is admitted to practice and are not services for
which the forum requires pro hac vice admission; or
(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably
related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to
practice.
(d) A lawyer admitted in another United States jurisdiction, and not disbarred or
suspended from practice in any jurisdiction, may provide legal services in this
jurisdiction that:
(1) are provided to the lawyer’s employer or its organizational affiliates and are
not services for which the forum requires pro hac vice admission; or
(2) are services that the lawyer is authorized to provide by federal law or other
law of this jurisdiction.
Comment
[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to
practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or
may be authorized by court rule or order or by law to practice for a limited purpose or on
a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer,
whether through the lawyer’s direct action or by the lawyer assisting another person. For
example, a lawyer may not assist a person in practicing law in violation of the rules
governing professional conduct in that person’s jurisdiction.
[2] The definition of the practice of law is established by law and varies from one
jurisdiction to another. Whatever the definition, limiting the practice of law to members
of the bar protects the public against rendition of legal services by unqualified persons.
This Rule does not prohibit a lawyer from employing the services of paraprofessionals
and delegating functions to them, so long as the lawyer supervises the delegated work
and retains responsibility for their work. See Rule 5.3.
[3] A lawyer may provide professional advice and instruction to nonlawyers whose
employment requires knowledge of the law; for example, claims adjusters, employees of
financial or commercial institutions, social workers, accountants and persons employed in
government agencies. Lawyers also may assist independent nonlawyers, such as
paraprofessionals, who are authorized by the law of a jurisdiction to provide particular
law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed
pro se.
[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice
generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or
other systematic and continuous presence in this jurisdiction for the practice of law.
Presence may be systematic and continuous even if the lawyer is not physically present
here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer
is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).
[5] There are occasions in which a lawyer admitted to practice in another United States
jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may
provide legal services on a temporary basis in this jurisdiction under circumstances that
do not create an unreasonable risk to the interests of their clients, the public or the courts.
Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer’s services are provided on a “temporary basis” in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word “admitted” in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research,
review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer’s client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer’s work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].

Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.
[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.
The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Report

Introduction

Law firms, lawyers, and corporate counsel are increasingly outsourcing legal and law-related work, both domestically and offshore. In 2008, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that provides guidance to lawyers about how to outsource ethically and in a manner that is consistent with the profession’s core values.\(^1\) State and local bar associations also have offered guidance in this area.\(^2\) To date, however, the Model Rules and their accompanying Comments have not specifically addressed outsourcing.

The ABA Commission on Ethics 20/20 has concluded that, although changes to the text of the Model Rules are not necessary, comments to some of those Rules should be clarified to address this issue so that lawyers can more easily determine their ethical obligations. In particular, the Resolutions that accompany this Report propose three changes. First, the Commission proposes a new Comment to Model Rule 1.1 that identifies the factors that lawyers need to consider when retaining lawyers outside the firm to assist on a client’s matter (i.e., outsourcing legal work to other lawyers). Second, the Commission proposes new Comments to Model Rule 5.3 in order to identify the factors that lawyers need to consider when using nonlawyers outside the firm (i.e., outsourcing work to nonlawyer service providers). Finally, the Commission proposes a new sentence to Comment [1] to Model Rule 5.5 in order to clarify that lawyers cannot engage in outsourcing when doing so would facilitate the unauthorized practice of law. In each of these cases, the Commission’s goal is to clarify how existing rules and principles apply to the particular context of outsourcing.

The Commission’s proposals also reflect the view that the evolution of law practice and the continued rapid changes in and diversity of outsourcing arrangements make bright lines impossible to draw. Like many obligations described in the Model Rules, the proposals are intended to be rules of reason and are not intended to preclude consideration of broader legal concerns, such as malpractice and tort liability, as well as the law described in the Restatements of Agency and the Law Governing Lawyers. In sum, the proposals do not (and cannot) replace existing legal principles that already govern lawyer conduct; rather, they are designed to ensure that lawyers engage in outsourcing in a manner that is consistent with applicable rules of professional conduct.

\(^1\) See e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451 (2008).
The Commission understands that certain outsourcing is controversial in light of the current employment market for lawyers and the economic hardships faced by lawyers currently seeking jobs. The changes to the Comments to Rules 1.1, 5.3, and 5.5 of the Model Rules of Professional Conduct are neither an endorsement nor a rejection of the practice of outsourcing. Rather, the proposals respond to the existence and growth of outsourcing practices and are intended to clarify a lawyer's obligations in this context so that lawyers who decide to outsource do so in an ethical and responsible manner.

In addition to its analysis of the issues, the Commission has conducted extensive outreach, held public meetings and public hearings on outsourcing, invited and considered comments from numerous entities and parties, posted material on its website, and sought the views of all ABA groups. Also, throughout its consideration the Commission has worked with the ABA's Standing Committee on Ethics and Professional Responsibility and the ABA Section of International Law Task Force on International Outsourcing of Legal Services. Their participation was critical to the development of the Resolutions and this Report.

I. An Overview of Outsourcing by Lawyers and Law Firms

Outsourcing refers generally to the practice of taking a specific task or function previously performed within a firm or entity and, for reasons including cost and efficiency, having it performed by an outside service provider, either in the United States or in another country. Among the factors that have contributed to the significant growth of outsourcing are globalization, the technology-driven efficiencies developed and utilized by many providers of outsourced services, and the demand by clients for cost-effective services.

Lawyers have found that the same technology-driven efficiencies that have led to an increase in outsourcing throughout the global economy are also making outsourcing an attractive option within the legal profession. In particular, lawyers have found that, if they exercise proper care in the selection of a provider, work can be completed with greater speed and lower costs without sacrificing quality. These efficiencies may be of particular benefit to solo practitioners and small and medium-sized U.S. law firms, allowing them to better compete for large matters without fear that they will lack adequate resources to perform the legal work involved. Also, by reducing the cost of legal services, outsourcing can improve access to justice by making legal services more affordable.

Lawyers use outsourcing for a variety of tasks. Law-related work that is frequently outsourced includes investigative services, "cloud computing" services (such as online data storage or online practice management tools), and creation and maintenance of databases to manage discovery in litigation. Outsourcing also occurs when lawyers retain other lawyers and law firms to conduct a range of services, such as legal research, document review, patent searches, due diligence, and contract drafting. The Commission's research indicates that lawyers still tend to outsource legal and law-related work domestically more often than they outsource.

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3 When outsourced work is sent outside the U.S., the activity is often referred to as "offshoring." Work outsourced within the United States has been referred to as "onshoring," "insourcing" or "homesourcing."
work internationally. In fact, information reviewed by the Commission indicates that, more recently, the outsourcing industry is responding to client demand for greater availability of on-shore operations.

II. The Commission’s Research Regarding Outsourcing

As noted above, as it studied outsourcing the Commission benefited from the efforts of other ABA entities. In particular, the ABA Standing Committee on Ethics and Professional Responsibility had released Formal Opinion 08-451 in 2008, which addressed a variety of ethical issues associated with outsourcing. Moreover, shortly after the release of Formal Opinion 08-451, the ABA Section of International Law created a Task Force on the International Outsourcing of Legal Services to examine related issues.

The Commission’s Outsourcing Working Group drew on this expertise by including representatives from the Section’s Task Force and the ABA Standing Committee on Ethics and Professional Responsibility. Moreover, the Commission included a representative from the Litigation Section. All of these representatives greatly enhanced the Commission’s understanding of the issues involved and contributed significantly to this Report and the accompanying Resolutions.

The Commission’s research focused on the ethics-related issues identified in ABA Formal Opinion 08-451: fees, competence, scope of practice, confidentiality, conflicts of interest, safeguarding client property, adequate supervision of lawyers and nonlawyers, unauthorized practice of law, and independence of professional judgment. The Commission also considered the ethics opinions issued by international, state and local bar associations, the vast majority of which identified issues similar to those in Formal Opinion 08-451.

The Commission’s conclusions regarding these issues were informed by scholarly articles, studies, and surveys; testimony offered at the Commission’s public hearings; comments received in response to questions that were posed to clients, lawyers, law firms, and providers of outsourced services; and news reports. The Commission also reviewed materials from domestic and international outsourcing providers, finding substantial evidence that the providers are focused on the ethical considerations identified in the organized bars’ ethics opinions. For example, providers of outsourced legal and non-legal services have developed protocols that include increasingly sophisticated technology to ensure quality control, adequate security over personnel and information, and opportunities for and convenience of oversight by the lawyers and law firms that are outsourcing the work.4

The Commission was particularly interested in procedures to protect confidential information. Although procedures vary depending on the type of work that is being outsourced, the Commission found that lawyer and nonlawyer employees of many outsourcing providers are required to sign confidentiality agreements, with some firms requiring employees to sign new and separate confidentiality agreements for each new assignment. Providers also frequently use

4 See http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html for a sample bibliography and other materials related to the Commission’s research.
security measures to protect electronic information (e.g., encryption, malware protection, firewalls). They use biometric and other security measures to ensure only authorized physical access to data, such as separate premises or areas for each project. They use continuous video monitoring, monitoring of employee computers, and repeated identity checks within buildings, elevators, and other areas where work is being performed. They frequently disable the portals on employee computers so that portable data storage devices cannot be used to remove information from the premises. They also perform extensive background checks on employees as well as periodic internal and external audits of all of the foregoing measures.

The Commission found that conflict-of-interest considerations are increasingly given careful attention. For example, a number of outsourcing providers employ conflicts checking procedures modeled after those used by large U.S. and U.K. law firms; others are developing similar systems. These systems include maintaining extensive databases for existing and former clients and screening the work history of new recruits and existing employees against both the information contained in the databases and information supplied by the client.

The Commission's research has revealed that a number of companies that provide outsourced services have established sophisticated training programs for nonlawyer and lawyer employees on a variety of topics, including U.S. substantive and procedural law, legal research and writing, and the rules of professional conduct. These companies also regularly seek input from and collaboration with the organized bar and lawyers and law firms in the development of ethics policies and training regimes for their lawyer and non-lawyer employees.

III. Guiding Principles for the Commission’s Recommendations

In considering possible changes to the ABA Model Rules of Professional Conduct, the Commission relied on two important principles. First, the Model Rules are a critical, but not exclusive, source of the law governing lawyers. In particular, the Model Rules “presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.” Model Rules, Scope, par. [15]. Second, the comments to the Model Rules are often used to provide guidance as to these additional obligations. See id. (observing that “comments are sometimes used to alert lawyers to their responsibilities under...other law”). In light of these guiding principles, the Commission concluded that lawyers should be given more guidance on outsourcing through changes to the Comments to the Model Rules.

The Commission’s review of the Model Rules of Professional Conduct revealed that, in all but three instances, they are either easily recognizable as having application to outsourcing, or they bear no relation to it at all. For example, the extensive commentary accompanying the series of Model Rules dealing with conflicts of interest (Rules 1.7 through 1.13), when considered in conjunction with the wealth of ethics opinions, court cases, and scholarly discussion generally available on that subject, revealed that no special language needed to be added to those Rules to remind lawyers of how they apply to outsourcing practices. The same can be said of Model Rule 1.5 (Fees) and the wealth of ethics opinions available treating myriad specific questions relating to the reasonableness of fees for both legal and non-legal services. The Commission reached the same conclusion regarding Model Rule 1.15 (Safekeeping
Property). Even Model Rule 1.6 (Confidentiality of Information) is clearly applicable to the lawyer who engages in outsourcing.

The Commission ultimately determined, however, that the comments to Rule 1.1 (Competence), Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) and Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) were appropriate locations for clearer guidance.

IV. The Commission's Proposal Regarding Model Rule 1.1: Retention of Nonfirm Lawyers

Model Rule 1.1 requires a lawyer to perform legal services competently. The Commission concluded that, in light of the frequency with which lawyers now outsource work to another lawyer or law firm, the Comments to Rule 1.1 should be expanded to refer specifically to the practice.

The Commission concluded that Model Rule 1.1 is the appropriate location for this guidance for two reasons. First, Comment [1] to Model Rule 1.1 already addresses a related subject: a lawyer's duty to associate with another lawyer to ensure competent representation of a client. Model Rule 1.1, cmt. [1]. Second, as Formal Opinion 08-451 makes clear, the primary ethical consideration when retaining a nonfirm lawyer is whether the nonfirm lawyer is competent to assist in the representation. The Commission considered other locations for the new commentary, including Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), but concluded that the primary ethical consideration when retaining nonfirm lawyers is the competence of those nonfirm lawyers and that Rule 1.1 is therefore the appropriate location for further guidance.

The first sentence of the proposed new Comment [6] restates a general position expressed in ABA Formal Opinion 08-451 and in various state and local ethics opinions: lawyers should ensure that the outsourced services will be performed competently and that they contribute to the overall competent and ethical representation of the client.

The first sentence also explains that, ordinarily, a lawyer should obtain a client's informed consent before retaining a nonfirm lawyer. The Commission was reluctant to conclude that consent is always required, because consent may not be necessary when a nonfirm lawyer is hired to perform a discrete and limited task, especially if the task does not require the disclosure of confidential information. Nevertheless, the Commission concluded that consent will typically be required, and will almost always be advisable, when a nonfirm lawyer is retained to assist on a client's matter.

Following the first sentence is a list of other Rules that lawyers should consult when retaining nonfirm lawyers. The Commission concluded that these Rules are commonly implicated in this context and that lawyers should be aware of their potential application.

The next sentence lists several factors that lawyers should consider when retaining nonfirm lawyers. This list is not intended to be exhaustive, but is intended to give lawyers some
guidance regarding some of the most important considerations to take into account when retaining nonfirm lawyers.

The third sentence provides guidance regarding the lawyer’s assessment of the work that the nonfirm lawyer performs. In particular, the lawyer must ensure that the nonfirm lawyer’s work is performed in a manner that is consistent with the lawyer’s own duty of competence. This sentence differs from the first sentence in the Comment in that the first sentence requires the lawyer to conclude that, before retaining the nonlawyer, the nonlawyer will contribute to the competent representation of the client. The last sentence suggests that the lawyer should conclude that the services that the nonlawyer actually performed after being retained were performed competently.

Proposed Comment [7] is intended to describe a lawyer’s obligations when a client requests multiple firms to perform discrete legal tasks concerning the same legal matter. In such situations, the law firms that will be assisting the client on that matter should consult with each other and the client about the allocation or scope of representation and responsibility, including the allocation of responsibility for monitoring and supervision of any nonfirm lawyers who will be working on the client’s matter. (The word “monitoring” is drawn from new proposed language in Rule 5.3 and is described in Part V of this Report.) When making any allocations of responsibility, the proposed Comment reminds lawyers that they (and their clients) might have additional obligations that are a matter of law beyond the scope of these Rules, particularly in the context of discovery.

Finally, although the new Comments address outsourcing, the Commission does not use the word “outsourcing” in its proposed additions to the official Comments. The Commission concluded that, in this context, lawyers are more familiar with the concept of “retaining” or “contracting with” a nonfirm lawyer, and that the word “outsourcing” would create unnecessary confusion. Moreover, the word “outsourcing” may become dated or fall out of use, to be replaced by a new term-of-art. Thus, the Commission retained the traditional terminology, but concluded that outsourcing, as it occurs today, is conceptually identical to the retention of nonfirm lawyers.

V. Use of Nonlawyer Assistance Outside the Firm: Proposal Regarding Model Rule 5.3

Model Rule 5.3 was adopted in 1983 and was designed to ensure that lawyers employ appropriate supervision of nonlawyers. Although the Rule has been interpreted to apply to lawyers’ use of nonlawyers within and outside the firm, the Commission concluded that additional comments would help to clarify the meaning of the Rule with regard to the use of nonlawyers outside the firm.

As an initial matter, nonlawyer services are provided not only by individuals, such as investigators or freelancing paralegals outside the firm, but also by entities, such as electronic discovery vendors and “cloud computing” providers. To make clear that the Rule applies to nonlawyer services of all kinds, even services performed by entities, the Commission decided to recommend a change in the title of Model Rule 5.3 from “Nonlawyer Assistants” to “Nonlawyer Assistance.” For the same reason, the first sentence of proposed Comment [3] expressly includes
a “cloud computing” example to make clear that the Rule applies to services offered by entities (such as services provided over the Internet) as well as to individual service providers.

The Commission also concluded that Comment [2], which offers an overview of Rule 5.3, should be renumbered as Comment [1] and should be revised to make clear that Rule 5.3 applies to the use of nonlawyers within and outside the firm. This revision is consistent with existing interpretations of Rule 5.3, but the Commission concluded that greater clarity on this issue was desirable.

Although Rule 5.3 applies to the use of nonlawyers within and outside a firm, the particular considerations that lawyers need to take into account may differ depending on where the nonlawyers are located. An existing Comment (now Comment [2]) identifies the considerations that apply when the services are performed within the firm, and the Commission concluded that a separate Comment – proposed Comment [3] – should identify the distinct concerns that arise when the services are performed outside the firm.

Proposed Comment [3] states that, when a lawyer uses nonlawyer services outside the firm, the lawyer has an obligation to ensure that the nonlawyer services are performed in a manner that is compatible with the lawyer’s professional obligations. The proposed Comment then identifies the factors that determine the extent of the lawyer’s obligations relative to nonlawyer service providers. These factors essentially parallel the factors that are recited in the proposed new Comment to Rule 1.1, which addresses the retention of nonfirm lawyers. The Comment also references several other Model Rules that lawyers should consider when using nonlawyer services outside the firm.

The last sentence of Comment [3] emphasizes that lawyers have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers. For example, a lawyer who instructs an investigative service may not be in a position to directly supervise how a particular investigator completes a particular assignment, but the lawyer’s instructions must be reasonable under the circumstances to provide reasonable assurance that the investigator’s conduct is compatible with the lawyer’s professional obligations.

As is the case with the proposed Comment to Rule 1.1, proposed Comment [3] does not use the term “outsourcing.” The Commission concluded that lawyers may incorrectly conclude that they are not engaged in “outsourcing” when using such nonlawyer services outside the firm. To avoid such a misunderstanding, the Commission decided to retain the original phrasing of the Model Rule within the Comment.

Proposed Comment [4] acknowledges that clients sometimes instruct lawyers to use particular nonlawyer service providers. In such situations, the lawyer ordinarily should consult with the client to determine how the outsourcing arrangement should be structured and who will be responsible for monitoring the performance of the nonlawyer services. The word “monitoring” was chosen intentionally to reflect the idea that, under these circumstances, a lawyer may have a duty to remain aware of how the nonlawyer service provider is performing its services, even if the lawyer has not chosen the provider and may not have any direct supervisory
obligations. When the lawyer or law firm chooses the nonlawyer service provider, there would likely be no reason to discuss the responsibility for monitoring, because the lawyer or law firm would have that responsibility.

The final sentence of the proposed Comment [4] is intended to remind lawyers that they may have duties to a tribunal that are not necessarily satisfied by complying with the Rules of Professional Conduct. For example, if a client instructs the lawyer to hire a particular electronic discovery vendor, the lawyer cannot cede all responsibility for monitoring the vendor to the client, given that the lawyer may have to make certain representations to a tribunal regarding the vendor’s work.

The proposed Comments do not describe the lawyer’s obligation to obtain consent when disclosing confidential information to nonlawyer service providers outside the firm. The Commission concluded that there are many circumstances where such consent is unnecessary. For example, lawyers regularly send documents to outside vendors for scanning or copying, but there is ordinarily no need to obtain the client’s consent to have those services performed. There are, however, other situations where client consent might be advisable or required. The Commission concluded that lawyers would benefit from further clarification of this issue in the form of an opinion from the Standing Committee on Ethics and Professional Responsibility and has requested that the Committee undertake consideration of this issue.

VI. Assisting the Unauthorized Practice of Law: Proposal Regarding Model Rule 5.5

When lawyers outsource work to lawyers and nonlawyers, it is important to ensure that those lawyers and nonlawyers are not engaging in the unauthorized practice of law. The Commission concluded that it is important to make this point explicitly in Comment [1] to Model Rule 5.5.

Conclusion

The Commission respectfully requests that the House of Delegates adopt the proposed amendments to Model Rules 1.1, 5.3, and 5.5 in the accompanying Resolutions. The Commission does not intend for its proposals to be the final word on outsourcing. Rather, the Commission believes that continuing study of outsourcing practices is essential, especially given that those practices continue to evolve and new issues continue to arise. Thus, in addition to recommending the adoption of the amendments described in this Report, the Commission enthusiastically endorses creation and management by the ABA Center for Professional Responsibility of a comprehensive, user-friendly website that would track all significant news and developments relating to the ethics of outsourcing. This website will provide up-to-date access to both evolving outsourcing practices and the technological changes that make them possible. During the period in which the continued and rapid evolution in outsourcing practices renders the creation of a static, established set of practice standards both unwieldy and premature, this web-based resource will serve as an easily-updated “living document,” useful both to those who engage in outsourcing and to those who study it.
ABA Business Law Section
2012 Spring Meeting
Las Vegas, NV

Program: The Ethics of Negotiations:
Guidance from the Business Law Advisors
Sponsored by: Committee on Business Law Advisors
Co-sponsored by: Committee on Professional Responsibility

March 24, 2012

Program Chairs: Lawrence A. Goldman, Gibbons P.C., Newark, NJ and
Steven Mayer, Mayer Law Group A.P.C., Encino, CA

Moderator: Geoffrey C. Hazard, Jr., University of California, Hastings College of Law

Panelists: Edward Fleischman, Former Commissioner, United States Securities and
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Robert H. Mundheim, Of Counsel, Shearman & Sterling LLP

Hon. Donald F. Parsons, Jr., Vice Chancellor, Court of Chancery, State of Delaware

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1. Selected ABA Model Rules of Professional Conduct

2. ABA Formal Opinion 06-439, dated April 12, 2006, “Lawyer’s Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation”

3. ABA Section of Litigation, August 2002, “Ethical Guidelines for Settlements”


9. Charles Craver, “Negotiation Ethics”


11. William Frievogel, “Negotiation Ethics,” originally published by the ABA Committee on Professional Responsibility
Ethics of Negotiations: Guidance from the Business Law Advisors

Program Outline

I. Introductions

II. Select Model Rules of Professional Conduct Applicable to Negotiations

A. Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

Section (d): A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client . . .

B. Rule 1.13: Organization as a Client

Section (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal duty to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

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

C. Rule 2.3: Evaluation for Use by Third Persons

Section (a) A lawyer may provide an evaluation of a matter affecting a client for use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.

Section (b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interest materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
D. **Rule 4.1: Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, unless disclosure is prohibited by Rule 1.6. (Confidentiality of Information)

Note: The exceptions to the general duty of confidentiality in Rule 1.6 vary considerably from one jurisdiction to another.

E. **Rule 4.2: Communication with Person Represented by Counsel**

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

F. **Rule 4.3: Dealing with Unrepresented Persons**

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

G. **Rule 4.4: Respect for Rights of Third Persons**

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

Section (b) A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

H. **Rule 8.4: Misconduct**

It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . .
III. ABA Opinions and Guidelines Related to Negotiations

A. ABA Formal Opinion 06-439, dated April 12, 2006, Lawyer’s Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation

(i) This opinion recognizes the distinction between misrepresentation and “puffing,” and observes that making the distinction usually depends on specific facts and circumstances.

(ii) The Opinion begins with the following summary: “Under Model Rule 4.1, in the context of negotiation, including a caused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statement that can fairly be characterized as negotiation “puffing,” ordinarily are not considered “false statements of material fact” within the meaning of the Model Rules.

B. ABA Section of Litigation, Ethical Guidelines for Settlement Negotiations, August 2002

(i) The text of these guidelines is extensive and covers a wide range of issues, including client authority, representation in class suits, and representation of minors and others with limited capacity.

(ii) Please note that this text has not been adopted by the House of Delegates and is not official ABA policy. However, the introduction to the guidelines includes that the statement that: “The American Bar Association recommends the Ethical Guidelines for Settlement Negotiations as a resource designed to facilitate and promote ethical conduct in settlement negotiations.”

(iii) Of particular interest is the section 2.3, which states “A lawyer’s conduct in negotiating a settlement should be characterized by honor and fair-dealing.” (This statement echoes the Causerie by Judge Alvin Rubin, noted below in Section V.B). Also, Section 4.1.1 states that “In the course of negotiating or concluding a settlement, a lawyer must not knowingly make a false statement of material fact (or law) to a third person. The committee notes to this section also include the statement that “Unethical false statements of fact or law may occur in at least three ways: (1) a lawyer knowingly and affirmatively stating a falsehood or making a partially true but misleading statement that is equivalent to an affirmative false statement; (2) a lawyer incorporating or affirming the statement of another that the lawyer knows to be false; and (3) in certain limited circumstances, a lawyer remaining silent or failing to disclose a material fact to a third person.
C. ABA Formal Opinion 11-461, dated August 4, 2011, Advising Clients Regarding Direct Contact with Represented Persons

(i) This opinion covers situations in which a lawyer may encourage his or her client to directly contact another represented party.

(ii) The Opinion begins with the following summary: “Parties to a legal matter have the right to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication.”


A. Section 94: Advising and Assisting a Client – In General

A lawyer who counsels or assists a client to engage in conduct that violates the rights of a third person is subject to liability: (a) To a third person to the extent states in §§ 51 and 56-57 . . .

B. Section 51: Duty of Care to Certain Nonclients

Section 51 is complex, but the provision that is relevant to negotiations is: “A lawyer owes a duty to use care . . . (2) to a nonclient when and to the extent that the lawyer or (with the lawyer’s acquiescence) the lawyer’s client invites the nonclient to rely on the lawyer’s opinion or provision of other legal services, and the nonclient so relies; and (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection.”

C. Section 57: Nonclient Claims – Certain Defenses and Exceptions to Liability

Among other things, Section 57 provides that “(3) A lawyer who advises a client to make or break a contract, or to enter or dissolve a legal relationship, or to enter or not enter a contractual relation, is not liable to a nonclient for interference with contract or prospective contractual relations or with a legal relationship, if the lawyer acts to advance the client’s objectives without using wrongful means.

V. Current State of the Law Regarding Transactional Negotiations

A. Since the Restatement of the Law Third, Law Governing Lawyers, was published in 2000, the law and ethics decisions and opinions covering representation in transactions have not materially changed. (See also, Hazard, Koniak, Cramton, Cohen and Wendel, The Law and Ethics of Lawyers, pp. 752-769 (5th ed. 2010); Crystal, The Lawyer’s Duty to

B. The major “non-development” in this area occurred in 1981, when the Kutak Commission, in the course of drafting the ABA Model Rules of Professional Conduct, proposed that “In conducting negotiations a lawyer shall be fair in dealing with other participants.” This reflected the thought of Judge Alvin Rubin in A Causerie on Lawyer’s Ethics in Negotiation, 35 Louisiana L. Rev. 577 (1975). The proposed rule was strenuously opposed and accordingly dropped. (See Hazard, The Lawyer’s Obligation to be Trustworthy When Dealing with Opposing Parties, 33 So. Carolina L. Rev. 181 (1981)). However, the Ethical Guidelines for Settlement Negotiations published by the ABA Section of Litigation (see Section III.B above) provide that a lawyer’s conduct in such negotiation “should” be “characterized by honor and fair-dealing,” which in substance seems to be the same concept that was rejected by the Kutak proposal.

VI. Legal Standards Applicable to Different Types of Negotiations

A. Negotiations in Securities Law Matters
   (i) Issues to consider between an issuer and a potential placement agent/underwriter
   (ii) Impact of Sarbanes-Oxley imposed statutory and regulatory requirements

B. Negotiations with Regulatory Agencies such as the SEC and IRS

C. Negotiations with Creditors in Context of Financially-Troubled Companies
   (i) Issues to consider in workouts with lenders
   (ii) Using the “threat” of filing a Chapter 7 or Chapter 11

D. Negotiations of the Settlement of Disputes and Litigation
   (i) Issues to consider in negotiations between opposing parties / counsel
   (ii) Court-ordered settlement negotiations
   (iii) ADR negotiations
   (iv) Negotiations in the context of mediation
MODERATOR

Geoffrey C. Hazard
Geoffrey Hazard is perhaps the primary figure in legal ethics in the country today. His treatise Civil Procedure (Foundation, 5th ed. 2001), with Fleming James Jr. and John Leubsdorf, is a mainstay of American legal education. He continues to write prodigiously including the ALI/UNIDROIT Principles of Transnational Civil Procedure, which has become a model of civil procedure for international commercial disputes; a treatise; and many articles, particularly on joinder, including class actions, and discovery. His latest book (with Angelo Dondi), Legal Ethics: A Comparative Study (Stanford, 2004) compares ethics in the legal professions of modern industrialized countries. He is also a principal author of a casebook.

Mr. Hazard has received tremendous recognition for his work, including the ABA Michael Franck Award in Professional Responsibility, American Bar Foundation Research Award and William Keck Foundation Award, Columbia University School of Law Association Medal for Excellence, American Judicature Society, Outstanding Contributions to Promoting Effective Administration of Justice, the ceremony of Salute, Superior Court of Pennsylvania, the International Insolvency Institute Gold Award, and the ABA Robert J. Kutak Award as well as seven honorary degrees. Mr. Hazard is a professor of law at University of California, Hastings College of Law.

PANELISTS

Edward H. Fleischman
Mr. Fleischman has since December 1994 been Senior Counsel to Linklaters LLP, the global law firm, specializing in U.S. securities law and related areas. Mr. Fleischman served as a Commissioner of the U.S. Securities and Exchange Commission from January 1986 to March 1992. Prior to 1986, he had practiced law for 26 years with the firm of Beekman & Bogue in New York City, and he resumed private law practice in New York in April 1992.

Mr. Fleischman holds membership in the American Law Institute, is a past president of the American College of Investment Counsel and from 1976 to 2000 served as an Adjunct Professor of Law in Securities Regulation at New York University Law School. He has chaired the American Bar Association Business Law Committees on Counsel Responsibility and on Developments in Business Financing as well as the Administrative Law Committee on Securities, Commodities and Exchanges and the International Law Committee on International Securities Transactions. For more than the past decade he has chaired the International Committee on Securities Regulation of the International Law Association, and is a member of the Securities Law Committee of the Legal Practice Division of the International Bar Association.

Mr. Fleischman received his undergraduate education at Harvard College and obtained his LL.B. degree from Columbia University Law School. He was admitted to the New York Bar in 1959 and to the Bar of the U.S. Supreme Court in 1981.
Donald F. Parsons, Jr.
Donald F. Parsons, Jr., became a Vice Chancellor of the Court of Chancery of the State of Delaware on October 22, 2003. He is a 1977 graduate of the Georgetown University Law Center and also received a B.S. degree in electrical engineering from Lehigh University. Before joining the Court of Chancery, he spent over twenty-four years at the firm of Morris, Nichols, Arsht & Tunnell in Wilmington, Delaware, where he was a senior partner. While in private practice, he specialized in intellectual property litigation, participated in numerous jury and nonjury patent trials, and wrote several papers relating to intellectual property law. Before joining Morris, Nichols in 1979, Vice Chancellor Parsons clerked for the Honorable James L. Latchum of the United States District Court for the District of Delaware. He also is a Past President of the Delaware State Bar Association.

Richard W. Pound
Richard Pound is a partner in the Montréal office of Stikeman Elliott and member of the firm's Tax Group. His main areas of practice include tax litigation and negotiations with tax authorities on behalf of clients, in addition to general tax advisory work and commercial arbitration.

Mr. Pound is included in the 2012 edition of The Best Lawyers in Canada. He is recognized by The Canadian Legal Lexpert Directory 2011, as a leading practitioner "repeatedly recommended" in the area of international commercial arbitration, and in the Lexpert/American Lawyer Media publication, A Guide to the Leading 500 Lawyers in Canada, 2009 edition. Mr. Pound has also been recognized as a prominent practitioner in the tax field in PLC's Cross-border Tax on Corporate Transactions Handbook 2009. He is recognized as having the highest rating ("AV") under the Martindale-Hubbell Peer Review Ratings.

Mr. Pound has been named to Time Magazine's 100 most influential people in the world for his relentless efforts to rid sport of performance- enhancing drugs.

In July 2009, he was awarded the Ernest T. Stewart Award, CASE's highest honour for a graduate who has gone above and beyond the call of duty for his alma mater. He is only the second Canadian in the 56 year history of the award to receive the prize.

In February 2008, he was awarded the Laureus "Spirit of Sport" Prize for his work as head of the World Anti-Doping Agency.

Former Olympic swimmer and Vice-President of the International Olympic Committee, Mr. Pound has been inducted into Canada's Sports Hall of Fame for his achievements in sports, both as an athlete and as an executive. He is chairman of the Board of Directors of Greater Montreal and honorary chairman of Swimming Canada's CANswim Movement.
Robert H. Mundheim

Robert H. Mundheim is Of Counsel to Shearman & Sterling and formerly Senior Executive Vice President and General Counsel of Salomon Smith Barney Holdings Inc. Prior to joining Salomon Inc. as its Executive Vice President and General Counsel in September 1992, Mr. Mundheim was Co-Chairman of the New York law firm of Fried, Frank, Harris, Shriver & Jacobson and University Professor of Law and Finance at the University of Pennsylvania Law School, where he had taught since 1965. He served as Dean of that institution for seven and a half years (1982-1989).

Mr. Mundheim advises on corporate governance issues and has counseled special committees in the buy-outs of HCA, Aramark and Bright Horizons. He also chaired the Special Committee in the recent buy-out of Quadra Realty Trust.

Among his other professional activities, Mr. Mundheim has been General Counsel to the U.S. Treasury Department (1977-1980); Special Counsel to the Securities and Exchange Commission (1962-1963); and Vice Chairman, Governor-at-Large and a member of the Executive Committee of the National Association of Securities Dealers (1988-1991). He was Chairman of the Board of Directors of Quadra Realty Trust, a director of eCollege, Benjamin Moore, Commerce Clearing House, Arnhold & S. Bleichroeder Holdings, Inc. and First Pennsylvania Bank. Mr. Mundheim is Vice Chairman of the Board of Trustees of New School University, a Trustee of the Curtis Institute of Music, and a member of the Council of the American Law Institute. He chaired the American Bar Association’s Standing Committee on Ethics and Professional Responsibility. He served as a member of the ABA Task Force on Corporate Responsibility and has been a faculty member of the Vanderbilt Directors’ College, the Duke Directors’ Education Institute and the Stanford Directors’ College. He was the President of the American Academy in Berlin and received the Officer’s Cross of the Order of Merit of the Federal Republic of Germany.

Ralph J. Rohner

Ralph Rohner is professor of law and former dean at the Columbus School of Law of The Catholic University of America (CUA), Washington, D.C., where he holds the James Whiteford Chair of Common Law. He has taught commercial and consumer law courses at CUA since 1964, and was dean from January 1987 through August 1995. During his tenure as dean, he oversaw the design and construction of the new law school building. In 1975-76 he served as staff counsel to the Consumer Affairs Subcommittee of the U.S. Senate Banking Committee. He has been a consultant to the Federal Reserve Board, the Federal Deposit Insurance Corporation, and various consumer banking trade associations and institutions, including more than twenty-five years as Special Counsel to the Consumer Bankers Association, Rosslyn, Virginia. From 1979 through 1981 he served as a member of the Federal Reserve Board’s Consumer Advisory Council, and in 1981 he chaired that Council. A co-author of a law school casebook on consumer law, and editor/co-author of a treatise on Truth-in-Lending law, he has written and lectured extensively on the federal and state consumer credit laws. He is a member of the American Law Institute, of the American Bar Association Business Law Section and its
Committees on the Uniform Commercial Code and on Consumer Financial Services, and is a founding member and past president of the American College of Consumer Financial Services Lawyers.

Professor Rohner earned both his B.A. (1960) and J.D. (1963) degrees from The Catholic University of America.

Steven Schwarcz

Steven Schwarcz is the Stanley A. Star Professor of Law & Business at Duke University. After graduating first in his class in engineering school (B.S. summa cum laude, New York University School of Engineering and Science), majoring in aeronautics and astronautics, he worked on legislative initiatives involving science and law while earning his J.D. degree from Columbia Law School. Prior to joining the Duke faculty in 1996, he was a partner at the law firm of Shearman & Sterling and then a partner and practice group chairman at Kaye Scholer LLP, where he represented many of the world’s leading banks and other financial institutions in structuring innovative capital market financing transactions, both domestic and international. He also helped to pioneer the field of asset securitization, and his book, Structured Finance, A Guide to the Principles of Asset Securitization (3d edition with supplements), is one of the most widely used texts in the field.

While practicing law, Professor Schwarcz taught at the Yale, Columbia, and Cardozo (Yeshiva University) law schools. His main areas of scholarship are international finance and capital markets, bankruptcy, and commercial law, where he brings the unique perspective of having been a leading practitioner as well as a scholar. In these inherently business dominated subjects, he works closely with colleagues at Duke’s Fuqua School of Business, where he has a secondary appointment. He also founded and was the first faculty director of Duke’s interdisciplinary Global Capital Markets Center.

Professor Schwarcz has testified before committees of both the Senate and House of Representatives, and also has been an adviser to the United Nations on international receivables financing, a member of the U.S. Secretary of State’s Advisory Committee on Private International Law, Visiting Professor at the University of Geneva Faculty of Law, Senior Fellow at The University of Melbourne Law School, and Leverhulme Visiting Professor at the University of Oxford.

Among other honors, Professor Schwarcz has presented endowed or distinguished public lectures at The University of Hong Kong, Georgetown University Law Center, Southern Methodist University (SMU) Dedman School of Law, Benjamin N. Cardozo School of Law, The University of Tennessee, Hofstra University School of Law, the University of Oxford, National University of Singapore, Chapman University, The National Assembly of the Republic of Korea, and the Korean Financial Supervisory Service. He also has been the keynote speaker at conferences of the Corporate Law Teachers Association of Australia, New Zealand, and Asia-Pacific, the New York Law School Law Review, the University of South Carolina Law Review, the New York University School of Law Journal of Law and Business, the Chapman University Law Review, Moody’s Corporation, and the Asian Securitisation Forum. Professor Schwarcz is also a Fellow of
Ben F. Tennille
In January of 1996 Judge Tennille was sworn in as the first Special Superior Court Judge for Complex Business Cases in North Carolina and charged with creating the first state-wide Business Court in the nation. He was the only judge until the fall of 2005 when, on recommendation of the Chief Justice’s Commission on the Future of the Business Court, the court’s jurisdiction was expanded and two new judges were added. At that time Judge Tennille was appointed Chief Judge of the Business Court. The Business Court is similar to a Federal District Court in that its judges try cases and write opinions designed to create a body of case law involving issues of importance to business and industry in North Carolina. In establishing the court, Judge Tennille designed a model paperless court which employs a free electronic filing system using the Internet. It was one of the first successful efiling systems in the country. The Court was one of the first to maintain a website where all the opinions were available as soon as they were filed and all pleadings were accessible on the website. Judge Tennille’s opinions are accessible at www.ncbusinesscourt.net. The Business Court has received awards for its innovations from the Institute for the Improvement of Civil Justice and Justice Served.

In July 2006 Judge Tennille established his chambers and his courtroom in the new Elon University School of Law. It was the first trial court in the country to be housed in a law school.

Judge Tennille retired from the bench in March 2011.
2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

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

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

Thoroughness and Preparation

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

Maintaining Competence

6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.2: Scope of Representation and Allocation of Authority between Client and Lawyer

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

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

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

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

Comment

Allocation of Authority between Client and Lawyer

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

2] On occasion, however, a lawyer and a client may disagree about
the means to be used to accomplish the client’s objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

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

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

Independence from Client’s Views or Activities

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

Agreements Limiting Scope of Representation

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

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

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

Criminal, Fraudulent and Prohibited Transactions

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

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

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

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

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

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

RULE 1.3: DILIGENCE

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

Comment

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

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

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

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

[5] To prevent neglect of client matters in the event of a sole practitioner’s death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer’s death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).
(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer.

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

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

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

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

Comment

[1] This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Paragraphs C(2), D(2) and E(2) of the Application Section of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, “shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.”

Although phrased differently from this Rule, those Rules correspond meaning.

[2] Like former judges, lawyers who have served as arbitrators or other third-party neutrals may be asked to represent a party in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.7(b). Other law or codes of ethics governing third-party neutrals impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have to screen the clients who are represented, they owe the parties an obligation of confidentiality under law or ethical governing third-party neutrals. Thus, paragraph (c) provides for such conflicts of the personally disqualified lawyer will be imputed to, lawyers in a firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.13. Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

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

RULE 1.13: ORGANIZATION AS CLIENT

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a manner related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary
in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,
then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer’s representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer’s actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.

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

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders

or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. “Other constituents” as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

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

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.
[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer’s advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization’s highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer’s responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)-(6). Under paragraph (c) the lawyer may reveal such information only when the organization’s highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer’s services be used in furtherance of the violation, but it is required that the matter be related to the lawyer’s representation of the organization. If the lawyer’s services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer’s engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer’s actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act in-
Rule 1.13

volves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

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

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

Dual Representation

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

Derivative Actions

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

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

Rule 1.14: Client with Diminished Capacity

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally
by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer’s duties when a prospective client entrusts valuables or papers to the lawyer’s care, see Rule 1.15.

COUNSELOR

Rule 2.1: Advisor

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

Comment

Scope of Advice

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

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

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

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

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Rule 1.4 may require that the lawyer offer advice if the client’s course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinaril has no duty to initiate investigation of a client’s affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client’s interest.

Rule 2.2: Intermediary

[Deleted 2002]

Rule 2.3: Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.
(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

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

Comment

Definition

[1] An evaluation may be performed at the client’s direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

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

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer’s responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer’s obligations are determined by law, having reference to the terms of the client’s agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client’s Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client’s interests materially and adversely, the lawyer must first obtain the client’s consent after the client has been adequately informed.
concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

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

Rule 2.4: Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyers-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitrators in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.
Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

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

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

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

Statements of Fact

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

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.
RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

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

Comment

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

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

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

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

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

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

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

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

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

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

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer’s client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(0).

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

Rule 4.4: Respect for Rights of Third Persons

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

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

Comment

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

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained from the sender person. For purposes of this Rule, “document” includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.
MAINTAINING THE INTEGRITY OF THE PROFESSION  Rule 8.4

(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of
Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

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

RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

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

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

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

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdic-
Lawyer’s Obligation of Truthfulness
When Representing a Client in Negotiation:
Application to Caucused Mediation

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” ordinarily are not considered “false statements of material fact” within the meaning of the Model Rules.

In this opinion, we discuss the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming. For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $200, when, in reality, it is willing to accept as little as $150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff’s demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.
Formal Opinion

dependence upon the supplier with which it is negotiating. Such remarks, often characterized as “posturing” or “puffing,” are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact. An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee. Similarly, it cannot be considered “posturing” for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

Applicable Provision of the Model Rules

The issues addressed herein are governed by Rule 4.1(a). That rule prohibits a lawyer, “[i]n the course of representing a client,” from knowingly making “a false statement of material fact or law to a third person.”

As to what constitutes a “statement of fact,” Comment [2] to Rule 4.1 provides additional explanation:

2. Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a “tribunal.” It does not apply in mediation because a mediator is not a “tribunal” as defined in Model Rule 1.0(m). Comment [5] to Model Rule 2.4 confirms the inapplicability of Rule 3.3 to mediation:

Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer’s duty of candor is governed by Rule 3.3. Otherwise, the lawyer’s duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 3.3 does apply, however, to statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-370 (1993) (Judicial Participation in Pretrial Settlement Negotiations), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 157, 161 (ABA 2000).

Rule 8.4(c), which on its face broadly proscribes “conduct involving dishonesty, fraud, deceit or misrepresentation,” does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1. Comment [1] to Rule 4.1, for example, describes Rule 8.4 as prohibiting “misrepresentations by a lawyer other than in the course of representing a client . . . .” In addition, Comment [5] to Rule 2.4 explains that the duty of candor of “lawyers who represent clients in alternative dispute resolution processes” is governed by Rule 3.3 when the process takes place before a tribunal, and otherwise by Rule 4.1. Tellingly, no reference is made in that Comment to Rule 8.4. Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer’s state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1. See GEOFFREY C. HAZARD, JR. & W. WILLIAM
This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.3

Truthfulness in Negotiation

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer's own client.4 Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law.5 Still others have suggested that lawyers should strive to balance the


Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker's state of mind.

4. See, e.g., Reed Elizabeth Loder, “Moral Truthseeking and the Virtuous Negotiator,” 8 Geo. J. Legal Ethics 45, 93-102 (1994) (principles of morality should drive legal profession toward rejection of concept that negotiation is inherently and appropriately deceptive); Alvin B. Rubin, “A Causerie on Lawyers' Ethics in Negotiation,” 35 La. L. Rev. 577, 589, 591 (1975) (lawyer must act honestly and in good faith and may not accept a result that is unconscionably unfair to other party); Michael H. Rubin, “The Ethics of Negotiation: Are There Any?,” 56 La. L. Rev. 447, 448 (1995) (embracing approach that ethical basis of negotiations should be truth and fair dealing, with goal being to avoid results that are unconscionably unfair to other party).

apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards. Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers.

Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370 that, although a lawyer may in some circumstances ethically decline to answer a judge’s questions concerning the limits of the lawyer’s settlement authority in a civil matter, the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

[wh]ile . . . , a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party’s actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty.


9. The opinion also concluded that it would be improper for a judge to insist that a lawyer “disclose settlement limits authorized by the lawyer’s client, or the lawyer’s advice to the client regarding settlement terms.”
fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387,\textsuperscript{10} we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client's claim, but cannot make any affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397\textsuperscript{11} that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client's death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect.\textsuperscript{12}

False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died.\textsuperscript{13} Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for


\textsuperscript{12} See New York County Lawyers' Ass'n Committee on Prof'l Ethics Op. 731 (Sept. 1, 2003) (lawyer not obligated to reveal existence of insurance coverage during a negotiation unless disclosure is required by law; correlative, not required to correct misapprehensions of other party attributable to outside sources regarding the client's financial resources); Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility Informal Op. 97-44 (Apr. 23, 1997) (lawyer negotiating on behalf of a client who is an undisclosed principal is not obligated to disclose the client's identity to the other party, or to disclose the fact that that other party is negotiating with a straw man); Rhode Island Supreme Court Ethics Advisory Panel Op. 94-40 (July 27, 1994) (lawyer may continue negotiations even though recent developments in Rhode Island case law may bar client's claim).

\textsuperscript{13} Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578, 579-80 (Ky. 1997); see also In re Warner, 851 So. 2d 1029, 1037 (La.), reh'g denied (Sept. 5, 2003) (lawyer disciplined for failure to disclose death of client prior to settlement of personal injury action); Toledo Bar Ass'n v. Fell, 364 N.E.2d 872, 874 (1977) (same).
stating to opposing counsel that, to the best of his knowledge, his client’s insurance coverage was limited to $200,000, when documents in his files showed that the client had $1,000,000 in coverage. Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions, and the setting aside of settlement agreements, as well as civil lawsuits against the lawyers themselves.

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client’s willingness to compromise, or present a client’s bargaining position without disclosing the client’s “bottom line” position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client’s position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

Application of the Governing Principles to Caucused Mediation

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation.

18. Conceivably, such statements could be viewed as violative of other provisions of the Model Rules if made in bad faith and without any intention to seek a compromise. Model Rule 4.4(a), for example, prohibits lawyers from using “means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . .” Similarly, Model Rule 3.2 requires lawyers to “make reasonable efforts to expedite litigation consistent with the interests of the client.”
19. This opinion is limited to lawyers representing clients involved in caucused mediations, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(e) (see note 2 above). Cf. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 04-433 (2004)
Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of “telephone,” the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called “deception synergy,” proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations.*

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation—particularly in a caucused mediation—precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes.**

*(Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law). In our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client. We note, in this regard, that many mediators are nonlawyers who are not subject to lawyer ethics rules. We need not address whether a lawyer should be held to a different standard of behavior than other persons serving as mediator.


21. Mediators are “the conductors—the orchestrators—of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators’ control extends to what nonconfidential informa-
Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a “tribunal,” the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow “understood” that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation.22

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client’s position, which otherwise would not be considered statements “of fact,” are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client’s Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

Conclusion

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” are ordinarily not considered “false statements of material fact” within the meaning of the Model Rules.
ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS

August 2002
The Ethical Guidelines for Settlement Negotiations have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association. However, the American Bar Association recommends the Ethical Guidelines for Settlement Negotiations as a resource designed to facilitate and promote ethical conduct in settlement negotiations. These Guidelines are not intended to replace existing law or rules of professional conduct or to constitute an interpretation by the ABA of any of the Model Rules of Professional Conduct, and should not serve as a basis for liability, sanctions or disciplinary action.

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TABLE OF CONTENTS

SECTION 1  PREFACE .................................................................................................1
SECTION 2  SETTLEMENT NEGOTIATIONS GENERALLY .................................2
  2.1  The Purpose of Settlement Negotiations ...........................................2
  2.2  Duty of Competence ........................................................................3
  2.3  Duty of Fair-Dealing .........................................................................3
  2.4  Restrictions on Disclosure to Third Parties of Information Relating to Settlement Negotiations .........................................................4
  2.5  Required Disclosure to Court of Information Relating to Settlement Negotiations ...............................................................5
SECTION 3  ISSUES RELATING TO LAWYERS AND THEIR CLIENTS ........7
  3.1  The Client's Ultimate Authority Over Settlement Negotiations ...7
    3.1.1  Prompt Discussion of Possibility of Settlement ....................7
    3.1.2  Client's Authority Over Initiation of Settlement Discussions .........................................................................................................................8
    3.1.3  Consultation Respecting Means of Negotiating Settlement ......................................................................................................................9
    3.1.4  Keeping Client Informed About Settlement Negotiations ..........12
  3.2  The Client's Authority Over the Ultimate Settlement Decision ..........13
    3.2.1  Acting Within the Scope of Delegated Authority ..................13
    3.2.2  Revocability of Authorization to Settle ................................14
    3.2.3  Avoiding Limitations on Client's Ultimate Settlement Authority ........................................................................................................15
    3.2.4  Assisting Client Without Impairing Client's Decisionmaking Authority .............................................................................................17
  3.3  Preserving the Integrity of the Settlement Process; Restrictions on Client Settlement Authority .................................................................18
    3.3.1  Adherence to Ethical and Legal Rules ....................................18
    3.3.2  Client Directions Contrary to Ethical or Legal Rules ..........20
    3.3.3  Disagreement With or Repugnant Client Strategies ..........21
  3.4  Clients With Diminished Capacity or Special Needs ..................22
  3.5  Multiple Clients Represented by the Same Counsel ..................25
  3.6  Class Actions .......................................................................................28
SECTION 4 ISSUES RELATING TO A LAWYER’S NEGOTIATIONS WITH OPPOSING PARTIES

4.1 Representations and Omissions .......................................................... 34
  4.1.1 False Statements of Material Fact .............................................. 34
  4.1.2 Silence, Omission, and the Duty to Disclose Material Facts .............. 37
  4.1.3 Withdrawal in Situations Involving Misrepresentations of Material Fact .............................................. 39

4.2 Agreements with Opposing Parties Relating to Settlement ................ 40
  4.2.1 Provisions Restricting Lawyer’s Right To Practice Law .................. 40
  4.2.2 Provisions Relating to the Lawyer’s Fee .................................... 41
  4.2.3 Agreements Not To Report Opposing Counsel’s Misconduct ............ 44
  4.2.4 Agreements on Return or Destruction of Tangible Evidence ............ 46
  4.2.5 Agreements Containing Illegal or Unconscionable Terms ............... 46
  4.2.6 Agreement to Keep Settlement Terms and Other Information Confidential .............................................. 47

4.3 Fairness Issues ........................................................................... 48
  4.3.1 Bad Faith in the Settlement Process ........................................... 49
  4.3.2 Extortionate Tactics in Negotiations ......................................... 49
  4.3.3 Dealing With Represented Persons ........................................... 51
  4.3.4 Dealing with Unrepresented Persons ....................................... 54
  4.3.5 Exploiting Opponent’s Mistake ............................................. 56

TABLES AND INDEX

Table A - ABA Model Rules of Professional Conduct ................................ 58
Table B - ABA Model Code of Professional Responsibility ........................ 60
Table C - The Restatement (Third) of the Law Governing Lawyers ............. 61
Table D - ABA Formal and Informal Ethics Opinions ................................ 62
Index ........................................................................................................ 63
ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS

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1 This project was initiated in the Fall of 1999 by Ronald Jay Cohen, then Chair-Elect of the Litigation Section.
ETHICAL GUIDELINES FOR
SETTLEMENT NEGOTIATIONS

Section 1  Preface

Settlement negotiations are an essential part of litigation. In light of the courts’ encouragement of alternative dispute resolution and in light of the ever increasing cost of litigation, the majority of cases are resolved through settlement. The settlement process necessarily implicates many ethical issues. Resolving these issues and determining a lawyer’s professional responsibilities are important aspects of the settlement process and justify special attention to lawyers’ ethical duties as they relate to negotiation of settlements.

These Guidelines are written for lawyers who represent private parties in settlement negotiations in civil cases. In certain situations, the Guidelines may not be applicable to lawyers representing governmental entities. The Guidelines should apply to settlement discussions whether or not a third party neutral is involved. To the extent there may be ethical issues specific to mediation and non-binding arbitration proceedings, the Guidelines or Committee Notes may provide guidance, but these specific issues deserve particularized treatment and are beyond the scope of these Guidelines. As a general rule, however, the involvement of a third party neutral in the settlement process does not change the attorneys’ ethical obligations.

The Guidelines are intended to be a practical, user-friendly guide for lawyers who seek advice on ethical issues arising in settlement negotiations. Generally, the Guidelines set forth existing ABA policy as stated in the Model Rules of Professional Conduct (“the Model Rules”) and ABA Opinions and should be interpreted accordingly. The Guidelines also identify some of the significant conflicts between ABA policy and other rules or law. In circumstances identified in the Committee Notes, the Guidelines suggest best practices and aspirational goals. Counsel should consult not only these Guidelines, but also the applicable rules, codes, ethics opinions, and governing law in the jurisdiction of concern and should be alert for amendments to the Model Rules in connection with the work of the ABA Ethics 2000 Commission.
References in this work are to the *Model Rules* and comments as amended by the ABA in February 2002. Such amendments may be found at the ABA website.

This compendium is limited to the negotiations phase of settlements (which includes client counseling). These Guidelines do not address the enforcement of settlement agreements or requests for sanctions for conduct in settlement negotiations.

These Guidelines are designed to assist counsel in ensuring that conduct in the settlement context is ethical. They are *not* intended to replace existing law or rules of professional conduct or to constitute an interpretation by the ABA of any of the Model Rules, and should not serve as a basis for civil liability, sanctions, or disciplinary action.

**Section 2  Settlement Negotiations Generally**

**2.1  The Purpose of Settlement Negotiations**

The purpose of settlement negotiations is to arrive at agreements satisfactory to those whom a lawyer represents and consistent with law and relevant rules of professional responsibility. During settlement negotiations and in concluding a settlement, a lawyer is the client’s representative and fiduciary, and should act in the client’s best interest and in furtherance of the client’s lawful goals.

**Committee Notes:** Subject to applicable rules and law, the lawyer’s work in settlement negotiations, like the work in other aspects of litigation, should be client-centered. A lawyer should not impede a settlement that is favored by a client (or likely to be favored) and consistent with law and ethical rules, merely because the lawyer does not agree with the client or because the lawyer’s own financial interest in
the case or that of another nonparty is not advanced to the lawyer's or nonparty's satisfaction. *But see, infra*, Sections 3.3. and 4.1.

2.2 Duty of Competence

A lawyer must provide a client with competent representation in negotiating a settlement.

*Committee Notes:* With respect to settlement negotiations and any resulting settlement agreement, as is the case generally, *Model Rule* 1.1 requires counsel to provide competent representation. As part of this obligation of competence, a lawyer should give attention to the validity and enforceability of the end result of the settlement process and should make sure the client's interests are best served, for example, by considering tax implications of the settlement.

2.3 Duty of Fair-Dealing

A lawyer's conduct in negotiating a settlement should be characterized by honor and fair-dealing.

*Committee Notes:* While there is no *Model Rule* that expressly and specifically controls a lawyer's general conduct in the context of settlement negotiations, lawyers should aspire to be honorable and fair in their conduct and in their counseling of their clients with respect to settlement. *Model Rule* 2.1 recognizes the propriety of considering moral factors in rendering legal advice and the preamble to the *Model Rules* exhorts lawyers to be guided by “personal conscience and the approbation of professional peers.” *Model Rules*, Preamble, [7]. *Cf. infra* Sections 4.1.1, 4.1.2, and 4.3.1. Whether or not a lawyer may be disciplined, sanctioned, or sued for failure to act with honor and fairness based on specific legal or ethical rules, best practices dictate honor and
fair dealing. Settlement negotiations are likely to be more productive and effective and the resulting settlement agreements more sustainable if the conduct of counsel can be so characterized.

2.4 Restrictions on Disclosure to Third Parties of Information Relating to Settlement Negotiations

With client consent, a lawyer may use or disclose to third parties information learned during settlement negotiations, except when some law, rule, court order, or local custom prohibits disclosure or the lawyer agrees not to disclose.

Committee Notes: Information learned during settlement discussions may be confidential as “information relating to representation” of the client. Therefore, client consent would be needed prior to disclosure of such information to third parties. Model Rule 1.6. Moreover, a lawyer must not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent. Model Rule 1.8 (b); Model Rule 1.9(c) (relating to former clients). Even with client consent, there may be other reasons the information should not be disclosed. For example, if public dissemination of the information has a “substantial likelihood of materially prejudicing” the proceeding, that disclosure may run afoul of applicable ethical rules. See Model Rule 3.6; see also, infra, Section 4.2.6 for a discussion of when a lawyer may be bound by an express agreement not to disclose settlement information to third parties.

Further, lawyers must comply with any other legal or procedural restrictions, including a court order prohibiting disclosure. Among the possible restrictions are mediation rules and rules of evidence, such as Federal Rule of Evidence 408, which excludes proof of offers to settle and “conduct or statements made” during settlement negotiations, when
offered to prove “liability for or invalidity of the claim or its amount.” At trial, lawyers should not refer to settlement discussions or offer proof relating to settlement discussions absent a good faith basis to believe the proof is admissible notwithstanding Federal Rule of Evidence 408 or other relevant limitations.

If there is a known local or judicial custom or practice restricting the disclosure or use of information learned during settlement discussions, lawyers should act accordingly, unless they have given notice of their intention not to do so. Cf. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule [hereinafter, the Model Code, DR] 7-106(C)(5) (providing that in a judicial proceeding a lawyer may not “[f]ail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply”). (It should be noted that the Model Code was withdrawn in 1983 and is no longer official ABA policy.) In some jurisdictions, the local practice is to confirm the parties’ mutual agreement not to disclose any part of settlement discussions through a mutual oral undertaking that the discussion is “off the record and without prejudice.” Such agreements should be honored. In other jurisdictions, many lawyers may believe that this agreement is implied even if it is not expressly discussed. Lawyers are encouraged to consult several local peers in attempting to discern relevant custom and practice in this area.

2.5 Required Disclosure to Court of Information Relating to Settlement Negotiations

When seeking court approval of a settlement agreement or describing in court matters relating to settlement, a lawyer shall not knowingly make a false statement of fact or law to the court, fail to correct a false statement of material fact or law previously made to the court by the lawyer, or fail to make disclosure to the court, if
necessary as a remedial measure, when the lawyer knows criminal or fraudulent conduct related to the proceeding is implicated. Failure to make such disclosure is not excused by the lawyer’s ethical duty otherwise to preserve the client’s confidences.

Committee Notes: Model Rule 3.3 requires candor toward a tribunal. A lawyer “must not allow the tribunal to be misled by false statements of law or fact . . . that the lawyer knows to be false.” Model Rule 3.3, comment 2. The duty not to engage in affirmative misrepresentations or material omissions when seeking court approval of a settlement agreement in accordance with Model Rules 3.3(a)(1) and (3) continues to the conclusion of the proceeding. This duty applies even if compliance requires disclosure of information otherwise protected by the lawyer’s ethical commitment of confidentiality under Model Rule 1.6. Further, substantive law may invalidate a settlement agreement where a lawyer’s affirmative misrepresentation or material omission prevents the court from making an informed decision about whether to approve a settlement agreement. See, e.g., Spaulding v. Zimmerman, 116 N. W. 2d 704 (Minn. 1962).

Because settlement agreements, by definition, are voluntary undertakings, a lawyer should first consult with the client before disclosing ethically protected confidential information to the court. See generally, infra, Section 3. The attorney also should allow the client to decide whether to seek judicial approval of the agreement with the required disclosures, or to abandon or seek to modify the settlement agreement accordingly. See Model Rule 1.4(b): “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,” and Model Rule 1.2(a): “A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.” If a mutually agreeable and proper course of action does not result from the consultation, the lawyer must withdraw from representing the client in accordance with Model Rule 1.16, for the lawyer may not pursue a course of action that would, on the one hand,
violate the duties required of counsel by Model Rule 3.3, or, on the other hand, defy the client’s directives or wishes.

Section 3  Issues Relating To Lawyers and Their Clients

3.1  The Client’s Ultimate Authority Over Settlement Negotiations

3.1.1 Prompt Discussion of Possibility of Settlement

A lawyer should consider and should discuss with the client, promptly after retention in a dispute, and thereafter, possible alternatives to conventional litigation, including settlement.

Committee Notes: The Model Rules do not specifically identify a responsibility to raise the possibility of settlement, but that responsibility arises from several provisions of the Rules, including the requirement that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation” (Model Rule 1.4(b)), the obligation to provide “competent representation” (Model Rule 1.1), and the obligation to “consult with the client as to the means by which [the objectives of the representation] are to be pursued” (Model Rules 1.2(a) and 1.4(a)(2)).

Without assistance from lawyers, clients often are not aware of potential alternative methods of dispute resolution, and may not understand how settlement discussions can or should begin in the context of a dispute in which parties are asserting strongly adversarial positions. Early discussion of the option of pursuing settlement may help
the client to develop reasonable expectations and to make better informed decisions about the course of the dispute. These early discussions also may reduce the risk of clients second-guessing their attorneys’ strategies if they ultimately settle after paying substantial legal fees.

A lawyer’s desire to convince the client of the lawyer’s support for the client’s position ordinarily will not justify significantly postponing an effort to discuss the possibility of settlement. See, e.g., Model Rule 2.1, comment 1 (While “a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits . . . a lawyer should not be deterred from giving advice by the prospect that the advice will be unpalatable to the client”).

3.1.2 Client’s Authority Over Initiation of Settlement Discussions

The decision whether to pursue settlement discussions belongs to the client. A lawyer should not initiate settlement discussions without authorization from the client.

Committee Notes: The client’s rights with respect to a representation include the right to have the lawyer “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” Model Rule 1.4(a)(2). Although the decision to initiate settlement discussions does not reflect a binding commitment of any kind, the initiation of such discussions can effect a significant alteration in the dynamic of a dispute. Clients therefore may want to discuss and approve in advance the initiation of settlement discussions. Accordingly, lawyers should obtain their clients’ consent before the initiation of settlement discussions.

One important commentary, The Restatement (Third) of the Law
Governing Lawyers [hereafter, the Restatement], has asserted (§ 22, comment c) that “normally a lawyer has authority to initiate or engage in settlement discussions, although not to conclude them. . . .” While clients may “normally” grant this authorization, better practice is to obtain the client’s express consent prior to initiation of settlement negotiations. The circumstances of a representation rarely present situations in which there is a need for the lawyer, acting in the client’s interests, to initiate such discussions without prior consultation with the client. Similarly, when opposing counsel first raises the possibility of settlement, better practice is to offer no immediate response (other than inquiries into what the counsel may have in mind) until the lawyer consults the client, unless the client has already authorized such discussions or given pertinent directions.

Sometimes a court may direct the parties to conduct settlement negotiations. In that event, if a lawyer has no prior instructions from the client, the lawyer is obligated to discuss with the client the significance of the court’s directive and the possible scope of negotiations with the opposing parties. The lawyer is not obligated to press the client to settle.

3.1.3 Consultation Respecting Means of Negotiating Settlement

A lawyer must reasonably consult with the client respecting the means of negotiation of settlement, including whether and how to present or request specific terms. The lawyer should pursue settlement discussions with a measure of diligence corresponding with the client’s goals. The degree of independence with which the lawyer pursues the negotiation process should reflect the client’s wishes, as expressed after the lawyer’s discussion with the client.

Committee Notes: Model Rule 1.2(a) provides that “[a] lawyer shall abide by a client’s decision concerning the objectives of
representation, . . . and, as required by Model Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” The Commentary to that Rule provides further guidance on the sometimes complex relationship between the roles of the client and the lawyer with respect to the means by which a representation is pursued:

With respect to the means by which the client’s objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

* * *

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client’s objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Model Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).
In the context of settlement discussions, clients may differ widely with respect to the scope of the independent authority they want the lawyer to exercise in negotiating a resolution. While the lawyer must always retain the freedom to refuse to take any step that would amount to a violation of the lawyer’s ethical obligations, and while the lawyer’s role as negotiator may sometimes inescapably place the lawyer in situations where positions must be asserted without an interruption to consult with the client, the client should nevertheless have a full opportunity to decide what scope of authority to give the lawyer, and the lawyer should operate exclusively within the scope of the authority the client has provided.

The client must be given full opportunity to assign priorities to various components of a possible settlement package. Unless the client has authorized otherwise, the lawyer should seek to discuss with the client, before extending a settlement offer, such matters as prioritization between monetary and non-monetary objectives, whether to offer particular terms, and timing. “The client, not the lawyer, determines the goals to be pursued, subject to the lawyer’s duty not to do or assist an unlawful act. . . .” *Restatement* § 16, comment c.

Settlement negotiations, like all other components of a representation, implicate the rule that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” *Model Rule* 1.3. *See also Restatement* § 16, comment d (“The lawyer must use those capacities diligently, not letting the matter languish but proceeding to perform the services called for by the client’s objectives, including appropriate factual research, legal analysis, and exercise of professional judgment”).

Timing, and the level of diligence with which negotiations are pursued, can have a substantial impact on the outcome of settlement negotiations, and on the cost of litigating the dispute before the settlement is reached. The lawyer should pursue settlement negotiations
diligently if and to the extent diligence is consistent with the client’s strategic directives and ultimate goals.

3.1.4 Keeping Client Informed About Settlement Negotiations

A lawyer must keep the client informed about settlement discussions, and must promptly and fairly report settlement offers, except when the client has directed otherwise.

Committee Notes: The duty to keep the client informed respecting settlement discussions is an inherent component of the responsibility to let clients make ultimate determinations respecting the objectives of the representation. “A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required . . . [and shall] keep the client reasonably informed about the status of the matter.” Model Rules 1.4(a)(1) and (3). Accord, Restatement § 20(1). See also Restatement § 20(3) (“A lawyer must notify a client of a decision to be made by the client . . . and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”); Garris v. Severson, Merson, Berke & Melchior, 252 Cal. Rptr. 204 (Cal. App. 2 Dist. 1988) (lawyer must inform client respecting facts bearing on advisability of settling)

A lawyer should communicate with the client in a timely manner and should promptly comply with a client’s reasonable requests for information. Model Rule 1.4(a)(4). “Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. . . .” Model Rule 1.4, comment 5. “The
lawyer ordinarily must explain the pros and cons of reasonably available alternatives. The appropriate detail depends on such factors as the importance of the decision, how much advice the client wants, what the client has already learned and considered, and the time available for deliberation.” Restatement § 20, comment e.

“[A] lawyer who receives from opposing counsel an offer of settlement . . . must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.” Model Rule 1.4, comment 2. As explained in Model Rule 1.4, comment 5, “The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of [the] representation.” See also Restatement § 122, comment c(1) (“A lawyer who does not personally inform the client assumes the risk that the client is inadequately informed and that the [client’s] consent is invalid.”).

3.2 The Client’s Authority Over the Ultimate Settlement Decision

3.2.1 Acting Within the Scope of Delegated Authority

A lawyer can exercise broad general authority from a client to pursue a settlement if the client grants such authority, but a lawyer must not enter into a final settlement agreement unless either (a) all of the agreement’s terms unquestionably fall within the scope of that authority, or (b) the client specifically consents to the agreement.
Committee Notes: The client’s entitlement to control over the objectives of the representation necessarily includes control over the ultimate decision whether to settle a matter. See Model Rule 1.2(a). While a lawyer may properly seek substantial independence or broad authority from the client over settlement strategy and even settlement terms, and may properly exercise such authority if the client provides it, relevant rules “forbid a lawyer to make a settlement without the client’s authorization. A lawyer who does so may be liable to the client or the opposing party and is subject to discipline.” Restatement § 22, comment c. The lawyer puts both the lawyer and client at risk when entering into a settlement agreement without the client’s consent, because such a settlement agreement may be binding on the client if the lawyer had apparent authority to enter the settlement as the client’s agent. Restatement § 27d.

Irrespective of the breadth of the settlement authorization the client has apparently provided and irrespective of the lawyer’s ability to take such action on behalf of the client as may be impliedly authorized, Model Rule 1.2(a), best practices dictate that the lawyer communicate to the client the full terms of a proposed final settlement agreement and obtain the client’s specific consent to the settlement before agreeing to it on the client’s behalf. This precaution is warranted by the potentially binding nature of the lawyer’s actions combined with the possibility that the client or lawyer may be confused about, may not have precisely defined, or may not fully understand the precise breadth of the authority the client has conveyed and the lawyer has obtained.

3.2.2 Revocability of Authorization to Settle

A lawyer should advise a client who has authorized the lawyer to pursue settlement that the client can revoke authorization to settle a claim at any time prior to acceptance of the settlement. If the
client does revoke authorization, the lawyer must abide by the client’s decision.

**Committee Notes:** A client “may authorize a lawyer to negotiate a settlement that is subject to the client’s approval or to settle a matter on terms indicated by the client. . . . [A] client [may] confer settlement authority on a lawyer, provided that the authorization is revocable before a settlement is reached.” Restatement § 22, comment c. See, also, Model Rule 1.2, comment 3. Clients may not always fully appreciate their power to revoke authorization or to alter the limits of the lawyer’s authority after having initially provided authorization to settle. Better practice is to advise the client of the client’s right to revoke authorization at the time the lawyer seeks the client’s authorization to settle, and as may be appropriate in later discussions regarding settlement.

Lawyers who have received authorization to negotiate a settlement and enter a final agreement on behalf of their client should consult the law of the relevant jurisdiction to determine whether the client’s delegation of such ultimate settlement authority must be in writing or is subject to any other formal preconditions to its validity.

3.2.3 Avoiding Limitations on Client’s Ultimate Settlement Authority

A lawyer should not seek the client’s consent to, or enter into, a retainer or other agreement that purports to (a) grant the lawyer irrevocable authorization to settle; (b) authorize the lawyer to withdraw if the client refuses the lawyer’s recommendation to settle; (c) require the lawyer’s assent before the client can settle; or (d) otherwise attempt to relieve the lawyer of ethical obligations respecting settlement. A lawyer may apprise the client in a retainer or other agreement of the scope of the lawyer’s right to withdraw or take other steps based on the client’s approach to settlement under
the applicable ethics rules and law, but any such disclosure should be accurate and complete.

**Committee Notes:** Conditioning agreement to representation on a waiver of the client’s right to approve a future settlement, or on the client’s agreement not to settle without the lawyer’s approval, would fundamentally and impermissibly alter the lawyer-client relationship and deprive the client of ultimate control of the litigation. A lawyer’s insistence on such a provision would seem calculated to place the lawyer’s interests ahead of the client’s interests, and is potentially coercive. See, e.g., *Model Rule* 1.5, comment 5 (“An agreement may not be made whose terms might induce the lawyer . . . to perform services . . . in a way contrary to the client’s interest”); *Restatement* § 22, comment c (“A contract that the lawyer as well as the client must approve any settlement is . . . invalid.”).

As described more fully in Sections 3.3.2, 3.3.3 and 4.1.3., *infra*, applicable ethical rules contain a number of provisions that an attorney might be able to invoke, in appropriate circumstances, to justify withdrawing from a representation based on the client’s approach to settlement, even if such a withdrawal might cause prejudice to the client. These include that the client “insists on pursuing an objective that the lawyer considers repugnant or imprudent,” or that continued representation “will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.” *See Model Rule* 1.16. Disclosing these potential bases for withdrawal in a retainer agreement would not violate any ethical rules, but the disclosure would have to be scrupulously accurate and complete under applicable law and rules to avoid the risk of misleading or manipulating the client.

The obligation of accuracy and completeness would presumptively include informing the client about any requirement of court approval that might impede the attorney’s freedom to withdraw. It would also involve recognizing that the entitlement to withdraw on any of these grounds is
dependent on the particular circumstances at the time when the decision might be made. Any categorical provision in a retainer agreement that the lawyer is entitled to withdraw if the client rejects the lawyer’s settlement recommendation would be inaccurate in its implication that such a client rejection would ethically and legally justify the lawyer’s withdrawal in all circumstances. ABA Informal Op. C-455 (1961) (under predecessor Canon 44 a client’s refusal to settle did not constitute “good cause” for withdrawal); Conn. Eth. Op. 99-16 (provision in contingency fee agreement providing that lawyer is entitled to an hourly fee if client refuses to settle and defendant prevails is unethical); Conn. Eth. Op. 95-24 (provision in fee agreement which gives attorney the absolute right to withdraw if the client refuses to accept a settlement proposal the attorney thinks should be accepted violates the Rules of Professional Conduct because it diminishes the client’s right to decide whether to settle and on what basis); Mich. Eth. Op. C-233 (1984) (under Code, unethical for staff attorney of a group legal services plan to require client to sign an “authorization to settle” form with an amount indicated and withdraw from representation if the client refuses to settle for that amount); N.Y. Eth. Op. 719 (1999) (improper under various Code provisions for lawyer to use retainer agreement which misleads client regarding the circumstances under which lawyer may withdraw).

3.2.4 Assisting Client Without Impairing Client’s Decisionmaking Authority

A lawyer should provide a client with a professional assessment of the advantages and disadvantages of a proposed settlement, so that the client can make a fully-informed decision about settlement. Any effort to assist the client in reaching a decision should avoid interference with the client’s ultimate decisionmaking authority.

Committee Notes: The lawyer’s role in connection with settlement
negotiations is one of advisor to and agent of the client. The lawyer should adhere to that relationship even when the lawyer’s judgment or experience leads the lawyer to believe that the lawyer more fully appreciates the wisdom of a proposed course of action than the client does. While a lawyer can and often should vigorously advise the client of the lawyer’s views respecting proposed settlement strategies and terms, that advice should not override or intrude into the client’s ultimate decisionmaking authority.

Lawyers should be particularly sensitive to the risk that the client’s practical dependency on the lawyer may give the lawyer immense power to influence or overcome the client’s will respecting a proposed settlement. A lawyer also should not threaten to take actions that may harm the client’s interests to induce the client’s assent to the lawyer’s position respecting a proposed settlement. Efforts to persuade should be pursued with attention to ensuring that ultimate decisionmaking power remains with the client.

3.3 Preserving the Integrity of the Settlement Process; Restrictions on Client Settlement Authority

3.3.1 Adherence to Ethical and Legal Rules

A lawyer must comply with the rules of professional conduct and the applicable law during the course of settlement negotiations and in concluding a settlement, and must not knowingly assist or counsel the client to violate the law or the client’s fiduciary or other legal duties owed to others.

Committee Notes: A lawyer should not take any action in
negotiating and entering a settlement, or knowingly assist or counsel any client to take any action, that exposes the client to civil or criminal liability or that exposes the lawyer to civil or criminal liability, procedural sanctions, or discipline for violation of professional rules. See Model Rule 1.2(d) (unethical for lawyer to counsel or assist client in conduct lawyer knows is criminal or fraudulent). For example, as discussed more fully in Section 4.1.1, infra, a lawyer may not make a false statement of material fact or law to an adverse party or a tribunal. Model Rules 3.3(a)(1), 4.1; Restatement § 120. A lawyer also may not fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client (Model Rule 3.3(a)(2)), and may not fail to disclose a material fact to a third party in such circumstances unless disclosure would violate the lawyer’s confidentiality obligation. Model Rules 4.1(b), 1.6; see also, infra, Section 4.1.2.

With respect to the option or obligation to disclose confidential information about future improper expected actions by the client, the lawyer should check state and local rules carefully. Rules vary widely: from permitting the lawyer to reveal information that the lawyer believes necessary “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm,” Model Rule 1.6(b)(1)(prior to 2002 amendment), to permitting revelation of “the intention of a client to commit a crime and the information necessary to commit the crime,” Model Code DR 4-101(C)(3), to permitting revelation of any information the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm without regard to criminality (Model Rule 1.6(b)(1) as amended in 2002), to requiring rather than merely permitting revelations in some of these circumstances. See generally Stephen Gillers and Roy Simon, Regulation of Lawyers: Statutes and Standards, Annotations to Model Rule 1.6 and Selected State Variations (Little, Brown & Co. 2002 Ed.)

The lawyer’s obligation of allegiance to the client will not justify the
lawyer in breaching, or knowingly assisting the client in breaching, duties owed by the lawyer or the client to third parties in connection with settlement. Such duties may arise, for example, because of the lawyer’s representation of multiple clients concerning a single matter, see, infra Section 3.5, or because the client intends that identified non-clients benefit from the lawyer’s services. To the extent that the client holds a fiduciary or other duty to others in connection with the matter in dispute – for example, as a trustee or class representative – a lawyer also may not knowingly assist the client to breach that duty to those other persons. See Model Rule 1.2, comment 8.

3.3.2 Client Directions Contrary to Ethical or Legal Rules

If a client directs the lawyer to act, in the context of settlement negotiations or in concluding a settlement, in a manner the lawyer reasonably believes is contrary to the attorney’s ethical obligations or applicable law, the lawyer should counsel the client to pursue a different and lawful course of conduct. If a mutually agreeable and proper course of action does not arise from the consultation, the lawyer should determine whether withdrawal from representing the client is mandatory or discretionary, and should consider whether the circumstances activate ethical obligations in addition to withdrawal, such as disclosure obligations to a tribunal or to higher decisionmaking authorities in an organization.

Committee Notes: A lawyer must withdraw from a representation rather than engage in conduct relating to settlement that will result in the lawyer’s “violation of the rules of professional conduct or other law,” Model Rule 1.16(a)(1), and may withdraw, even if there is a material adverse effect on the client’s interests, if the client “persists in a course of action involving the lawyer’s services” during the settlement process that “the lawyer reasonably believes is criminal or fraudulent.” Model Rule
1.16(b)(2). The lawyer should first consult with the client before refusing to carry out the client’s instructions to act in a way that could lead to withdrawal or other steps. Such consultation should give the client the opportunity to abandon the course of action, persuade the lawyer the course is legal, or retain a different lawyer. *Restatement § 23, comment c,* *Cf. Model Rule 3.3, comment 6* (If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence.); *Model Code* DR 7-102(B)(1) (A lawyer who receives information “clearly establishing that the client has . . . perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same”). Any lawyer who withdraws based on the client’s refusal to act lawfully must take reasonable steps to protect the client’s interests and minimize unnecessary harm as a result of the withdrawal. *Model Rule 1.16(d); Restatement § 32, comment a; Restatement § 33(b).*

3.3.3 Disagreement With or Repugnant Client Strategies

If a lawyer finds a client’s proposed strategy or goal regarding settlement to be repugnant, but not contrary to applicable law or rules, or if the lawyer has a fundamental disagreement with the client’s strategy or goal, the lawyer may continue the representation on the condition that the lawyer will not be required to perform acts in furtherance of the repugnant strategy or goal, or may withdraw from the representation.

**Committee Notes:** *Model Rule 1.16(b).* A lawyer who has a fundamental disagreement with or considers the client’s settlement strategy or goals repugnant or misguided but not illegal may withdraw from the representation or may continue the representation on the
condition that the lawyer will not be required to perform the repugnant acts. The lawyer, however, may not merely decide in secret without disclosure to the client, that the lawyer will not engage in the activities that the lawyer considers offensive. The client is entitled to choose whether to continue retaining the lawyer in connection with the settlement if the lawyer is unwilling to engage in desired activities. The client should not be deprived of that choice because the lawyer has concealed the lawyer’s unwillingness. See, e.g., Restatement § 32, comment j.

3.4 Clients With Diminished Capacity or Special Needs

A lawyer’s general obligations when representing a client with diminished capacity or special needs – the obligations to maintain to the extent possible a normal client-lawyer relationship, and to protect the client when a normal relationship is impossible – apply equally to decisions respecting whether, how and on what terms to settle a dispute. If the client lacks the requisite capacity to make an adequately considered decision, but a guardian or other individual is legally authorized to make decisions in the representation on the client’s behalf, the lawyer should abide by the guardian’s lawful decisions concerning settlement. If the client lacks the requisite capacity and no one else is legally authorized to make decisions respecting settlement on the client’s behalf, a lawyer should take measures to protect the client’s interests which may include seeking appointment of a guardian, guardian ad litem, or other court-approved representative.

Committee Notes: When representing a client with diminished capacity or special needs, “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” Model Rule 1.14; Restatement § 24(1); In re M.R., 638 A.2d 1274 (N.J.
This includes keeping the client reasonably informed and explaining matters to the extent necessary to permit the client to make informed decisions. *Model Rule* 1.4. It also includes abiding by the client’s decisions about whether and on what terms to settle the case, if the client can adequately act in his or her own interests by making an adequately considered decision. *Model Rule* 1.14(a) and (b).

Clients generally should be presumed to be capable of making decisions and participating in the lawyer-client relationship. When a serious question arises as to whether the client has the capacity to direct the settlement process, the lawyer should seek to ascertain as reliably as is practicable the scope and limits of the client’s capacity, taking into account that settlement of a dispute may permanently affect the client’s rights and interests. In forming conclusions about the client’s capacity, “the lawyer must take account not only of information and impressions derived from the lawyer’s [communications with the client], but also of other relevant information that may reasonably be obtained, and the lawyer may in appropriate cases seek guidance from other professionals and concerned parties.” N.Y. City Eth. Op. 1997-2.

When a client lacks the capacity to make settlement decisions, a lawyer should abide by the decision of a guardian or other legal representative who is acting within the scope of his or her authority to direct the representation. The lawyer may not make the decision whether to settle on his or her own, unless legally authorized to do so. Ordinarily, absent a court order authorizing the lawyer to make decisions on behalf of the client in the litigation, the lawyer is not so empowered. *See* Conn. Informal Op. 97-19; Charles W. Wolfram, *Modern Legal Ethics* 161 (2d ed. 1986) (the lawyer representing an incompetent client is still “only a lawyer and not a full legal representative” of the client).

If a lawyer concludes that a client cannot adequately act in the client’s own interest in making decisions, and no guardian or other legal representative has been appointed for the client, the lawyer should seek
the client’s authorization to obtain mental health assistance or appointment of a legal representative. If the client refuses to authorize such steps, the lawyer should evaluate whether pursuing the appointment of a guardian over the client’s objections appears in the best interests of the client. In the settlement context, the determination of whether seeking a guardian is in the best interests of the client should include consideration of whether the attorney believes pursuit of settlement opportunities is in the client’s best interests, whether the settlement will be better served by involvement of a guardian, whether the process and result will be aided by the active involvement of an independent person without personal interest in the settlement (such as a family member, mental health professional, other independent counselor or the court), how incapacitated the client is, the probable costs of obtaining a guardian in comparison to the amounts in controversy in the dispute, and whether the trauma that the client may suffer from appointment of a guardian makes the appointment seem unwarranted or seems simply to be an inescapable consequence of actions believed to be in the client’s best interests. Model Rule 1.14 (b) and comments 3, 5 and 7.

The lawyer should seek to take the action that is the least restrictive under the circumstances and be mindful that appointment of a guardian can constitute a serious deprivation of the client’s rights and ought not to be undertaken if other less drastic solutions are available. ABA Formal Op. 96-404 (1996). Limited disclosure of the client’s condition may also be authorized when the protective action does not extend as far as the initiation of guardianship proceedings. ABA Informal Op. 89-1530 (1989). Under relevant law or ethics rules, a lawyer may have broad discretion in making these decisions. See Model Rule 1.14, comment 7 (“Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer.”)).
3.5 Multiple Clients Represented by the Same Counsel

A lawyer who represents two or more clients shall not counsel the clients about the possibility of settlement or negotiate a settlement on their behalf if the representation of one client may be materially limited by the lawyer’s responsibilities to another client, unless the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law and does not involve assertion of a claim by one client against another, and each client gives informed consent in writing.

Committee Notes: A lawyer ordinarily will not reach the point of representing multiple clients in settlement discussions without having concluded at the outset of the representation that the lawyer could represent each client in the dispute because their interests were generally aligned. See generally Model Rule 1.7, comment 28. If contentious litigation or negotiations between the clients are imminent or contemplated, the lawyer cannot undertake representation of both clients. Model Rule 1.7, comment 29. Even when the lawyer’s initial conclusion that multiple clients can be represented was well-founded, however, consideration later of possible settlement options can generate circumstances where interests emerge as potentially divergent, if not actually conflicting. Conflicts can arise from differences among clients in the strength of their positions or the level of their interest in settlement, or from proposals to treat clients in different ways or to treat differently positioned clients in the same way.

A lawyer must ensure that differences among clients’ positions are considered in the settlement negotiations. A lawyer may continue the representation of multiple clients in settlement negotiations only if the lawyer reasonably believes that the lawyer will be able to resolve the matter on terms compatible with each client’s interests. A lawyer’s conclusion to that effect will be sustainable, even if the settlement of one
client’s claim may materially affect the interests of another client, if the lawyer reasonably concludes that the negotiation of such settlement creates no material limitation on the nature, quality or zealousness of the lawyer’s representation of any individual client, and if all clients give consent after full disclosure of all material information. Model Rule 1.7(b). This joint representation sometimes properly occurs, for example, when a lawyer represents similarly situated family members against a mutual adversary, or a corporate entity and one or more of its executives in a dispute in which the interests of both are entirely congruent.

Because many dynamics of settlement negotiation will create situations where the interests of multiple clients are sufficiently different to create a conflict, a lawyer representing several clients will often have to assess whether the conflict is waivable. The most common example of an unwaivable conflict is where the settlement of one client’s claim is conditioned upon the client’s taking a position against another client’s interests. In this circumstance, the attorney cannot represent both clients in the settlement. Thus, if there is a reasonable possibility of reaching a proposed settlement which includes terms that would be beneficial or otherwise acceptable to one client but adverse or otherwise unacceptable to another, the lawyer ordinarily should withdraw from representation of one or both of the clients. If, however, the client potentially favored by the settlement makes an informed decision after full disclosure directing the lawyer not to pursue the settlement terms at issue, or if the client affected by the potential adversity nevertheless concludes after full disclosure that the lawyer remains the best representative for the client’s claims and consents to the settlement terms, the lawyer may proceed to conclude the settlement on behalf of the multiple clients. The lawyer, however, should advise the affected clients in these circumstances to seek independent advice from separate counsel before proceeding to conclude the settlement on behalf of the multiple clients.

Similarly, when a settlement would provide some benefit to all
clients but arguably benefit a particular client or group of clients more than others, the lawyer must evaluate the settlement in the context of the claims of each client separately and determine, taking into account the interests of each client, whether to treat the claims individually or in groups. The attorney may continue to represent multiple clients, and may settle multiple claims even on different terms and even based on generalized groupings, but only with full disclosure to all clients and meaningful consent from each client. The lawyer’s provision of information in connection with such consent should include an explanation of the implications of the group settlement and a discussion of the possible advantages and disadvantages in settling the client’s claim along with the claims of others. In most circumstances, even if the settlement fund is not so fixed that a payment by or to one client will necessarily affect the amount payable by or to another client, full disclosure is necessary to obtain multiple clients’ consent. This disclosure should include an explanation of what the other clients are paying or being paid, so that each client (and any separate lawyer the client retains for advice on whether to consent to the continued multiple representation) can make an informed assessment of whether that client’s treatment in comparison to others is fair.

If the settlement involving multiple clients is an aggregate or global settlement (defined as one where a lump sum is negotiated to settle a number of claims or one where a proffered settlement offer is contingent on another client’s acceptance of another proffered settlement offer), then the provisions of Model Rule 1.8(g) apply. That rule provides: “A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, . . . unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.”
3.6 Class Actions

An attorney representing a class in settlement of a class action must not only satisfy applicable procedural and legal requirements associated with submission of any proposed class settlement for judicial approval, but also should insure during class settlement negotiations that any agreement providing different recoveries to different categories of class members is grounded upon materially distinct circumstances supporting such different recoveries, and is supported by the attorney’s good faith belief that the settlement is fair to each group. An attorney should not represent class members whose interests have become adverse in connection with settlement of class actions.

Committee Notes: An attorney will often face situations in negotiating class action settlements where different groups within the class – sometimes identified in commonly represented subclasses, but often not – are offered different recoveries because not all class members’ claims or asserted injuries are precisely identical. The nature of the class action warrants a slightly modified and less rigid application in these circumstances of some of the general rules associated with representation of multiple parties. These include the general rule that a lawyer cannot negotiate different recoveries when representing multiple clients without obtaining each client’s consent after full disclosure, and the general rule that an attorney may not represent clients having differing interests without obtaining the consent of each after full disclosure (a rule that may particularly be implicated when the availability of a limited or fixed amount of settlement funds means that increasing the recovery for one group of class members might result in a decrease in the recovery to others). Also, representation of a class does not mean that unnamed members of the class are necessarily considered to be clients of the lawyer representing the class. Model Rule 1.7, comment 25.
Applicable legal rules mandate procedural protections in class action settlements that are reasonably designed to adapt these general rules to the special context of class action settlement. Those legal rules require such protections as reasonable notice to the class of any proposed settlement that could be binding on its members, provision of an opportunity to object to any proposed settlement, communication of the entitlement to opt out of a proposed settlement and proceed individually in many forms of class actions, and court approval. Notice of a proposed settlement will be adequate as a legal proxy for the ethical obligation to notify all represented clients even though notice virtually never actually reaches all class members – and in the case of published notice, may not even reach a majority of them. See Federal Rule of Civil Procedure 23(c)(2); Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1973) (requiring only “best notice practicable under the circumstances”). Similarly, court approval after notice and an opportunity to object or withdraw becomes a legal proxy for the ethical obligation to obtain consent to the settlement from each represented person.

While these legal requirements provide important protections to individual class members, adherence to them does not relieve the attorney from all personal ethical responsibility for protecting the interests of individual class members. An attorney representing a class may negotiate different levels of recovery for different class members based on their different circumstances, but should not knowingly disadvantage members of one group within the class for the benefit of members of another group on bases unrelated to differences in their legal or factual positions, and should not present for court approval a proposed settlement providing different recoveries to different groups of class members absent a good faith, personal belief that the settlement is fair to each group. If a lawyer becomes concerned that a proposed settlement would advance the interests of one group within the class but not the interests of another group, the lawyer should raise with the court the potential need for separate representation for separate groups.
An attorney also should not continue to represent different groups of class members if the interests of members of one group become adverse to the interests of members of another. An attorney cannot represent and be an advocate for subclasses with opposing interests, and may not be able to represent class members supporting a settlement while also representing individuals who are objecting to it. The determination whether an attorney can represent a class in seeking approval of a settlement while also representing individual class members who have opted out will depend on the particular circumstances of the case, since opting out and pursuing individual claims may amount to adversity to the class members supporting settlement in some cases and may not reflect such adversity in others. See, e.g., In re Prudential Ins. Co. of America Sales Practice Litig., Civ. No. 95-4704 (D.N.J.); Duhaime v. John Hancock Mutual Life Ins. Co., No. 96-CV-10706-6AO (D. Mass.).

For a discussion of ethical issues associated with negotiating attorneys' fees as part of a class action settlement, see infra Section 4.2.2.

3.7 Clients With Insured Claims/Dealing with Insurers

The ordinary principles governing an attorney's obligations in connection with settlements apply to clients covered by insurance. The insured may be the sole client even though the insurance contract obligates the insurer to pay the attorney's fees and to indemnify the insured. The insurer may or may not also be the client depending upon applicable law, the contract, and the facts of the particular case. If both the insured and the insurer are the lawyer's clients, the lawyer should be governed by the rules respecting representation of multiple clients.
Committee Notes: Insurance contracts provide for a broad range of possible arrangements by which one or the other of an insurer and insured select the counsel who will represent the insured and be paid by the insurer. See, e.g., N.Y. State Urban Dev. Corp. v. VSL Corp., 738 F.2d 61 (2d Cir. 1984) (insurer may participate in selection of the insured’s independent counsel); San Diego Navy Federal Credit Union v. Cumis Ins. Soc’y, Inc., 208 Cal. Rptr. 494 (Cal. App. 4 Dist. 1984) (consent to insurer’s choice of counsel deemed withdrawn when insured retained independent counsel); Nandorf, Inc. v. CNA Ins. Cos., 479 N.E.2d 988 (Ill. App.1 Dist. 1985) (insurer obliged to pay for separate counsel for insured). In all of these contexts, the insured is the client, and the lawyer’s duty is to the insured without regard to the insurer’s payment of legal fees or past relationship with the lawyer. See Model Rule 1.8(f) (lawyer cannot accept compensation from anyone other than the client unless the client gives informed consent and the compensation arrangement does not interfere with the lawyer’s independence or the client-lawyer relationship); Model Rule 5.4(c) (lawyer “shall not permit a person who . . . pays the lawyer to render legal services to another to direct or regulate the lawyer’s professional judgment”); Model Rule 1.7, comment 13 (“A lawyer may be paid from a source other than the client, . . . if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty or independent judgment to the client.”) (“when an insurer and its insured have conflicting interests on a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel’s professional independence”). This duty of loyalty extends to all aspects of a lawyer’s duties relating to settlement.

In some jurisdictions, the law treats the attorney as representing both the insurance carrier and the insured. Such multiple representation is ethically permitted in appropriate circumstances. See, e.g., ABA Formal Op. 96-403 (1996), at 2, 3 (1996) (“Provided there is appropriate
disclosure, consultation and consent, any of these arrangements would be permissible...), cf. Silver & Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L.J. 255 (1995). *See also Model Rule 1.7(b)(2).* The determination whether only the insured or both insured and insurer (as co-clients) have entered into a client-lawyer relationship with the designated lawyer must be made based on the facts of the particular case and applicable law. *See Restatement §§ 14 and 134* (formulation of the attorney-client relationship and the status of insureds and insurers). When the lawyer is formally representing both insured and insurer, the lawyer’s obligations in the settlement context are governed by the rules respecting multiple client representation. *See Model Rule 1.7(b)(2).*

In defending and settling a dispute in which the defendant has insurance coverage, the financial and other interests of the insurance carrier and those of the insured will often diverge. The insured’s economic interests may focus on the deductible rather than the full amount claimed (particularly if future premiums are not expected to be heavily experience-rated) and may often be supplanted by non-economic interests if it appears that the deductible will be lost and the insured’s funds consequently no longer seem at risk. By contrast, the insurer’s economic interests may correspond only with its own different range of coverage, and insurers typically have little or no interest in non-economic considerations. When such divergences arise in the context of the lawyer’s representation of both the insured and the insurer, the attorney is obliged to advance the interests of the insured, and to inform the insurer that the attorney is treating the insured’s interests as paramount. *See ABA Formal Op. 96-403* (1996), at 5-6 (1996) (dispute between insurer and counsel over settlement may require lawyer’s withdrawal; thereafter former-client conflicts rule may preclude lawyer from assisting insurer in reaching a settlement objected to by the insured).

Insured clients, acting under contractual obligations or otherwise, often authorize the lawyer to consult with or take direction from the
insurer concerning settlement. Some insurance contracts require the insured to delegate to the insurer the right to settle claims. *Cf. Rogers v. Robson, Masters, Ryan, Brummund & Belom*, 407 N.E.2d 47 (Ill. 1980). The lawyer’s representation of the insured often may include consultation with the client about the client’s obligations under the insurance contract and the ramifications of failing to comply with the requirements of that contract. Irrespective of the scope of delegation by the insured, however, the insured remains a client, and the lawyer may need to consult with and obtain authorization from the insured before finalizing settlement of a claim.

3.8 Organizational Clients

A lawyer representing a client that is an organization should generally obtain settlement authority, and take direction concerning settlement, from the representative authorized to act on the organization’s behalf.

*Committee Notes:* “An organizational client is a legal entity, but it cannot act except through its officer, directors, employees, shareholders and other constituents.” *Model Rule* 1.13, comment 1. *See generally* *Restatement* § 96 addressing representation of an organization. Thus, the authorized representative of an organization charged with supervising a lawyer’s settlement efforts for the organization may be an officer, director, an in-house lawyer or other employee, a shareholder, or a person having an analogous position in an organization other than a corporation. *Id.* Any such identified representative generally should be considered the spokesperson for the client for purposes of the lawyer’s representation of the organization, unless the lawyer has reason to question whether the representative has authorization to perform that role. In the latter circumstances the lawyer should seek clarification of who will be making decisions for the organization.
Ordinarily, a lawyer has no obligation to seek, within the organization’s hierarchy, review of an authorized representative’s settlement directive merely because the attorney believes the directive reflects poor judgment or otherwise doubts the utility or prudence of the authorized representative’s directive. “Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province.” Model Rule 1.13, comment 3.

Different considerations arise, however, when a lawyer knows that the authorized representative is acting, intends to act or refuses to act in a manner related to the representation in violation of a legal obligation to the organization, or that the organization may be substantially injured by action of the authorized representative that is in violation of law, in which case the lawyer must proceed “as is reasonably necessary in the best interest of the organization.” See Model Rule 1.13(b); Model Rule 1.13, comment 3.

Section 4 Issues Relating To A Lawyer’s Negotiations With Opposing Parties

4.1 Representations and Omissions

4.1.1 False Statements of Material Fact

In the course of negotiating or concluding a settlement, a lawyer must not knowingly make a false statement of material fact (or law) to a third person.
Committee Notes: A lawyer is required to be truthful when dealing with others on a client’s behalf. Model Rule 4.1, comment 1. False or misleading statements are unethical when they are knowing misstatements of material fact (or law). The Model Rules define “knowledge” as “actual knowledge of the fact in question,” but such knowledge “may be inferred from circumstances.” Model Rules, Preamble, Scope and Terminology. The ethical requirement of truthfulness when speaking to others includes not only false statements to those who have interests adverse to one’s client, but also misrepresentations to government officials, opposing counsel, and mediators or other third party neutrals. See generally ABA Annotation to Model Rule 4.1. See also Model Rule 1.2(d), prohibiting a lawyer from counseling a client to engage, or assisting a client, in conduct that the lawyer knows is criminal or fraudulent.

Unethical false statements of fact or law may occur in at least three ways: (1) a lawyer knowingly and affirmatively stating a falsehood or making a partially true but misleading statement that is equivalent to an affirmative false statement; (2) a lawyer incorporating or affirming the statement of another that the lawyer knows to be false; and (3) in certain limited circumstances, a lawyer remaining silent or failing to disclose a material fact to a third person. This section addresses the first two of these situations; the next section deals with silence and nondisclosure.

The prohibition against making false statements of material fact or law is intended to cover only representations of fact, and not statements of opinion or those that merely reflect the speaker’s state of mind. Whether a statement should be considered one of fact, as opposed to opinion, depends on the circumstances. Model Rule 4.1, comment 2. “Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category. . . .” Model Rule 4.1, comment 2. (This comment was amended in February 2002 to make clear that even these types of
statements may be statements of material fact.) “Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker’s knowledge of facts reasonably implied by the statement or as merely an expression of the speaker’s state of mind.” Restatement, § 98, comment c. Factors to be considered include the past relationship among the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement (for example, whether the statement is presented as a statement of fact), related communications, the known negotiating practices of the community in which both are negotiating and similar circumstances. Restatement, § 98, comment c. In making any such statements during negotiation, a lawyer should consider the effect on his/her credibility and the possibility that misstatements in negotiation can lead not only to discipline under ethical rules, but also to vacatur of settlements and civil and criminal liability for fraud. Model Rule 4.1., comment 2.

Reliance by and injury to another person from misrepresentations ordinarily is not required for purposes of professional discipline. See Restatement, § 98, comment c. Moreover, some jurisdictions do not include the “materiality” limitation that is contained in Model Rule 4.1. Even if materiality is required for disciplinary purposes, as a matter of professional practice in settlement negotiations, counsel should not knowingly make any false statement of fact or law. See Section 2.3, supra, and see also Model Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation.” Some jurisdictions may interpret Model Rule 8.4(c) not to require the falsity, scienter, and materiality requirements of Model Rule 4.1, thus creating textual and analytical tensions with respect to the interplay between Model Rules 4.1 and 8.4(c). See, e.g., Restatement, § 98, comment c.
4.1.2 Silence, Omission, and the Duty to Disclose Material Facts

In the course of negotiating or concluding a settlement, a lawyer must disclose a material fact to a third person when doing so is necessary to avoid assisting a criminal or fraudulent act by a client, unless such disclosure is prohibited by the ethical duty of confidentiality.

Committee Notes: A lawyer generally has no ethical duty to make affirmative disclosures of fact when dealing with a non-client. Under certain circumstances, however, a lawyer’s silence or failure to speak may be unethical. Model Rule 4.1(b) and Model Rule 4.1, comment 3.

The duty to disclose may arise in at least three situations: (1) a lawyer has previously made a false statement of material fact or a partially true statement that is misleading by reason of omission; (2) a lawyer learns of a client’s prior misrepresentation of a material fact; and (3) a lawyer learns that his or her services have been used in the commission of a criminal or fraudulent act by the client, “unless such disclosure is prohibited by the ethical duty of confidentiality.” Thus, the disclosure duty under Model Rule 4.1(b) is severely limited by the prohibition against revealing without client consent information covered by Model Rule 1.6. For example, under Model Rule 1.6, a lawyer may (but is not required to) reveal information a lawyer has learned during representation of a client (including knowledge of the falsity of representations), but only “to the extent the lawyer reasonably believes necessary” to prevent “reasonably certain death or substantial bodily harm.” Model Rule 1.6.

The ethical duty of confidentiality under Model Rule 1.6, as noted above, trumps the ethical duty of disclosure under Model Rule 4.1(b); however, states have adopted different versions of these rules and there is considerable variation in the rules’ application by the states. Some
states either allow or require disclosure in situations where the *Model Rules* do not. Accordingly, particularly in this area of the law and the ethics governing lawyers, a lawyer should be careful to check the controlling ethical rules in the relevant jurisdiction. Moreover, even if a lawyer is not subject to discipline for failure to disclose, such failure may be inconsistent with professional practice and may possibly jeopardize the settlement or even expose the lawyer to liability. See Section 2.3, *supra*.

Additionally, the ethical duty of confidentiality under *Model Rule* 1.6, which, as noted above, trumps the ethical duty of disclosure under *Model Rule* 4.1(b), is itself trumped by the lawyer’s disclosure obligations under *Model Rule* 3.3 concerning candor before tribunals, regardless of whether the client consents to revelation. And, even where a lawyer’s disclosure duties to a tribunal are not triggered directly under *Model Rule* 3.3, the ABA Standing Committee on Ethics and Professional Responsibility and ethics committees in some jurisdictions have held that lawyers must disclose certain types of information under *Model Rule* 4.1, even though the revelation arguably would violate *Model Rule* 1.6. One example is the death of a client during negotiations to settle personal injury claims. ABA Formal Op. 95-397 (1995) (lawyer for personal injury client who dies before accepting pending settlement offer must inform court and opposing counsel of client’s death); *Kentucky Bar Ass’n v. Geisler*, 938 S.W. 2d 578 (Ky. 1997) (lawyer who settled personal injury case without disclosing that her client died violated the state’s version of *Model Rule* 4.1, because failure to disclose equals affirmative misrepresentation of material fact). Another example is the notion that a lawyer should notify opposing counsel of an advantageous scrivener’s error in a document, notwithstanding that the lawyer’s knowledge of the error is “information relating to the representation” within the meaning of *Model Rule* 1.6’s prohibition against disclosures without client consent. See ABA Informal Op. 86-1518 (1986). See also *infra* Section 4.3.5, regarding exploiting an opponent’s mistake.
4.1.3 Withdrawal in Situations Involving Misrepresentations of Material Fact

If a lawyer discovers that a client will use the lawyer’s services or work product to further a course of criminal or fraudulent conduct, the lawyer must withdraw from representing the client and in certain circumstances may do so “noisily” by disaffirming any opinion, document or other prior affirmation by the lawyer. If a lawyer discovers that a client has used a lawyer’s services in the past to perpetuate a fraud, now ceased, the lawyer may, but is not required to, withdraw, but a “noisy withdrawal” is not permitted in such circumstances.

Committee Notes: In the context of settlements, as generally, “a lawyer shall . . . withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law.” Model Rule 1.16(a)(1) (emphasis added). “A lawyer may withdraw from representing a client . . . if the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent,” or “the client has used the lawyer’s services to perpetrate a crime or fraud.” Model Rule 1.16(b)(2) and 1.16(b)(3), (emphasis added). See also Model Rule 1.6, comments 15 and 16, and Restatement Section 32(3)(e). (In any case, however, “[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.” Model Rule 1.16(c).)

The text of the Model Rules does not explicitly authorize a “noisy withdrawal.” The ABA, however, has interpreted the comments and rules to allow a “noisy withdrawal,” i.e., notice of withdrawal and disaffirmance of the lawyer’s work product, when (but only when): (i) the lawyer knows that the client will engage in criminal or fraudulent conduct that will implicate the lawyer’s past services; (ii) the lawyer’s withdrawal from further representation as mandated by Model Rule 1.16(a)(1) in silence
will be ineffective to prevent the client from using the lawyer’s work product to accomplish its unlawful purpose; and (iii) disaffirmance of the lawyer’s work product is appropriate to avoid violating Model Rule 1.2(d), which prohibits assisting a client in conduct that the lawyer knows is criminal or fraudulent. See ABA Formal Op. 92-366 (1992).

4.2 Agreements with Opposing Parties Relating to Settlement

4.2.1 Provisions Restricting Lawyer’s Right To Practice Law

A lawyer may not propose, negotiate or agree upon a provision of a settlement agreement that precludes one party’s lawyer from representing clients in future litigation against another party.

Committee Notes: Ethics rules expressly prohibit lawyers for private parties from offering or making a settlement agreement that includes a restriction on a lawyer’s right to practice law. See Model Rule 5.6(b); Model Code DR 2-108. The principal rationales are that a settlement provision that “buys off” a party’s lawyer unjustifiably deprives future litigants of the opportunity to employ that lawyer and that the possibility of such a provision creates a conflict between the interests of the lawyer and the client. See, e.g., ABA Formal Op. 93-371 (1993).

The most obvious example of an ethically impermissible settlement provision of this nature is one that expressly prohibits a plaintiff’s lawyer from subsequently representing other plaintiffs in litigation against the defendant. Arrangements calculated to achieve this same result indirectly are also impermissible when they serve as partial consideration for a settlement, notwithstanding that the same arrangement might be permissible if it were made independently of a settlement. For example, a lawyer may not negotiate or agree upon a settlement provision whereby the defendant will retain the plaintiff’s lawyer in the future as a consultant or attorney, so that conflict of interest rules will prevent the
plaintiff’s lawyer from representing future plaintiffs against the defendant without the defendant’s consent. Although provisions of this nature may be legally enforceable in some jurisdictions, they are nevertheless unethical if they are designed to “buy off” the lawyer and thereby restrict a lawyer’s right to practice law.

4.2.2 Provisions Relating to the Lawyer’s Fee

When an attorney’s fee is a subject of settlement negotiations, a lawyer may not subordinate the client’s interest in a favorable settlement to the lawyer’s interest in the fee.

Committee Notes: There are various contexts in which lawyers negotiate over the amount that one party will pay to the other to compensate for the other party’s attorneys’ fees. Although the conventional American rule is that each party must bear its own legal expenses, statutes and common law sometimes require the losing party to pay the prevailing party’s attorney’s fee. Examples include the Civil Rights Act (42 U.S.C. § 1988), the patent and copyright laws (35 U.S.C. § 285; 17 U.S.C. § 505) and state deceptive trade practice acts (see Uniform Deceptive Trade Practices Act, § 313). Similarly, when a class action settlement is designed to result in a common fund for the benefit of class members, courts routinely permit an award of fees from that fund to plaintiffs’ counsel. See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 257 (1975); Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). In these circumstances, the parties often negotiate a fee acceptable to both sides to be presented to the court for its approval.

If the lawyer’s fee arrangement with the client entitles the lawyer to whatever attorney’s fee is awarded, then the lawyer has a financial interest in negotiating the highest possible fee. This poses a risk that trade-offs will be made between the amount of the fee and other settlement provisions, such as those relating to the amount of compensation to be paid to the plaintiff or, in an injunctive proceeding, the terms of the injunction. These trade-offs will not necessarily be explicit.
Although lawyers are certainly permitted to seek compensation for their work, they must resolve tensions between the client’s interest in an optimal recovery and their own interest in optimal compensation in favor of the client’s interests. A lawyer may not forego other favorable settlement terms in exchange for a favorable fee. Even when the court ultimately must approve any negotiated fee, the lawyer has an independent obligation not to enter arrangements that sacrifice client interests for a larger fee.

The tension between the interests of the plaintiff and the plaintiff’s counsel are manifest in cases where the plaintiff is asked to forego an attorney’s fee altogether in exchange for other favorable terms. The United States Supreme Court’s decision in Evans v. Jeff D., 101 S.Ct. 1531 (1986), addressed this scenario. The Court held that a defendant in a civil rights action governed by the fee-shifting provisions of 42 U.S.C. § 1988 may condition a settlement offer on the plaintiff’s waiver of his claim for attorneys’ fees. The court resolved the apparent tension between the interests of the plaintiff and his attorney by concluding that, under the statute, any attorney’s fees recovered belong to the plaintiff, not to the plaintiff’s attorney.

A lawyer’s retainer agreement may address the possibility that the defendant will ask the plaintiff to forego payment of an attorney’s fee. The lawyer may enter into a conditional contingent fee arrangement, entitling the lawyer to a percentage of the client’s recovery if the client surrenders the right to attorneys’ fees as part of a settlement. It is uncertain, however, whether a lawyer may enter into a retainer agreement that forbids the client from waiving an attorney’s fee. Some ethics opinions have concluded that a lawyer may not do so, because the decision of whether to settle a case and on what terms belongs exclusively to the client; other opinions reach the opposite conclusion depending on the circumstances. See N.Y. City Eth. Op. 1987-4 (not per se unethical for defense counsel to propose settlement conditioned on plaintiff’s waiver of a statutory fee award: case by case analysis is required); Conn. Eth. Op. 97-31 (lawyers may negotiate a settlement premised on a fee waiver, but should be mindful of potential conflicts); Tenn. Eth. Op. 85-F-96 (negotiating fee waivers is not inherently
unethical provided certain conditions are met); Cal. Eth. Op. 1989-114 ("prudent attorney is well-advised to discuss the possibility of a fee waiver settlement with client at the onset of representation;" failure to do so might be a violation of attorney’s duty to provide competent representation); Utah Eth. Op. 98-05 (while it is not unethical for a defense lawyer to make a settlement offer proposing a fee waiver, potential conflicts present other ethical concerns). See generally supra Sections 3.1.3 and 3.2.1. However, one opinion has concluded that the initial retainer agreement may include a provision in which the client commits not to waive any statutory entitlement to fees. See State Bar of Cal., Standing Committee on Prof’l. Resp. and Conduct, Op. 94-136 (1994) (retainer agreement can preclude fee waiver by plaintiff if (i) the agreement is fair and reasonable, (ii) the client agrees in writing after having been advised to seek independent counsel on the issue, (iii) the lawyer keeps the client abreast of settlement offers, and (iv) the client is informed of the opportunity to consult with other counsel about whether to accept a settlement); see also Restatement, § 125. Two commentators have suggested, as an alternative, that the retainer agreement may contain an assignment to the lawyer of the client’s right to recover fees. Yelinosky & Silver, A Model Retainer Agreement for Legal Services Provisions: Mandatory Attorney Fee Provisions, 28 Clearinghouse Rev. 114 (1994).

When the amount of the attorney’s fee is a subject of negotiation, a lawyer should take any available procedural steps to reduce the possibility that the lawyer’s professional judgment, in negotiating other settlement terms, will be adversely influenced by the lawyer’s interest in the fee. One way to do this is to postpone fee discussions until an agreement on other terms has been achieved or nearly achieved. Other possibilities include enlisting the assistance of a mediator to oversee the discussions, or agreeing that the request for fees will be presented to the court without prior agreement on a proposed figure.

In a class action, the attorneys’ fees recovery will often be drawn from a common fund of cash paid by the defendant to the class. In that event, lawyers for the class should negotiate settlement terms – and, in particular, the amount of the common fund – without regard to attorneys’ fees. The plaintiff class and the defendant can agree on the amount of
the common fund, but not how the fund is divided between the class and class counsel. In some class actions, however, the defendant may have to provide additional funds to cover the attorneys’ fees. In that event, it may be appropriate to negotiate the attorneys’ fees at the same time as other terms; however, class counsel must not agree to reduce the class’s recovery in order to obtain a higher fee award.

4.2.3 Agreements Not To Report Opposing Counsel’s Misconduct

A lawyer must not agree to refrain from reporting opposing counsel’s misconduct as a condition of a settlement in contravention of the lawyer’s reporting obligation under the applicable ethics rules.

Committee Notes: Settlement is conventionally designed to end all disputes related to a matter, including any existing or potential claims directed at opposing parties’ attorneys, and parties often include opposing counsel in the releases they enter as part of a settlement. However, ethics rules limit the extent to which an attorney may properly agree to forego reporting opposing counsel’s misconduct to applicable disciplinary authorities.

Subject to confidentiality requirements, in most jurisdictions a lawyer has an ethical obligation to report another lawyer’s serious disciplinary misconduct to the appropriate professional authority, See Model Rule 8.3(a); Model Code DR 1-103(A). The reporting obligations are mandatory and cannot be vitiated by private agreement, including by settlement agreement. Consequently, a settlement agreement may be conditioned on a lawyer’s undertaking not to report opposing counsel’s misconduct only if the information in issue falls outside the mandatory reporting obligation.

Similarly, a lawyer may not enter into an agreement that disables the lawyer from fulfilling a future reporting obligation. Although a lawyer may not have a reporting obligation at the time of the settlement, a reporting obligation may later arise. For example, the lawyer may initially
have merely a suspicion, and not reportable knowledge, of another lawyer’s serious disciplinary misconduct; the lawyer may not enter an agreement that would preclude the lawyer from filing the requisite report in the event that the lawyer acquires enough additional information to clearly establish that serious misconduct in fact occurred. Likewise, the lawyer’s initial knowledge of misconduct may not be reportable because the jurisdiction’s reporting obligation is limited by the lawyer’s duty of confidentiality and the lawyer’s information is confidential; the lawyer may not enter an agreement that would prevent reporting the misconduct in the event that the client later consents to disclosure. In general, a lawyer should encourage a client to permit the lawyer to report another lawyer’s misconduct when disclosure of client confidences would not substantially prejudice the client’s interests. Model Rule 8.3, comment 2.

A lawyer may, however, agree not to report possible misconduct that is and will be outside the reporting obligation. In many jurisdictions, this would include information about misconduct by opposing counsel that does not raise a substantial question about the opposing counsel’s honesty, trustworthiness or fitness as a lawyer. Further, the lawyer’s reporting obligation would not prevent a lawyer from negotiating an agreement that the client, as opposed to the lawyer, will not report opposing counsel’s misconduct.

An agreement not to report another lawyer’s possible misconduct, where such an agreement is otherwise permissible, must not be negotiated in such a manner as to run afoul of restrictions against impermissible threats. The Model Code expressly prohibited a lawyer from threatening to present criminal charges solely to obtain an advantage in a civil matter, DR 7-105, and it might have been read to forbid threats to present disciplinary charges as well. Criminal laws that forbid blackmail and extortion may be to like effect. Lawyers should therefore avoid negotiating, in a threatening or extortionate manner, terms relating to the reporting of criminal or disciplinary misconduct. See infra Section 4.3.2 and accompanying Committee Note; ABA Formal Ops. 92-363 (1992) and 94-383 (1994).
4.2.4 Agreements on Return or Destruction of Tangible Evidence

Unless otherwise unlawful, a lawyer may agree, as part of a settlement, to return or dispose of documents and other items produced in discovery.

**Committee Notes:** In general, there is no prohibition against returning or disposing of documents produced in discovery once a lawsuit is over. Parties may have a legitimate interest in securing the return or destruction of documents that contain embarrassing or proprietary information. Parties may therefore agree on the disposition of such material as a term of the settlement. The only exception is where there is a legal obligation to retain or preserve evidence. Ethics rules generally would not impose an additional obligation. See, e.g., Model Rule 3.4 (providing that “a lawyer shall not . . . unlawfully alter, destroy or conceal a document or other material having potential evidentiary value”) (emphasis added).

Such a legal obligation may exist by statute or under tort law governing spoliation of evidence. For example, applicable law may forbid destroying material obtained in a settled lawsuit if the material has evidentiary value in a pending lawsuit, or a reasonably anticipated potential future lawsuit, or if it is known to be relevant to a pending criminal investigation. Likewise, if the material has been subpoenaed by another party, it may not be destroyed.

Further, in some cases a party may be seeking to destroy evidence for a legally improper purpose. For example, the party may be seeking to obstruct justice or perpetrate a fraud. If a lawyer knows that to be the case, the lawyer may not agree to the return or disposition of the evidence or otherwise assist in the unlawful enterprise. See Model Rule 1.2(d).

4.2.5 Agreements Containing Illegal or Unconscionable Terms

A lawyer should not negotiate a settlement provision that the
lawyer knows to be illegal.

**Committee Notes:** The *Model Rules* forbid a lawyer from assisting a client in conduct that is criminal or fraudulent. *Model Rule* 1.2(d). The earlier *Model Code* contained a broader prohibition. It additionally prohibited assisting the client in conduct the lawyer knew to be illegal, even if not fraudulent or criminal. DR 7-102(A)(7). After debate, the *Model Rules* drafters decided not to retain the broader prohibition. Thus, a lawyer is not subject to discipline under the *Model Rules* for assisting a client in pursuing settlement terms the lawyer knows to be illegal or unconscionable, although not fraudulent or criminal. Nonetheless, as a matter of sound professional practice, a lawyer should discourage a client from pursuing such terms and should decline to pursue them on the client’s behalf.

### 4.2.6 Agreement to Keep Settlement Terms and Other Information Confidential

Except where forbidden by law or disciplinary rule, a lawyer may negotiate and be bound by an agreement to keep settlement terms and other information relating to the litigation confidential.

**Committee Notes:** In general, as a condition of settlement, a party may agree not to disclose the settlement terms and certain other information relating to the lawsuit, such as information produced by the opposing party in discovery. As the party’s agent, the lawyer will ordinarily be bound by such an agreement, since settlement terms and other matters concerning a lawsuit will ordinarily be confidential information that may not be disclosed without the client’s consent after consultation. *Model Rule* 1.6. (A lawyer’s duty of confidentiality applies not only to attorney/client privileged information but also to other information learned in the course of the representation.) Therefore, in connection with a settlement, the general rule is that a lawyer may agree not to reveal the settlement terms and other specified information that is subject to the lawyer’s confidentiality duty.

There may also be ethical restrictions on the scope of confidentiality agreements. For example, a lawyer may not agree to preserve the confidentiality of information that the lawyer has an ethical duty to report, such as information establishing the opposing lawyer’s serious disciplinary misconduct. See supra Section 4.2.3. Nor may the lawyer agree to keep information confidential where, in doing so, the lawyer knowingly engages in a fraud, deceit or misrepresentation. Cf. In re Fee, 898 P.2d 975 (Ariz. 1995) (disciplining lawyer for failure to disclose secret side agreement concerning payment of attorney’s fees).

Further, as discussed in the Committee Notes to Section 4.2.1, supra, many jurisdictions have a disciplinary rule modeled on Model Rule 5.6, which provides that “[a] lawyer shall not participate in offering or making...[a]n agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between private parties.” If a confidentiality term of a settlement agreement restricts a lawyer from using, as distinguished from revealing, confidential information, it may be forbidden as an indirect restriction on the lawyer’s right to practice. See, e.g., ABA Formal Op. 00-417 (2000). Likewise, the agreement may be impermissible on this ground if it restricts the lawyer from revealing information (for example, publicly available information) that is not subject to the lawyer’s duty of confidentiality. See, e.g., N.Y. Eth. Op. 730 (2000).

4.3 Fairness Issues
4.3.1 Bad Faith in the Settlement Process

An attorney may not employ the settlement process in bad faith.

**Committee Notes:** It is axiomatic that lawyers may not use the settlement process in bad faith. Ethics rules, procedural rules and statutes forbid the bad faith use of the litigation process. See, e.g., *Model Rules* 3.2 and 4.4. The ordinary prohibition is applicable to settlement negotiations as to other phases of litigation. Therefore, the settlement process should not be used solely to delay the litigation or to embarrass, delay, or burden an opposing party or other third person. For example, a lawyer would be acting in bad faith if he were to schedule a mediation for the purpose of disrupting the opposing counsel’s trial preparation.

It is not bad faith for a party to refuse to engage in settlement discussions or to refuse to settle. Settlement is not an obligation, but an alternative to litigation. The choice to pursue it to fruition should be that of the client. However, it may be impermissibly deceptive, and thus an act of bad faith, for a lawyer to obtain participation in settlement discussions or mediation or other alternative dispute resolution processes by representing that the client is genuinely interested in pursuing a settlement, when the client actually has no interest in settling the case and is interested in employing settlement discussions or alternative dispute resolution processes solely as a means of delaying proceedings or securing discovery. *See supra*, Section 2.3.

4.3.2 Extortionate Tactics in Negotiations

A lawyer may not attempt to obtain a settlement by extortionate means, such as by making extortionate or otherwise unlawful threats.

**Committee Notes:** Not all threats are impermissible in the context of settlement negotiations. Most obviously, it is proper to threaten to file a civil lawsuit if the opposing party does not settle a dispute, if there is a
good faith basis for a civil claim. It is also proper to remind the opposing party of the ordinary costs of proceeding to trial and to suggest that it may be in the opposing party’s interest to avoid these costs by agreeing to a settlement. For example, it is obviously permissible to point out that, if the case proceeds to trial, evidence that is embarrassing to the opposing party will be offered in evidence, if the evidence is legally admissible. While this may be characterized as a “threat,” it would not be an improper one.

Lawyers must avoid threats that are extortionate or otherwise unlawful or unethical, however. See, e.g., Robertson’s Case, 626 A.2d 397 (N.H. 1993) (plaintiff’s civil rights lawyer violated disciplinary rules by persistently threatening city lawyers with serious criminal and disciplinary charges and publicly maligning them in an aggressive effort to settle case). Threats that would be illegal if made to convince a party to pay money outside the context of a lawsuit may also be illegal if made to pressure a party to agree to a settlement. Examples would include threats to publicly reveal embarrassing or proprietary information other than through the introduction of admissible evidence in a legal proceeding.

While lawyers have obligations to report certain unethical conduct (see Model Rule 8.3), authorities have held that it is unethical for a lawyer to threaten to report another lawyer to the disciplinary authorities to gain an advantage in a civil lawsuit. See ABA Formal Op. 94-383 (1994); Ill. Eth. Op. 87-7 (1988) (although threatening client’s former lawyer, whom client is now suing, with disciplinary action to influence civil suit does not violate Code provision barring threats of criminal charges it violates ban on action that serves merely to injure another); L.A. County Eth. Op. 469 (1992) (lawyer in fee dispute may not use threat of disciplinary charges against other side to gain advantage in fee dispute).

Threats to report a party to the criminal authorities are also unlawful or unethical in some, although not all, situations. The act of making the threat of criminal prosecution sometimes violates criminal law. See, e.g., Fla. Stat. § 836.05 (proscribing a threat to accuse another of a crime with the intent of extorting money). Ethics rules based on DR 7-105 of the Model Code expressly prohibit a lawyer from
threatening to present criminal charges solely to obtain an advantage in a civil matter. Although ethics codes based on the ABA *Model Rules* do not have this express provision, it has been held that a lawyer may use the possibility of presenting criminal charges against an opposing party in a private civil matter to gain relief for the client, only if the criminal and civil matters are related, the report would be warranted by the law and facts, and the lawyer does not try to influence the criminal process. ABA Formal Op. 92-363 (1992); accord Comm. on Legal Ethics v. Printz, 416 S.E.2d 720 (W.Va. 1992) (finding that it was permissible for a lawyer to threaten to press criminal charges against his client’s former employee unless the former employee made restitution of embezzled funds).

Lawyers should take care in employing threats as a means of obtaining favorable settlement terms, because the line between legally permissible and impermissible threats is sometimes a fine one. See, e.g., *In re Finkelstein*, 901 F.2d 1560 (11th Cir. 1990) (reversing order suspending plaintiff’s lawyer from practice where, to pressure the defendant into settling employment discrimination lawsuit, plaintiff’s lawyer wrote to the defendant’s general counsel threatening (a) a report to the NAACP and the SCLC, (b) submission of a story to an ABC News producer, and (c) widespread boycott of defendant’s products, among other things).

4.3.3 Dealing With Represented Persons

A lawyer must not attempt to negotiate a settlement or otherwise communicate about a settlement with a person the lawyer knows to be represented in the lawsuit, except with the permission of the represented person’s counsel or where authorized by law or a court order.

Committee Notes: Communications with a represented person, including a represented entity, are restricted by *Model Rule* 4.2, sometimes called the anti-contact rule, and by equivalent provisions in the ethics codes of every state. The rule restricts a lawyer’s communication concerning settlement, as it restricts communication of

In addition to restricting person-to-person communications between a lawyer and the opposing party, the rule restricts communications in writing. For example, the rule would forbid a lawyer from sending proposed settlement terms directly to the opposing party or sending the opposing party a copy of a letter sent to opposing counsel discussing a possible settlement. Pa. Eth. Op. 91-116 (direct written communication with insurer against wishes of its counsel inconsistent with Model Rule 4.2); S.C. Eth. Adv. Op. 93-16 (copying defendant with a written settlement proposal directed to defendant’s counsel violates Model Rule 4.2). This problem arises when a lawyer believes that opposing counsel has not communicated a settlement offer to the client (notwithstanding the professional obligation to do so). ABA Formal Op. 92-362 (1992) (lawyer who doubts whether opposing counsel has communicated settlement offer to offeree may not communicate directly with offeree, but may advise client that client is free to do so). A professionally proper way to address this problem may be to raise it at mediation or with the court, including a setting in which the opposing party is present.

The anti-contact rule does not by its terms prohibit a lawyer’s client from communicating directly with the opposing party. Notwithstanding some early ethics opinions to the contrary, it is now generally agreed that, if the lawyer’s client decides to discuss a settlement directly with the opposing party, the lawyer has no obligation to discourage the client from doing so. Ethics opinions of different jurisdictions take different views, however, on whether the lawyer may encourage the client to do so or counsel and assist the client by suggesting how to approach client-to-client discussions. Some opinions authorize the lawyer to lend assistance; other opinions forbid such assistance. ABA Formal Op. 92-
362 (1992) (lawyer may advise client that client may communicate with opposing party); Cal. Eth. Op. 1993-131 (lawyer may confer with client regarding strategy of client contacting opposing party directly, but may not discuss the content of client’s communication with opposing party). In 1999, New York State became the first jurisdiction to address this question in its anti-contact rule, which now authorizes the lawyer to counsel the client concerning client-to-client discussions as long as the lawyer gives opposing counsel notice of the client’s intent to speak personally with the opposing party. *N.Y. Lawyer’s Code of Professional Responsibility*, DR 7-104(B). Even outside New York, providing notice to opposing counsel would be prudent.

There is also considerable variation nationally concerning how the anti-contact rule applies when the represented person is a corporation or other entity. In all jurisdictions, the rule would preclude a lawyer’s communications with at least some officers and employees of the opposing entity – in particular, those who are in the “control group,” that is, those who are communicating directly with counsel and implementing counsel’s advice. ABA Formal Op. 95-396 (1995) (impermissible for corporate counsel to claim that all corporate employees are “represented persons” for purposes of *Model Rule* 4.2). In many jurisdictions, a broader restriction would apply. *See Annotation to Model Rule* 4.2 and cases cited therein. This variation is not of significance with regard to settlement discussions: In every jurisdiction, the anti-contact rule would apply to the representative of an entity (other than a lawyer representing the entity in that matter) who is authorized to settle the case on the entity’s behalf. Therefore, a lawyer may not negotiate a settlement with the business officer of an opposing corporation without consent of the lawyer representing the corporation in the litigation.

Finally, it is unclear whether and to what extent settlement discussions with an opposing party that would otherwise be forbidden may be “authorized by law.” This exception may conceivably apply in certain contexts where the opposing party is a government entity; for example, there may be situations in tax litigation where the taxpayer’s lawyer is permitted to negotiate directly with an agent for the Internal Revenue Service, rather than with a lawyer assigned to the matter. ABA Formal Op. 97-408 (1997) (discussing communications with individuals
within governmental agency represented by counsel). Unless it is clear that the law authorizes such communications, however, the prudent practice would be to deal directly with the lawyer assigned to the case or to obtain that lawyer’s permission to speak with the non-lawyer official.

4.3.4 Dealing with Unrepresented Persons

A lawyer who negotiates a settlement with an unrepresented person must (a) clarify whom the lawyer represents and that the lawyer is not disinterested, (b) make reasonable efforts to correct any misunderstanding about the lawyer’s role in the matter, (c) avoid giving advice to an unrepresented person whose interests are in conflict with those of the lawyer’s client, other than advice to obtain counsel, and (d) avoid making inaccurate or misleading statements of law or material fact.

Committee Notes: Ethics rules recognize that, when the opposing party to a litigation is unrepresented, counsel will have to deal directly with the opposing party, including in the context of settlement discussions. Even so, the ethics rules impose some restrictions designed to prevent overreaching and misleading conduct. See Model Rules 4.3 and 4.1.

A particular danger is that an unrepresented person, particularly one who is not sophisticated about legal matters, might assume that a lawyer, even one representing the other party, would be a disinterested authority on the law. See Model Rule 4.3, comment 1. Therefore, it is important for the lawyer to make his or her role clear and to explain clearly that he or she is not disinterested. Similarly, to the extent the party’s interests may be adverse to those of the lawyer’s client, the lawyer may not ethically give advice to the unrepresented person with respect to a proposed settlement. Model Rule 4.3, comment 2. The lawyer may advise the other party to obtain counsel, see id., and may give his or her view on what the law is or what the facts show. In doing so, however, the lawyer may not make a false statement of material fact or law, must make clear that the lawyer is not acting on behalf of the

54
unrepresented person, and must explain that the lawyer is not taking steps to advance the interests of the unrepresented person. See Model Rule 4.1; N.C. Eth. Op. 15 (1986).

A lawyer may document the terms of a settlement reached with an unrepresented party and may submit the document to that party for execution. However, in preparing and submitting such documentation, the lawyer should not, directly or indirectly, give the opposing party legal advice, except as to the lawyer’s view of the meaning of the documents or underlying legal obligations, and should again make clear that the lawyer does not represent the opposing party. Model Rule 4.3, comment 2. Further, in the context of obtaining a court order approving a settlement or dismissing a case after settlement, the lawyer should give notice to the court that the opposing party is unrepresented. In negotiating with an unrepresented person, a lawyer may not mislead or otherwise overreach. Impermissible tactics may include suggesting that an immediate decision is necessary when that is not the case.

A distinction is difficult to discern in many cases between what is and is not permissible when submitting papers to an unrepresented person. See, e.g., In re Estate of Lutz, 563 N.W.2d 90 (N.D. 1997) (reversing summary judgment and remanding for trial on issue of voluntary nature of prenuptial agreement when evidence conflicted about whether husband’s lawyer advised wife, whose will he also prepared, to seek independent counsel before signing prenuptial agreement; court advises that lawyer should document independent counsel offer and obtain written waiver); Bd. of Comm’rs on Grievances and Discipline of Ohio Sup. Ct., Op. 96-2 (1996) (lawyer hired by defendant’s insurer may prepare application for guardianship appointment and approval of settlement for unrepresented minor plaintiff to sign; must make sure parents, court, and guardian know he is hired by insurer, and that lawyer has prepared documents and other counsel may be obtained to review them, “[p]reparation of these statutorily required documents does not constitute legal advice”); Dolan v. Hickey, 431 N.E.2d 229 (Mass.1982) (“drafting documents and presenting them for execution, without more, do[es] not amount to advice, and [is] proper as long as the attorney does not engage in misrepresentation or overreaching”); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1269 (1973)
(plaintiff’s counsel in domestic relations case may submit to unrepresented defendant, for signature, a waiver of issuance and service of summons and entry of appearance, provided lawyer does not advise defendant regarding the law); ABA Comm. on Professional Ethics and Grievances, Formal Op. 102 (1933) (lawyer may prepare settlement papers in workers’ compensation suit and submit them to unrepresented employee on behalf of client-employer, provided papers are not misleading and court is notified that employee is unrepresented); The Florida Bar v. Belleville, 591 So. 2d 170 (Fla. 1991) (when transaction in which attorney represents one party and other party is unrepresented is one-sided, counsel preparing documents for transaction is under ethical duty to make sure that unrepresented party understands possible detrimental effect of transaction and fact that attorney’s loyalty lies with his client alone); cf. Disciplinary Counsel v. Rich, 633 N.E.2d 1114 (Ohio 1994) (violation of Model Code DR 7-104(a)(2) for lawyer to meet with mother of child allegedly fathered by client, arrange for guardian ad litem to be appointed for child, and prepare consent judgment dismissing paternity action for signature by guardian). Professor Wolfram recommends that the lawyer presenting documents to an unrepresented person for signing clarify in writing that the lawyer represents only his or her client. Charles W. Wolfram, Modern Legal Ethics, § 11.6.3, at 617 (1986) (citing In re Bauer, 581 P.2d 511 (Ore.1978)).

4.3.5 Exploiting Opponent’s Mistake

In the settlement context, a lawyer should not exploit an opposing party’s material mistake of fact that was induced by the lawyer or the lawyer’s client and, in such circumstances, may need to disclose information to the extent necessary to prevent the opposing party’s reliance on the material mistake of fact.

Committee Notes: Ethics rules forbid a lawyer from making misstatements or engaging in misleading or deceitful conduct. See, e.g., Model Rule 4.1. Although there is no general ethics obligation, in the settlement context or elsewhere, to correct the erroneous assumptions of the opposing party or opposing counsel, the duty to avoid
misrepresentations and misleading conduct implies a professional responsibility to correct mistakes induced by the lawyer or the lawyer’s client and not to exploit such mistakes. See, e.g., Crowe v. Smith, 151 F.3d 217 (5th Cir. 1998) (upholding sanction where attorney falsely responded to a discovery request that no indemnity agreements were known, then offered to settle on behalf of his clients, emphasizing that his clients were not insured and did not have access to substantial funds for settlement purposes). Additionally, applicable principles of contract law may allow rescission of a settlement agreement that resulted from a party’s exploitation of the opposing party’s mistake.

In some limited circumstances, even where neither counsel nor counsel’s client caused the other party’s error, there may be a professional duty to correct the error. See Pa. Eth. Op. 97-107 (1997) (lawyer who learns that mutual release negotiated for client is premised on client’s inability to transfer her interest in real estate, which lawyer knows is not necessarily correct premise, must disclose this to opposing counsel); See also ABA Formal Op. 95-397 (1995) (lawyer of client who dies before accepting pending settlement offer must inform opposing counsel of client’s death). Further, some may conclude that, as a matter of professionalism, the other party’s misconception must be corrected in certain circumstances.

In the context of drafting a settlement agreement, in particular, a lawyer should endeavor in good faith to state the understanding of the parties accurately and completely, and should identify changes from draft to draft or otherwise bring them explicitly to the other counsel’s attention. See ABA Guidelines for Litigation Conduct. It would be unprofessional, if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement. See N.Y. City Eth. Op. 477 (1939) (when opposing lawyer recognizes inadvertent mistake in settlement agreement, lawyer should urge client to reveal the mistake and, if the client refuses, the lawyer should do so); cf. ABA Informal Op. 86-1518 (1986) (“Where the lawyer for A has received for signature from the lawyer for B the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error.”).
<table>
<thead>
<tr>
<th>Model Rule</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1</td>
<td>3, 7</td>
</tr>
<tr>
<td>1.13</td>
<td>33, 34</td>
</tr>
<tr>
<td>1.13(b)</td>
<td>34</td>
</tr>
<tr>
<td>1.14</td>
<td>22, 24</td>
</tr>
<tr>
<td>1.14(a)</td>
<td>23</td>
</tr>
<tr>
<td>1.14(b)</td>
<td>23, 24</td>
</tr>
<tr>
<td>1.16</td>
<td>6, 16</td>
</tr>
<tr>
<td>1.16(a)(1)</td>
<td>20, 39</td>
</tr>
<tr>
<td>1.16(a)(3)</td>
<td>10</td>
</tr>
<tr>
<td>1.16(b)</td>
<td>21</td>
</tr>
<tr>
<td>1.16(b)(2)</td>
<td>21, 39</td>
</tr>
<tr>
<td>1.16(b)(3)</td>
<td>39</td>
</tr>
<tr>
<td>1.16(b)(4)</td>
<td>10</td>
</tr>
<tr>
<td>1.16(c)</td>
<td>39</td>
</tr>
<tr>
<td>1.16(d)</td>
<td>21</td>
</tr>
<tr>
<td>1.2</td>
<td>15, 20</td>
</tr>
<tr>
<td>1.2(a)</td>
<td>6, 7, 9, 13, 14</td>
</tr>
<tr>
<td>1.2(d)</td>
<td>19, 35, 40, 46, 47</td>
</tr>
<tr>
<td>1.3</td>
<td>11</td>
</tr>
<tr>
<td>1.4</td>
<td>9, 12, 13, 22</td>
</tr>
<tr>
<td>1.4(a)(1)</td>
<td>12</td>
</tr>
<tr>
<td>1.4(a)(2)</td>
<td>7, 8, 10</td>
</tr>
<tr>
<td>1.4(a)(3)</td>
<td>12</td>
</tr>
<tr>
<td>1.4(a)(4)</td>
<td>12</td>
</tr>
<tr>
<td>1.4(b)</td>
<td>6, 7</td>
</tr>
<tr>
<td>1.5</td>
<td>16</td>
</tr>
<tr>
<td>1.6</td>
<td>4, 6, 19, 37, 38, 39, 47</td>
</tr>
<tr>
<td>1.6(b)(1)</td>
<td>19</td>
</tr>
<tr>
<td>1.7</td>
<td>25, 28, 31</td>
</tr>
<tr>
<td>1.7(b)</td>
<td>26</td>
</tr>
<tr>
<td>1.7(b)(2)</td>
<td>32</td>
</tr>
<tr>
<td>1.8(b)</td>
<td>4</td>
</tr>
</tbody>
</table>

2 As amended February 2002
<table>
<thead>
<tr>
<th>Model Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.8(f)</td>
</tr>
<tr>
<td>1.8(g)</td>
</tr>
<tr>
<td>1.9(c)</td>
</tr>
<tr>
<td>2.1</td>
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<tr>
<td>3.2</td>
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<tr>
<td>3.3</td>
</tr>
<tr>
<td>3.3(a)(1)</td>
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<tr>
<td>3.3(a)(2)</td>
</tr>
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</tr>
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<td>3.4</td>
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<td>3.6</td>
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<tr>
<td>4.1</td>
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<td>4.1(b)</td>
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<td>4.2</td>
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<tr>
<td>4.3</td>
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<tr>
<td>4.4</td>
</tr>
<tr>
<td>5.4(c)</td>
</tr>
<tr>
<td>5.6</td>
</tr>
<tr>
<td>5.6(b)</td>
</tr>
<tr>
<td>8.3</td>
</tr>
<tr>
<td>8.3(a)</td>
</tr>
<tr>
<td>8.4(c)</td>
</tr>
</tbody>
</table>

Page 59
### TABLE B
ABA Model Code of Professional Responsibility

<table>
<thead>
<tr>
<th>Code</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Model Code DR 1-103(A)</td>
<td>44</td>
</tr>
<tr>
<td>Model Code DR 2-108</td>
<td>40</td>
</tr>
<tr>
<td>Model Code DR 4-101(C)(3)</td>
<td>19</td>
</tr>
<tr>
<td>Model Code DR 7-102(A)(7)</td>
<td>47</td>
</tr>
<tr>
<td>Model Code DR 7-102(B)(1)</td>
<td>21</td>
</tr>
<tr>
<td>Model Code DR 7-104(a)(2)</td>
<td>56</td>
</tr>
<tr>
<td>Model Code DR 7-105</td>
<td>45, 50</td>
</tr>
</tbody>
</table>

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3 Withdrawn in 1983 and no longer official ABA policy.
TABLE C
The Restatement (Third) of the Law Governing Lawyers

<table>
<thead>
<tr>
<th>The Restatement (Third) of the Law Governing Lawyers § 14</th>
<th>32</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 16</td>
<td>11</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 20</td>
<td>13</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 20(1)</td>
<td>12</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 20(3)</td>
<td>12</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 22</td>
<td>9, 14, 15, 16</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 23</td>
<td>21</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 24(1)</td>
<td>22</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 27d</td>
<td>14</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 32</td>
<td>21, 22</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 32(3)(e)</td>
<td>39</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 33(b)</td>
<td>21</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 96</td>
<td>33</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 98</td>
<td>36</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 120</td>
<td>19</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 122</td>
<td>13</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 125</td>
<td>43</td>
</tr>
<tr>
<td>The Restatement (Third) of the Law Governing Lawyers § 134</td>
<td>32</td>
</tr>
<tr>
<td>ABA Formal Op. 96-403 (1996)</td>
<td>...........................................................</td>
</tr>
<tr>
<td>ABA Informal Op. 86-1518 (1986)</td>
<td>...........................................................</td>
</tr>
</tbody>
</table>
INDEX

Adverse Party. See Anti-Contact Rule.
Affirmative Duty to Disclose. See Omissions.
Aggregate settlements ................................................................. 27
Agreements relating to settlement ............................................. 40-48
Anti-contact rule ........................................................................ 51-53
Arbitration ...................................................................................... 1
Aspirational goals ........................................................................ 1
Attorney’s fees
  amount ...................................................................................... 41,43
  class actions ........................................................................... 30,41,43,44
  contingent .................................................................................. 17,42
  fee-shifting .............................................................................. 42
  payment by third-party ............................................................... 30,31
  secret agreement ..................................................................... 48
  subordinate to interest of client .............................................. 41,42
  waiver ....................................................................................... 42
Authority
  client’s ultimate authority ....................................................... 7-18
  limitations or restrictions on client’s authority ....................... 15,18-22
  revocation of client’s authority to initiate settlement discussions ...
  to initiate settlement discussions ........................................... 8
Bad faith ......................................................................................... 49
Backmail ........................................................................................ 45
Candor. See Court Approval; Deceit; Dishonesty; Falsehood;
  Misrepresentation; Omissions; Tribunal; Truthfulness.
Capacity ....................................................................................... 22,23
Charges
  criminal .................................................................................. 51
  disciplinary ............................................................................. 45,50
Class
  action ...................................................................................... 28,29,41,43,44
  attorney’s fee .......................................................................... 30,41,43,44
  member .................................................................................... 28,29,30
  representation .......................................................................... 28
  settlement ............................................................................... 28,29,41
  subclasses ............................................................................. 28,30
Co-clients ..................................................................................... 32
Communication with represented persons .................................... 51-54
Communication with unrepresented persons ................................ 54,55
Compensation. See Attorney’s fees.
Competent representation ........................................................... 3,7,25,43
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concealing evidence</td>
<td>46</td>
</tr>
<tr>
<td>Confidential information.</td>
<td></td>
</tr>
<tr>
<td>Confidentiality agreements</td>
<td>47, 48</td>
</tr>
<tr>
<td>Conflict of interest</td>
<td>25, 26, 32, 40, 42, 54</td>
</tr>
<tr>
<td>Conscience</td>
<td>3</td>
</tr>
<tr>
<td>Contingent fee</td>
<td>17, 42</td>
</tr>
<tr>
<td>Corporation as client.</td>
<td></td>
</tr>
<tr>
<td>Corporation as opposing party.</td>
<td></td>
</tr>
<tr>
<td>Court Approval</td>
<td>5, 22, 55</td>
</tr>
<tr>
<td>Courtesy</td>
<td>5</td>
</tr>
<tr>
<td>Court-ordered settlement discussions</td>
<td>9</td>
</tr>
<tr>
<td>Credibility</td>
<td>36</td>
</tr>
<tr>
<td>Criminal conduct</td>
<td>6, 18-20, 35, 37, 39, 40, 45, 47, 50, 51</td>
</tr>
<tr>
<td>Custom</td>
<td>4, 5</td>
</tr>
<tr>
<td>Death of client</td>
<td>38, 57</td>
</tr>
<tr>
<td>Duty to disclose</td>
<td></td>
</tr>
<tr>
<td>Deceit</td>
<td>36, 48, 49, 56</td>
</tr>
<tr>
<td>Destruction of Evidence</td>
<td>36, 48, 49, 56</td>
</tr>
<tr>
<td>Disclosure of Confidential Information;</td>
<td></td>
</tr>
<tr>
<td>Disclosure of Material Facts.</td>
<td></td>
</tr>
<tr>
<td>Disclosure of Settlement Information;</td>
<td></td>
</tr>
<tr>
<td>Disclosure of Settlement Information;</td>
<td></td>
</tr>
<tr>
<td>Discovery</td>
<td>46, 47, 49, 57</td>
</tr>
<tr>
<td>Dishonesty</td>
<td>36</td>
</tr>
<tr>
<td>Dissemination</td>
<td>4</td>
</tr>
<tr>
<td>Enforceability</td>
<td>3</td>
</tr>
<tr>
<td>Expectations</td>
<td>8, 13</td>
</tr>
<tr>
<td>Exploiting opponent's mistake</td>
<td>56, 57</td>
</tr>
<tr>
<td>Extortion.</td>
<td></td>
</tr>
<tr>
<td>Failure to Disclose Material Facts.</td>
<td></td>
</tr>
<tr>
<td>Fair-dealing</td>
<td>3, 4</td>
</tr>
<tr>
<td>Fairness</td>
<td>3, 48</td>
</tr>
<tr>
<td>False statement.</td>
<td></td>
</tr>
<tr>
<td>Falsehood</td>
<td>35</td>
</tr>
<tr>
<td>Fees.</td>
<td></td>
</tr>
<tr>
<td>Fee-shifting.</td>
<td></td>
</tr>
<tr>
<td>Fiduciary</td>
<td>2, 18, 20</td>
</tr>
<tr>
<td>Fraud</td>
<td>6, 19-21, 35-37, 39, 46-48</td>
</tr>
<tr>
<td>Global settlement</td>
<td>27</td>
</tr>
</tbody>
</table>
Parties to a legal matter have the right to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication. The lawyer’s assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer.¹

A lawyer may not communicate with a person the lawyer knows is represented by counsel, unless that person’s counsel has consented to the communication or the communication is authorized by law or court order. ABA Model Rule 4.2 (sometimes called the “no contact” rule). Further, a lawyer may not use an intermediary, i.e., an agent or another, to communicate directly with a represented person in violation of the “no contact” rule.²

It sometimes is desirable for parties to a litigation or transactional matter to communicate directly with each other even though they are represented by counsel. Two examples may be where the parties wish to cement a settlement or break an impasse in settlement negotiations. In this opinion, the Committee explores the limits within which it is ethically proper under the Model Rules of Professional Conduct for a lawyer to assist a client regarding communications the client has a right to have with a person the lawyer knows is represented by counsel. Even though parties to a matter are represented by counsel, they have the right to communicate directly with each other.³ In addition, a client may require the lawyer’s assistance and a lawyer may be reasonably expected to advise or assist the client regarding communications the client desires to have with a represented person. A client may ask the lawyer for advice on whether the client may lawfully communicate directly with a represented person without their lawyer’s consent or their lawyer being present. The comments to Rules 4.2 and 8.4(a) state that such advice is proper.⁴ Even if the client has not asked for the advice, the lawyer may take the initiative and advise the client that it may be desirable at a particular time for the client to communicate directly with the other party.

For example, a lawyer represents a client in a marital dissolution. The client’s husband also is represented by counsel. The parties and their lawyers have reached an impasse in their negotiations over various issues. The client may ask her lawyer if she may communicate directly with her husband to see if an agreement can be reached on some contested issues. Alternatively, the lawyer might independently

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.
² Rule 8.4(a). The Rule states: “[i]t is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” ABA Comm. on Ethics and Professional Responsibility. Formal Op. 95-395 (1995) (“Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject of the representation, she [under Rule 8.4(a)] may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do.”); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 408 (ABA 7th ed. 2011) (“A lawyer may not, however, “mastermind” a client’s communication with a represented person.”).
⁴ See Rule 4.2 cmt. 4 (“A lawyer may not make a communication prohibited by this Rule through the acts of another. See also Rule 8.4(a) cmt. 1 (“Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.”).
suggest that the possibility of resolving outstanding issues would be enhanced if the client communicates directly with her husband. The client also might benefit from the lawyer’s advice on how she should conduct such settlement negotiations, the topics or issues to be covered, and the goals or objectives to be reached. The client also could ask the lawyer to prepare a marital settlement agreement with the goal of having her husband execute the agreement during her meeting with him.

The language of Rule 4.2 Comment [4] raises the primary question addressed in this opinion, to what extent may the lawyer advise and assist the client in communicating directly with the represented husband without violating Rule 4.2 through the acts of another, i.e., the client. However, there is tension between Comment [1] to Rule 4.2 and Rule 8.4(a). In ABA Formal Op. 92-362 (1992), this Committee opined that, without violating Rules 4.2 and 8.4(a), a lawyer may ethically advise the client to communicate directly with a represented adversary to determine if the adverse party’s lawyer had informed them that a settlement offer was pending. The inquiring lawyer in the opinion represented the plaintiff in a civil case in which the defendant also was represented by counsel. Previously, the plaintiff’s lawyer made a settlement offer to opposing counsel. Plaintiff’s lawyer had received no response, and the case was set for trial in two weeks. Plaintiff’s lawyer suspected that opposing counsel had not informed the defendant of the offer. In that opinion, the Committee concluded that, although the plaintiff’s lawyer could not communicate the settlement offer directly to the defendant without violating Rule 4.2, the plaintiff’s lawyer had an ethical duty under Rules 1.1, 1.2(a), and 1.4(b) to advise the client that the lawyer believed his settlement offer had not been communicated by defendant’s counsel to the defendant and that the plaintiff had the right to speak directly with the defendant to determine whether the settlement offer had been communicated.

ABA Formal Op. 92-362 acknowledged tension between the lawyer’s decision to advise the client of the right to communicate directly with a represented adversary and Rule 8.4(a)’s prohibition against the lawyer’s doing indirectly what the lawyer cannot do directly. Nevertheless, the Committee concluded that “where the purpose of the communication is to ascertain whether a settlement offer has been communicated to the other party, Rule 8.4(a) should not be read to preclude the lawyer’s fulfilling the lawyer’s duty, reasonably expected by the client, fully and fairly to advise the client of the lawyer’s best professional judgment as to the exercise of the client’s rights in furtherance of the representation.” The Committee expressly indicated that it was not addressing what the lawyer might tell the client to say to the other party and where the line might be crossed before running afoul of Rule 8.4(a). The Committee was careful to note that if the client was only going to find out if the other party had been told of the offer, there would be no violation of the rules. Several bar ethics committees likewise have concluded that it is not a violation of the professional conduct rules for a lawyer to suggest or recommend that the client communicate directly with a represented person.

The decision to communicate directly with a represented person may be the client’s idea or the lawyer’s. Some decisions and opinions suggest that counsel may be violating the rules prohibiting communication with a represented party by encouraging or failing to discourage a client speaking directly

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5 We conclude that a lawyer’s client is “another” for purposes of Rule 8.4(a). In re Marietta, 569 P.2d 291 (Kan.1977) (lawyer sanctioned for preparing release and advising client to pass it on to represented adverse party); S.F. Bar Informal Opinion 1985-1 (1985) (“it would be inappropriate ... for [a] lawyer to use the client as an indirect means of communicating with the adverse party” in settlement negotiations).
7 Id. at 89.
8 See, e.g., Massachusetts Bar Op. 11-03 (2011) (not violation of Rules 4.2 and 8.4(a) for lawyer to advise client to urge another person to release attachment on client’s property, even though other person is represented by counsel); Oregon Eth. Op. 2005-147 (1997) (Direct Communication Between Represented Parties) (“Allowing the parties themselves to discuss the issues and possible avenues for settlement does not conflict with the policy behind the rule [prohibiting a lawyer from causing another to communicate on the subject of the representation].”); California Comm. on Prof'l Resp. and Conduct Formal Op. 1993-131 (1993) (lawyer may confer with client as to strategy to be pursued in, goals to be achieved by, and general nature of communication client intends to initiate with opposing party as long as communication itself originates with, and is directed by, client and not the lawyer; Michigan Eth. Op. Cl-920 (1983) (in domestic relation case, it is permissible for lawyer to give client draft settlement proposal even when lawyer knows client may discuss document with spouse who is represented by counsel); San Francisco Bar Assoc. Informal Op. 1985-1 (1985) (lawyer may allow or encourage his client to attempt to resolve dispute by communicating directly with opposing party, so long as client is not directly or indirectly acting as agent of lawyer).
to the other party. The “no contact” rules applied in these opinions, however, differ from the Model Rules in that they do not contain the relevant language in Rule 4.2 Comment [4] that “a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” As the Committee observed in Formal Op. 92-362, other rules may require that, in some situations, a lawyer advise the client to consider communicating directly with her represented adversary about a matter related to the representation. Rule 1.1 requires that “[a] lawyer shall provide competent representation to a client.” Rule 1.4(a)(2) requires the lawyer to consult with the client as to the means by which the client’s objectives are to be accomplished. These fundamental ethical principles, coupled with the comments to Rules 4.2 and 8.4(a), suggest that the assistance a lawyer may give to a client extends beyond advising her of her right to communicate with her adversary.

Rule 8.4(a)’s prohibition against a lawyer’s violating the rules through the acts of another raises questions about what a lawyer may or may not say to the lawyer’s client, or what the lawyer may do to assist the client in communicating directly with the represented opponent. These issues were explicitly left unaddressed in Formal Op. 92-362. When Formal Opinion 92-362 was issued, the comments to Rules 4.2 and 8.4 did not contain the current language that expressly permits the lawyer to advise the client regarding communications the client is legally entitled to make and actions the client is legally entitled to take. There is very little authority that provides guidance in any context regarding the scope of assistance and advice a lawyer may give a client under the comments to Rules 4.2 and 8.4. Some authority states that because of Rule 8.4(a)’s prohibition against violating or attempting to violate the Rules of Professional Conduct through the acts of another, a lawyer may not “script” or “mastermind” a client’s communication with a represented person and may violate Rule 4.2 by preparing legal documents for the client to have a represented person sign without the assistance of their counsel. What constitutes “scripting” or “masterminding” the communication is not clear, but such a standard, if too stringently applied, would unduly inhibit permissible and proper advice to the client regarding the content of the communication, greatly restricting the assistance the lawyer may appropriately give to a client. Relying on language similar to Comment [4] of Model Rule 4.2, the Restatement (Third) of The Law Governing Lawyers (2000) (“the Restatement”) explains:

The lawyer for a client intending to make such a communication may advise the client regarding legal aspects of the communication, such as whether an intended communication is libelous or would otherwise create risk for the client. Prohibiting such advice would unduly restrict the client's autonomy, the client's interest in obtaining important legal advice, and the client’s ability to communicate fully with the lawyer.\(^{13}\)

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9. See, e.g., Miano v. AC & R Advertising, Inc., 148 F.R.D. 68, 82 (S.D.N.Y. 1993) (“where a client directly asks his or her attorney whether he should approach a represented adversary, the attorney may not ethically recommend or endorse such action”); N.Y. City Ethics Op. 2002-3 (2002) (if client “conceives of the idea” of communicating with represented adversary, lawyer may advise client about it but must avoid helping client to either elicit confidential information or encourage other party to proceed without counsel); Massachusetts Bar Op. 82-8 (1982) (lawyer who has prepared settlement agreement on client’s behalf should discourage client from specifically discussing settlement with other party or directly sending letter that addresses settlement without consent of that party’s lawyer).


11. See, e.g., Holdgren v. General Motors Corp., 13 F.Supp.2d 1192, 1193-96 (D.Kan. 1998) (lawyer in age discrimination case violated rules of professional conduct “through the acts of another” by encouraging client to obtain affidavits from coworkers, advising him of difference between “out of court statements” and signed affidavits for trial purposes, and advising him how to draft affidavit); In re Pyle, 91 P.3d 1222, 1228-29 (Kan. 2004) (lawyer “circumvented the constraints” of Rule 4.2 by, at client’s request, preparing affidavit for her to deliver to represented defendant in personal injury case); California Comm. on Prof'l Resp. and Conduct Formal Op. 1993-131 (“An attorney is also prohibited from scripting the questions to be asked or statements to be made in the communications or otherwise using the client as a conduit for conveying to the represented opposing party words or thoughts originating with the attorney.”); Massachusetts Bar Op. 11-03 (“We believe, however, that the lawyer would cross the line if she prepared a release of the attachment and presented it to the sister for execution without the knowledge and express permission of the sister’s lawyer.”).

12. See n.11.

13. Restatement (Third) of The Law Governing Lawyers § 99 cmt (k) (2000). See also John Leubsford, Communicating With Another Lawyer’s Client: The Lawyer’s Veto and the Client’s Interests, 127 U. Pa. L. Rev. 683, 697 (1979) (“An extension of the [no-contact] rule to communications between clients is hard to reconcile with its ostensible purposes. Whatever dangers flow from the confrontation of professional guile with lay innocence are absent...
Comment 1: client, counsel must be careful not to violate the underlying purpose of Rule 4.2, as explained in Rule 4.2. The lawyer or the client conceives of the idea of having the communication. This Committee believes that, without violating Rules 4.2 or 8.4(a), a lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who—the lawyer or the client—conceives of the idea of having the communication.

This Committee favors the approach taken by Restatement § 99 Comment (k). Under that approach, the lawyer may advise the client about the content of the communications that the client proposes to have with the represented person. For example, the lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary. Such advice enables the client to communicate her points more articulately and accurately or to prevent the client from disadvantaging herself. The client also could request that the lawyer draft the basic terms of a proposed settlement agreement that she wishes to have with her adverse opponent. The line between permissible advice and impermissible assistance may not always be clear. This Committee does not think that line should be drawn based on who initiates the first draft of a communication with a represented adversary. Such an approach favors only those clients who have the sophistication to ask the lawyer to draft a document for the client to give to a represented adversary. In addition, allowing the lawyer to assist only if the client originates the substance of the communication leaves the unsophisticated client without the benefit of the lawyer’s advice in formulating communications that the rules allow the client to have with a represented person. Instead, the line must be drawn on the basis of whether the lawyer’s assistance is an attempt to circumvent the basic purpose of Rule 4.2, to prevent a client from making uninformed or otherwise irrational decisions as a result of undue pressure from opposing counsel.

This Committee favors the approach taken by Restatement § 99 Comment (k). Under that approach, the lawyer may advise the client about the content of the communications that the client proposes to have with the represented person. For example, the lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary. Such advice enables the client to communicate her points more articulately and accurately or to prevent the client from disadvantaging herself. The client also could request that the lawyer draft the basic terms of a proposed settlement agreement that she wishes to have with her adverse opponent, or to draft a formal agreement ready for execution. Rules 4.2 and 8.4(a) may permit the lawyer to fulfill the client’s request without violating the lawyer’s ethical obligations. However, in advising the client, counsel must be careful not to violate the underlying purpose of Rule 4.2, as explained in Rule 4.2 Comment [1]:

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

when two nonlawyers communicate.... Perhaps we have again come across the desire to keep disputes safely in the control of lawyers.”); James G. Sweeney, Attorneys’ Arrogance: Warning Unheeded, N.Y.L.J., June 17, 1991, at 2 col. 3 (“To deny or deter the client from the opportunity of entering into the gauging process of what value is to him in a particular dispute by denying him an opportunity to sit at the bargaining table with his adversary works against the very fundamental idea of the self and of human autonomy.”).

14 See, e.g., California Comm. on Prof’l Resp. and Conduct Formal Op. 1993-131 (“When the content of the communication to be had with the opposing party originates with or is directed by the attorney, it is prohibited by rule 2-100.”).

15 See ABA Formal Opinion 95-396 (1995), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) at 330, 334 (“The anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests.”). See also Niesig v. Team I, 558 N.E.2d 1030, 1032 (N.Y. 1990) (“By preventing lawyers from deliberately dodging adversary counsel to reach-and-exploit the client alone, [the rule prohibiting communicating with a person represented by counsel] safeguards against clients making...
Prime examples of overreaching include assisting the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel. To prevent such overreaching, a lawyer must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations, making admissions or disclosing confidential information. If counsel has drafted a proposed agreement for the client to deliver to her represented adversary for execution, counsel should include in such agreement conspicuous language on the signature page that warns the other party to consult with his lawyer before signing the agreement.\textsuperscript{16}

\textsuperscript{16}This opinion does not address situations in which a lawyer advises a client with respect to using an investigator or agent to gather facts from a represented person. These situations may involve a variety of factors, not considered in this opinion, relevant to the presence or absence of overreaching.
A CAUSERIE ON LAWYERS' ETHICS IN NEGOTIATION

Alvin B. Rubin*

I asked him whether, as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty. Johnson: ‘Why no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a judge.’ 2 Boswell's Life of Johnson 47 (G.B. Hill ed. 1984).

The philosopher of Mermaid Tavern did not discuss the morality expected when lawyers deal with other lawyers or with laymen. When a lawyer buys or sells a house or a horse or a used car, he is expected to bargain. When he becomes a Secretary of State — like Dean Acheson or John Foster Dulles — or a Governor, or a Senator, or a Congressman or a legislator, he will negotiate and compromise.

In such activities lawyers may be acting for themselves as principals, or they may be representing constituents. But they are not practicing their profession as attorneys-at-law. It may be assumed that the lawyer who is buying or selling a farm on his own behalf is expected to behave no differently from any other member of his society, that no special ethical principles command his adherence or govern his conduct. And while the lawyer-diplomat or lawyer-politician may conceive of himself as a professional, rather than as an amateur, he will not be practicing a profession, as that term is generally understood.

When the lawyer turns to his law practice and begins to represent his clients as attorney or advocate, he assumes the role of a professional. What constitutes a profession is difficult to define comprehensively, but all attempts include reference to a store of special training, knowledge, and skills and to the adoption of ethical standards governing the manner in which these should be employed. When acting as an advocate, the lawyer professes a complex set of ethical principles that regulate his conduct toward the courts, his own clients, other lawyers and their clients.

Litigation spawns compromise, and courtroom lawyers engage almost continually in settlement discussions in civil cases and plea bargains in criminal cases. We do not know what proportion of civil

* Judge, United States District Court, E.D. Louisiana.
claims is settled by negotiation before the filing of suit, but it must
be vastly greater than the number of cases actually filed. Neither
does institution of suit mean an end to negotiations; 91% of all cases
filed in the United States District Courts for the fiscal year ending
June 30, 1974 were disposed of prior to the beginning of a trial on the
merits, most of them by some sort of negotiated compromise. In the
same year only 15% of the defendants in criminal cases in the federal
courts went to trial; 61% of the charges terminated in pleas of guilty
or nolo contendere and 24% were not prossed or dismissed for some
other reason. In almost all of the cases that were disposed of without
trials, there were likely negotiations of one kind or another, such as
plea bargains or exchanges of information.

Although less than one fourth of the lawyers in practice today
devote a majority of their time to litigation, and most spend none at
all in the traditional courtroom, there are few lawyers who do not
negotiate regularly, indeed daily, in their practice. Some lawyers who
handle little conventional litigation persist in saying that they do not
act as negotiators. If there are a few at the bar who do not, they are
rarae aves. Patent lawyers, tax counsellors and securities specialists
and all those who perform the myriad tasks of office law practice may
not dicker about the value of a case — though some assuredly do; but
they constantly negotiate the settlement of disputed items.

Neither the Code of Professional Responsibility nor most of the
writings about lawyers' ethics specifically mention any precepts that
apply to this aspect of the profession. The few references to the law-
ner's conduct in settlement negotiations relate to obtaining client
approval and disclosing potentially conflicting interests. It is scant
comfort to observe here, as apologists for the profession usually do,
that lawyers are as honest as other men. If it is an inevitable profes-
sional duty that they negotiate, then as professionals they can be

1. See Reports of the Proceedings of the Judicial Conference of the United
States—Annual Report of the Director of the Administrative Office of the United
States Courts 1973; 1974 Semi-Annual Report of the Director—Administrative Offi-
ces of the United States Courts.

2. This "fact" is derived from personal observation, conversation with lawyers,
and discussions with managing partners of larger law firms, who usually report that
about 25% of their lawyers are in the litigation section.

3. ABA Code of Professional Responsibility, EC 7-7. The ABA Code, as adopted
in Louisiana, is found in Articles of Incorporation, Louisiana State Bar Ass'n art.
XVI, La. R.S. 37, ch. 4, app.

4. ABA Code of Professional Responsibility, EC 5-16, 5-17.

5. Ferdinand Lunberg, quoted in M. Bloom, The Trouble with Lawyers 17
(1968).
expected to observe something more than the morality of the marketplace.

In 1969, after five years of study, the American Bar Association, to which 192,000 of the nation’s more than 300,000 lawyers belong, adopted a Code of Professional Responsibility, superseding the archaic Canons of Ethics. The Code has, with minor changes, been adopted in forty-nine states and the District of Columbia. It purports to set forth the ethical standards that apply to the lawyer’s professional conduct. It is lengthy and intricate. Its style is forbidding and is only slightly more lucid than the more formidable parts of the Internal Revenue Code. But its complex structure and apparent effort to be comprehensive induce the belief that it sets forth those general principles to which lawyers should adhere in every aspect of their professional engagements.

Its nine canons are preceptual; they purport to state “axiomatic norms,” and to express “in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession.” From the Canons are derived 137 Ethical Considerations that are “aspirational in character.” Both Canons and Ethical Considerations (EC) are reinforced by 38 mandatory Disciplinary Rules (DR), each with subparts, that set forth the sanctions for proscribed conduct. But these scriptures contain nothing that deals directly with the propriety of a lawyer’s conduct or his ethical responsibilities when dealing as a negotiator with another lawyer, a layman or a government agency. Indeed, there are only a few texts that can be used to construct precepts by analogy.

The superseded Canons of Ethics contained a fine homiletic sentence: “The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.” The admonitions of duty to the Court — at least in some respects — remain explicit and elaborated in the Code; the general statement of a duty to other lawyers no longer appears. The Code does not speak directly to the duty of a lawyer in dealing with laymen.


8. Id.

9. Id.

10. ABA Canons of Professional Ethics No. 22 (emphasis added).

11. ABA Code of Professional Responsibility, EC 7-38 speaks to the lawyer’s relationship with other lawyers in litigation: “A lawyer should be courteous to opposing
There are a few rules designed to apply to other relationships that touch peripherally the area we are discussing. A lawyer shall not:

—knowingly make a false statement of law or fact.\(^{12}\)
—participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.\(^{13}\)
—counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent,\(^{14}\) or
—knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.\(^{15}\)
—conceal or knowingly fail to disclose that which he is required by law to reveal.\(^{16}\)

In addition, he “should be temperate and dignified and . . . refrain from all illegal and morally reprehensible conduct.”\(^{17}\) The lawyer is admonished “to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.”\(^{18}\)

Taken together, these rules, interpreted in the light of that old but ever useful candel, ejusdem generis, imply that a lawyer shall not himself engage in illegal conduct, since the meaning of assisting a client in fraudulent conduct is later indicated by the proscription of other illegal conduct. As we perceive, the lawyer is forbidden to make a false statement of law or fact knowingly. But nowhere is it ordained that the lawyer owes any general duty of candor or fairness to members of the bar or to laymen with whom he may deal as a negotiator, or of honesty or of good faith insofar as that term denotes generally scrupulous activity.

Is the lawyer-negotiator entitled, like Metternich, to depend on “cunning, precise calculation, and a willingness to employ whatever means justify the end of policy?”\(^{19}\) Few are so bold as to say so. Yet some whose personal integrity and reputation are scrupulous have

\(^{12}\) ABA Code of Professional Responsibility, DR 7-102(A)(6).

\(^{13}\) ABA Code of Professional Responsibility, DR 7-102(A)(6).

\(^{14}\) ABA Code of Professional Responsibility, DR 7-102(A)(7). Presumably this implies, a fortiori, that a lawyer must not himself do anything fraudulent.

\(^{15}\) ABA Code of Professional Responsibility, DR 7-102(A)(8) (emphasis added).

\(^{16}\) ABA Code of Professional Responsibility, DR 7-102(A)(3) (emphasis added).

\(^{17}\) ABA Code of Professional Responsibility, EC 1-5.

\(^{18}\) ABA Code of Professional Responsibility, EC 7-10.

\(^{19}\) Lapham, The Easy Chair, Harper’s, November, 1974, at 30.
instructed students in negotiating tactics that appear tacitly to coun-
tenance that kind of conduct. In fairness it must be added that they
say they do not “endorse the propriety” of this kind of conduct and
indeed even indicate “grave reservations” about such behavior;
however, this sort of generalized disclaimer of sponsorship hardly
appears forceful enough when the tactics suggested include:

—Use two negotiators who play different roles. (Illustrated by the
“Mutt and Jeff” police technique; “Two lawyers for the same side
feign an internal dispute. . . .”)
—Be tough — especially against a patsy.
—Appear irrational when it seems helpful.
—Raise some of your demands as the negotiations progress.
—Claim that you do not have authority to compromise. (Empha-
sis supplied.)
—After agreement has been reached, have your client reject it
and raise his demands.21

Another text used in training young lawyers commendably coun-
sels sincerity, capability, preparation, courage and flexibility. But it
also suggests “a sound set of tools or tactics and the know-how to use
(or not to use) them.”22 One such tactic is, “Make false demands,
bluffs, threats; even use irrationality.”23

Occasionally, an experienced legal practitioner comments on the
strain the custom of the profession puts on conscience. An anonymous
but reputedly experienced Delaware lawyer is quoted as saying, “The
practice of tax law these days requires the constant taking of anti-
ematic.”24

The concern of lawyers with problems that do not ostensibly
involve either ethics or negotiations reveals assumptions regarding
who: attorneys assume to be professionally proper. Thus, the Ameri-
can Bar Association suggests that a major problem is raised by the
question, “Must Attorneys ‘Tell All to Accountants?’”25

The problem revolves around the growing demand by accoun-

20. M. MEULTSNER & P. SCHROD, PUBLIC INTEREST ADVOCACY; MATERIALS FOR CLIN-
21. Id. at 235-38. Regarding the tactic of having the client reject the agreement
and raise his demand, the authors add, “This is the most ethically dubious of the
tactics listed here, but there will be occasions where a lawyer will have to defend
against it or even to employ it.” Id. at 238.
23. Id.
tants auditing corporate books that they be informed by corporate lawyers when a mutual client is facing or could be facing contingent liabilities through involvement in potentially costly lawsuits, possible tax claims, and so on.26

This is not a negotiation situation, but the resistance to telling an auditor the truth about his client's affairs arises, we are told, "because revelations could weaken cases already in court. . . ."27 Since the disclosure would certainly not be admissible in evidence, we must assume that the apprehended "weakening" is a softening of settlement posture if the real truth were told.

Honesty, as the oath administered to witnesses makes clear, implies not only telling literal truth but also disclosing the whole truth. The lawyer has no ethical duty to disclose information to an adversary that may be harmful to his client's cause; most lawyers shrink from the notion that morality requires a standard more demanding than duty to clients. EC 4-5 prohibits a lawyer from using information acquired in the representation of a client to the client's disadvantage, and this, together with the partisan nature of the lawyer's employment, indicates to the practitioner that nondisclosure is both a duty to the client and consistent with ethical norms.

While the lawyer who appears in court is said to owe a duty to disclose relevant legal authorities even if they harm his client's position, he need not disclose, and indeed most would say that he must conceal, evidence damaging to the client's cause. This fine analysis of what a lawyer should reveal to the judge in court doubtless inspired the observation by the Italian jurist, Piero Calamandrei, who, in his celebrated Eulogy of Judges, asked:

Why is it that when a judge meets a lawyer in a tram or in a café and converses with him, even if they discuss a pending case, the judge is more disposed to believe what the lawyer says than if he said the same thing in court during the trial? Why is there greater confidence and spiritual unity between man and man than between judge and lawyer?28

Let us consider the proper role for a lawyer engaged in negotiations when he knows that the opposing side, whether as a result of poor legal representation or otherwise, is assuming a state of affairs that is incorrect. Hypothesize: L., a lawyer, is negotiating the sale of

26. Id.
27. Id.
his client’s business to another businessman, who is likewise represented by counsel. Balance sheets and profit and loss statements prepared one month ago have been supplied. In the last month, sales have fallen dramatically. Counsel for the potential buyer has made no inquiry about current sales. Does L have a duty to disclose the change in sales volume?

Some lawyers say, “I would notify my client and advise him that he has a duty to disclose,” not because of ethical considerations but because the client’s failure to do so might render the transaction voidable if completed. If the client refused to sanction disclosure, some of these lawyers would withdraw from representing him in this matter on ethical grounds. As a practical matter, (i.e., to induce the client to accept their advice) they say, in consulting with the client, the lawyer is obliged to present the problem as one of possible fraud in the transaction rather than of lawyers’ ethics.

In typical law school fashion, let us consider another hypothet. L, the lawyer is representing C, a client, in a suit for personal injuries. There have been active settlement negotiations with LD, the defendant’s lawyer. The physician who has been treating C rendered a written report, containing a prognosis stating that it is unlikely that C can return to work at his former occupation. This has been furnished to LD. L learns from C that he has consulted another doctor, who has given him a new medication. C states that he is now feeling fine and thinks he can return to work, but he is reluctant to do so until the case is settled or tried. The next day L and LD again discuss settlement. Does L have a duty either to guard his client’s secret or to make a full disclosure? Does he satisfy or violate either duty if, instead of mentioning C’s revelation he suggests that D require a new medical examination?

Some lawyers avoid this problem by saying that it is inconceivable that a competent LD would not ask again about C’s health. But if the question as to whether L should be frank is persistently presented, few lawyers can assure that they would disclose the true facts.

Lawyers whose primary practice is corporate tend to distinguish the two hypeths, finding a duty to disclose the downturn in earnings but not the improvement in health. They may explain the difference by resorting to a discussion of the lower standards (expectations?) of the bar when engaged in personal injury litigation. “That’s why I stay away from that kind of work,” one lawyer said. The esteem

29. “[P]laintiff should disclose as much information as he possibly can without harming his own case.” H. BAKR & A. BRODER, HOW TO PREPARE AND NEGOTIATE CASES FOR SETTLEMENT 91 (1987).
of a lawyer for his own profession must be scant if he can rationalize the subclassifications this distinction implies. Yet this kind of gradation of professional ethics appears to permeate the bar.

Lawsyers from Wall Street firms say that they and their counterparts observe scrupulous standards, but they attribute less morality to the personal injury lawyer, and he, in turn, will frequently point out the inferiority of the standards of those who spend much time in criminal litigation. The gradation of the ethics of the profession by the area of law becomes curioser and curioser the more it is examined, if one may purloin the words of another venturer in wonderland.

None apparently deny that honesty and good faith in the sale of a house or a security implies telling the truth and not withholding information. But the Code does not exact that sort of integrity from lawyers who engage in negotiating the compromise of a lawsuit or other negotiations. Scant impetus to good faith is given by EC 7-9, which states, "When an action in the best interest of his client seems to him to be unjust, [the lawyer] may ask his client for permission to forego such action," for such a standard means that the client sets the ultimate ethical parameter for the lawyer's conduct. Neither is there much guidance for the negotiator in EC 7-10, "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid infliction of needless harm." EC 7-27 also pelters with the issue: "Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce." in context, this obviously applies to the presentation of evidence before a tribunal and not to out-of-court conversations. It likewise begs our present inquiry, for the issue in regard to EC 7-27 is whether there is a legal rather than an ethical obligation to reveal or produce the evidence.

The professional literature contains many instances indicating that, in the general opinion of the bar, there is no requirement that the lawyer disclose unfavorable evidence in the usual litigious situation." The racontes of lawyers and judges with their peers are full of

30. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-27 (in pertinent part) (emphasis added).
31. "[I]n ordinary litigious controversy the bar has been told that it is entitled and perhaps required to take a tough, unyielding attitude with respect to the revelation of distasteful evidence. . . ." Maguire, Conscience and Propriety in Lawyer's Tax Practice, 6 TAX COUNSELOR'S Q. 493 (1962). In a footnote, Maguire continues: "Instance after instance can be adduced. Williston, Life and Law 271-272 (1940) (refraining from correcting judge's statement of fact, although Mr. Williston did and his opponents did
tales of how the other side failed to ask the one key question that would have revealed the truth and changed the result, or how one side cleverly avoided producing the critical document or the key witness whom the adversary had not discovered. The feeling that, in an adversary encounter, each side should develop its own case helps to insulate counsel from considering it a duty to disclose information unknown to the other side. Judge Marvin Frankel, an experienced and perceptive observer of the profession, comments, "Within these unconfining limits [of the Code] advocates freely employ time-honored tricks and stratagem to block or distort the truth."22

The United States Supreme Court has developed a rule that requires the disclosure by the prosecutor in a criminal case of evidence favorable to the accused. But this is a duty owed by the government as a matter of due process, not a duty of the prosecutor as a lawyer. In all other respects in criminal cases, and in almost every aspect of the trial of civil cases, client loyalty appears to insulate the lawyer's conscience. Making fidelity to client the ultimate loyalty and the client himself the authority served appears to sanction the abdication of personal ethical responsibility, a kind of behavior described by psychologist Stanley Milgrim in Obedience to Authority. He discusses a series of experiments in which people are induced to inflict apparent physical pain on another person because someone in authority orders it. The lawyer permits obedience to the client's interest to provide the moral authority as well as the rationalized justification for his conduct.

Do the lawyer's ethics protest more strongly against giving false information? DR 7-102(A)(5), already quoted,23 forbids the lawyer to "knowingly make" a false statement of law or fact. Most lawyers say it would be improper to prepare a false document to deceive an adversary or to make a factual statement known to be untrue with the intention of deceiving him. But almost every lawyer can recount repeated instances where an adversary of reasonable repute dealt with facts in such an imaginative or hyperbolic way as to make them appear to be different from what he knew they were.

Interesting answers are obtained if lawyers are asked whether it

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23. See text at note 12 supra.
is proper to make false statements that concern negotiating strategy rather than the facts in litigation. Counsel for a plaintiff appears quite comfortable in stating, when representing a plaintiff, "My client won't take a penny less than $25,000," when in fact he knows that the client will happily settle for less; counsel for the defendant appears to have no qualms in representing that he has no authority to settle, or that a given figure exceeds his authority, when these are untrue statements. Many say that, as a matter of strategy, when they attend a pre-trial conference with a judge known to press settlements, they disclaim any settlement authority both to the judge and adversary although in fact they do have settlement instructions; estimable members of the bar support the thesis that a lawyer may not misrepresent a fact in controversy but may misrepresent matters that pertain to his authority or negotiating strategy because this is expected by the adversary.  

To most practitioners it appears that anything sanctioned by the rules of the game is appropriate. From this point of view, negotiations are merely, as the social scientists have viewed it, a form of game; observance of the expected rules, not professional ethics, is the guiding precept. But gamesmanship is not ethics.

Consider the problems raised when a lawyer represents a client before a government agency, for example the Internal Revenue Service. Here special rules are thought to be applicable. A formal opinion of the ABA Committee on Ethics states:

In practice before the Internal Revenue Service, which is itself an adversary party rather than a judicial tribunal, the lawyer is under a duty not to mislead the Service, either by misstatement, silence, or through his client, but is under no duty to disclose the weaknesses of his client's case. He must be candid and fair, and his defense of his client must be exercised within the bounds of the law and without resort to any manner of fraud or chicane.

The committee states that a lawyer engaged in handling a case before the Internal Revenue Service is not held to the principles of ethics that would apply to litigation in court because he is dealing with the IRS, which is the representative of one of the parties. The lawyer has an "absolute duty not to make false assertions of fact" but this does not "require the disclosure of weaknesses in the client's case . . .

34. See, e.g., Voorhies, Law Office Training: The Art of Negotiation, 13 PRAC. LAW., no. 4, at 61 (April, 1967).
35. AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS, FORMAL OPINION 314, at 690 (April 27, 1965).
unless the facts in the attorney’s possession indicate beyond reasonable doubt that a crime will be committed. A wrong, or indeed sometimes an unjust, tax result in the settlement of a controversy is not a crime.” This kind of juxtaposition of the permissible and the criminal leads inevitably to the conclusion that all that is not criminal is acceptable.

A different distinction is drawn by Calamandrei:

The difference between the true lawyer and those men who consider the law merely a trade is that the latter seek to find ways to permit their clients to violate the moral standards of society without overstepping the letter of the law, while the former look for principles which will persuade their clients to keep within the limits of the spirit of the law in common moral standards.  

The courts have seldom had occasion to consider these ethical problems, for disciplinary proceedings have rarely been invoked on any charge of misconduct in the area. But where settlements have in fact been made when one party acted on the basis of a factual error known to the other and this error induced the compromise, courts have set releases aside on the basis of mistake, or, in some cases, fraud.

In Louisiana “fraud” is defined as “an assertion of what is false, or a suppression of what is true. . . .” Such assertion or suppression embraces “not only an affirmation or negation by words either written or spoken, but any other means calculated to produce a belief of what is false, or an ignorance or disbelief of what is true.” This codification is much the same as the prevailing view at common law. It is embraced within the concept of good faith in the negotiation and performance of contracts under the Uniform Commercial Code.  

Obviously a contract negotiated on the basis of misrepresentation of fact may be set aside; there is precedent, too, for invalidating the release of a personal injury claim entered into as a result of misrepresentation of matters of law. These authorities fix limits on the con-

36. Id. at 591.
37. P. Calamandrei, Eulogy of Judge 82 (1942).
39. LA. CIV. CODE art. 1847(5).
40. LA. CIV. CODE art. 1847(6).
42. See UNIFORM COMMERCIAL CODE §§ 1-201, 1-203, 2-103.
duct of the principal whether he acts in person or through a lawyer.

The profession seldom confronts the necessity Vern Countryman and Ted Finman say the attorney-at-law must consider: "the need, if conflicting interests are to be protected, for the lawyer to serve as a source of restraint on his client, and, indeed, on himself." 44 The lawyer is a professional because his role is not merely to represent his client as a mercenary in the client's war; he is also "a guardian of society's interests." 45

In an unpublished paper, Dean Murray L. Schwartz, of the University of California Law School, 46 succinctly proposed three possible standards of the relationship of the lawyer's value structure to that of his client:

(1) A lawyer should do everything for his client that is lawful and that the client would do for himself if he had the lawyer's skill;
(2) A lawyer need not do for his client that which the lawyer thinks is unfair, unconscionable or over-reaching, even if lawful;
(3) A lawyer must not do for his client that which the lawyer thinks is unfair, unconscionable or over-reaching, even if lawful. 47

"It will be giving away no professional secrets," he continues, "to tell you that the first standard of behavior is the one that is largely applied in a contested judicial matter." 48 He thinks that the second standard is "officially recognized as appropriate for non-litigated matters" 49 though the authorities cited in this paper and my own experience make me think this observation overly generous to the profession. The third, he correctly finds, "no part of official doctrine." 50

A lawyer should not be restrained only by the legal inhibitions on his client. He enjoys a monopoly on the practice of law protected by sanctions against unauthorized practice. Through a subpart of the profession, lawyer-educators, the lawyer controls access to legal education. He licenses practitioners by exacting bar examinations. He controls access to the courts save in those limited instances when a litigant may appear pro se, and then he aptly characterizes this liti-

45. Id. at 186.
47. Id. at 7.
48. Id.
49. Id.
50. Id.
gant as being his own lawyer, hence having a fool for his client.

The monopoly on the practice of law does not arise from the presumed advantages of an attorney's education or social status: it stems from the concept that, as professionals, lawyers serve society's interests by participating in the process of achieving the just termination of disputes. That an adversary system is the basic means to this end does not crown it with supreme value. It is means, not end.\textsuperscript{51}

If he is a professional and not merely a hired, albeit skilled hand, the lawyer is not free to do anything his client might do in the same circumstances. The corollary of that proposition does set a minimum standard: the lawyer must be at least as candid and honest as his client would be required to be. The agent of the client, that is, his attorney-at-law, must not perpetrate the kind of fraud or deception that would vitiate a bargain if practiced by his principal. Beyond that, the profession should embrace an affirmative ethical standard for attorneys' professional relationships with courts, other lawyers and the public: \textit{The lawyer must act honestly and in good faith.} Another lawyer, or a layman, who deals with a lawyer should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar. It is inherent in the concept of an ethic, as a principle of good conduct, that it is morally binding on the conscience of the professional, and not merely a rule of the game adopted because other players observe (or fail to adopt) the same rule. Good conduct exacts more than mere convenience. It is not sufficient to call on personal self-interest; this is the standard created by the thesis that the same adversary met today may be faced again tomorrow, and one had best not prejudice that future engagement.

Patterson and Cheatham\textsuperscript{52} correctly assert that the basic standard for the negotiator is honesty. "In terms of the standards of the profession, honesty is candor..."\textsuperscript{53} Candor is not inconsistent with striking a deal on terms favorable to the client,\textsuperscript{54} for it is known to all that, at least within limits, that is the purpose to be served. Substantial rules of law in some areas already exact of principals the duty to perform legal obligations honestly and in good faith. Equivalent standards should pervade the lawyer's professional environment.

\textsuperscript{51} For a recent illuminating reappraisal of the adversary process as a means to truth, see Frankel, \textit{supra} note 32.

\textsuperscript{52} L. Patterson & E. Cheatham, \textit{The Profession of Law} 121 (1971).

\textsuperscript{53} Id. at 123.

\textsuperscript{54} Id.
The distinction between honesty and good faith need not be finely drawn here; all lawyers know that good faith requires conduct beyond simple honesty.

Since bona fides and truthfulness do not inevitably lead to fairness in negotiations, an entirely truthful lawyer might be able to make an unconscionable deal when negotiating with a government agency, or a layman or another attorney who is representing his own client. Few lawyers would presently deny themselves and their clients the privilege of driving a hard bargain against any of these adversaries though the opponent's ability to negotiate effectively in his own interest may not be equal to that of the lawyer in question. The American Bar Association Committee on Ethics does not consider it improper for a lawyer to gain an unjust result in a tax controversy. Young lawyers, among the most idealistic in the profession, about to represent indigents, are advised that they be tough, especially against a patsy. 54.1

There is an occasional Micah crying in the wilderness:

One should go into conference realizing that he is an instrument for the furtherance of justice and is under no obligation to aid his client in obtaining an unconscionable advantage. Of course, in the zone of doubt an attorney may and probably should get all possible for his client. 55

This raises the problem inevitable in an adversary profession if one opponent obeys a standard the other defies. As Countryman and Finman inquire,

How is a lawyer who looks at himself as 'an instrument for the furtherance of justice' likely to fare when pitted against an attorney willing to take whatever he can get and use any means he can get away with? 56

In criminal trial matters, Brady v. Maryland 57 imposes constraints on the prosecutor as a matter of constitutional due process by requiring that he divulge evidence favorable to the accused. The

54.1. See text at notes 20-21, supra.
56. V. Countryman & T. Finman, The Lawyer in Modern Society 281 (1966). See also Mathews, Negotiation: A Pedagogical Challenge, 6 J. Legal Ed. 93, 96 (1953), observing that in negotiation a lawyer "endowed with shrewdness and a sportive sense of outmaneuvering his opponent" has "an opportunity to indulge his proclivity almost devoid of risk of detection" provided he limits himself to "sharp practice" and does not step over into fraud, coercion or violations of law "or public policy." See Note, 112 U. Pa. L. Rev. 865 (1964).
57. 373 U.S. 83 (1962).
only limitations in the Code of Professional Responsibility on sharp practice in plea bargaining are on the public prosecutor, who

shall make timely disclosure to counsel for the defendant . . . of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. 58

It is obvious, as has already been pointed out, that this does not stem from an ethical standard for lawyers but on the duty of the government, a duty the government's lawyer performs as alter ego for his employer.

While it might strain present concepts of the role of the lawyer in an adversary system, surely the professional standards must ultimately impose upon him a duty not to accept an unconscionable deal. While some difficulty in line-drawing is inevitable when such a distinction is sought to be made, there must be a point at which the lawyer cannot ethically accept an arrangement that is completely unfair to the other side, be that opponent a patsy or a tax collector. So I posit a second precept: The lawyer may not accept a result that is unconscionably unfair to the other party. 59

A settlement that is unconscionable may result from a variety of circumstances. There may be a vast difference in the bargaining power of the principals so that, regardless of the adequacy of representation by counsel, one party may simply not be able to withstand the expense and bear the delay and uncertainty inherent in a protracted suit. There may be a vast difference in the bargaining skill of counsel so that one is able to manipulate the other virtually at will despite the fact that their framed certificates of admission to the bar contain the same words.

The unconscionable result in these circumstances is in part created by the relative power, knowledge and skill of the principals and their negotiators. While it is the unconscionable result that is to be avoided, the question of whether the result is indeed intolerable depends in part on examination of the relative status of the parties. The imposition of a duty to tell the truth and to bargain in good faith would reduce their relative inequality, and tend to produce negotiation results that are within relatively tolerable bounds.

But part of the test must be in result alone: whether the lesion is so unbearable that it represents a sacrifice of value that an ethical

58. ABA Code of Professional Responsibility, DR 7-103(B).
person cannot in conscience impose upon another. The civil law has long had a principle that a sale of land would be set aside if made for less than half its value, regardless of circumstance. This doctrine, called lesion beyond moiety, looks purely to result. If the professional ethic is caveat negotiator, then we could not tolerate such a burden. But there certainly comes a time when a deal is too good to be true, where what has been accomplished passes the line of simply-a-good-deal and becomes a cheat.

The lawyer should not be free to negotiate an unconscionable result, however pleasing to his client, merely because it is possible, any more than he is free to do other reprobated acts. He is not to commit perjury or pay a bribe or give advice about how to commit embezzlement. These examples refer to advice concerning illegal conduct, but we do already, in at least some instances, accept the principle that some acts are proscribed though not criminal: the lawyer is forbidden to testify as a witness in his client’s cause, or to assert a defense merely to harass his opponent; he is enjoined to point out to his client “those factors that may lead to a decision that is morally just.” Whether a mode of conduct available to the lawyer is illegal or merely unconscionably unfair, the attorney must refuse to participate. This duty of fairness is one owed to the profession and to society; it must supersede any duty owed to the client.

One who has actively practiced law for over 20 years and been a federal trial judge for eight years knows that the theses he has set forth are vulnerable to charges that they are impractical, visionary, or radical. Old friends will shake their heads and say that years on the bench tend to addle brains and lead to doddering homilies.

But, like other lawyers, judges hear not only of the low repute the public has for the bench but also of the even lower regard it has for the bar. We have been told so in innumerable speeches but, more important, our friends, neighbors and acquaintances tell us on every hand that they think little of the morality of our profession. They like us; indeed some of their best friends are lawyers. But they deplore the conduct of our colleagues. This is not merely an aftermath of Watergate: it is, in major part, because many members of the public, not without some support in the facts, view our profession as one that adopts ethics as cant, pays lip service to DR’s and on behalf of clients stoops to almost any chicane that is not patently unlawful. We will

60. See, e.g., LA. CIV. CODE art. 2589.
61. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-102(A). See also EC 5-9, DR 5-101(B).
62. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(1).
63. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-8.
not change that attitude by Law Days alone. It is to serve society’s needs that professions are licensed and the unlicensed prohibited from performing professional functions. It is inherent in the concept of professionalism that the profession will regulate itself, adhering to an ethos that imposes standards higher than mere law observance. Client avarice and hostility neither control the lawyer’s conscience nor measure his ethics. Surely if its practitioners are principled, a profession that dominates the legal process in our law-oriented society would not expect too much if it required its members to adhere to two simple principles when they negotiate as professionals: Negotiate honestly and in good faith; and do not take unfair advantage of another — regardless of his relative expertise or sophistication. This is inherent in the oath the ABA recommends be taken by all who are admitted to the bar: “I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor.”64

64. Oath of Admission recommended by ABA, modeled after the one in use in the State of Washington.
THE LAWYER'S OBLIGATION TO BE TRUSTWORTHY WHEN DEALING WITH OPPOSING PARTIES

GEOFFREY C. HAZARD, JR.*

It is desirable that lawyers be trustworthy in dealing with opposing parties. It is impractical, however, to go very far in formulating rules of professional conduct that require lawyers to be trustworthy.

I. DEFINING TERMS

At the outset, some definition of terms may be useful. By "lawyer" is meant lawyers in the practice of law generally. This includes lawyers in private practice and in public service, in independent firms and in law departments, in large organizations and in solo practice; civil and criminal lawyers, specialists and generalists. Lawyers perform a broad range of functions including counseling and advocacy, but this article focuses on those functions that concern direct dealings with opposing parties on behalf of a client. In this analysis, the term "vouching lawyer"

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refers to a lawyer who is making a representation to an opposing party.

By “opposing parties” is meant those persons, other than clients and officials of a tribunal, with whom vouching lawyers deal during the course of representing clients. Lawyers, of course, have special duties of trustworthiness in dealing with tribunals and owe equally exacting and even broader fiduciary duties to their clients. The present analysis focuses on the duty to opposing parties, not in derogation of vouching lawyers’ duties to client and court, but for purposes of clarification. The analysis presupposes and holds constant these other duties, particularly duties owed to clients. The term “opposing parties” in its exclusive connotation thus signifies those other than client and court. In its inclusive connotation, the term specifically refers to persons of adverse interest and their legal counsel, including opposite parties in contract or property transactions, formation of partnerships and corporations, negotiations aimed at settling litigation, and negotiation and mediation in interpersonal, interorganizational, interdepartmental, and political or social controversies of all kinds. Adversary relationships are ubiquitous in modern society, and the participation of lawyers in defining and transforming adversary relationships is commonplace. Ordinarily, whenever a lawyer acts for a client, a party of actual or potential opposing interest also exists.

Finally, by “trustworthy” is meant truthfulness in statements made as representations. The definition is limited to “statements made as representations” because conventions governing social intercourse do not require strict truthfulness at all.


5. For purposes of this analysis, the term “opposing party” includes the party's lawyer. A lawyer's duty of trustworthiness as regards an opposing party should not vary according to whether that party has representation. Indeed, the fact that opposing parties have representation generally makes it easier for vouching lawyers to discharge their own professional obligations. It simplifies communication, for lawyers can communicate in mutually understood jargon. Also, lawyers can generally assume that an opposing party is adequately represented and that an adequately represented party has the narrowest latitude for subsequently asserting that the transaction was infected by mistake, fraud, or other infirmity. The fact that an opposing party is represented by a lawyer, however, generally changes the potential for effective sanctions against violation of the duty of trustworthiness.
times. On the contrary, those conventions give license to make certain kinds of statements that are literally false. Thus, a lawyer is allowed to say at certain stages of negotiation that his client will not offer or accept a specified sum, concession, or interest when, in fact, the client is not intransigent. Indeed, the lawyer may so describe the client's position when that position has been taken on the lawyer's advice. A statement that a client will not offer or accept specified terms thus means only that the client will not presently accept such terms and instead wants to extend the risk and cost of nonresolution in the hope of reducing the price he must pay for resolution. Negotiations can reach a point of no return, however, when a party's anticipated gain in a negotiated resolution is less than the anticipated cost of the resolution. When the opposing party's situation begins to approach that point, it is time for the negotiator to shift from chaffering to bargaining in earnest. A lawyer's professional skill should include the ability to project where the points of no return are, both for his client and for the opposing party. The lawyer must also have the ability to signal when his statements are to be taken as representations, that is, when he is vouching for an assertion. Thus, trustworthiness is not simply the moral virtue of veracity but is an amalgam of moral virtue, market sense, and physiological and political discernment. It is the ability to understand what truth is, to understand when the truth is called for, and to instill in others confidence that one has such understanding.

II. The Uses of Trustworthiness

If a lawyer is trustworthy, then a statement made as a representation by the lawyer may be taken by an opposing party as a firm factual component of a transaction. This enables the opposing party to appreciate the situation and recognize what alternative resolutions are practicable. That, in turn, facilitates assessment of the opposing party's interests by the vouching lawyer's client, thereby further clarifying the available alternatives. In the economist's view, the lawyer's voucher, if accepted

as such, reduces transaction costs.  

This economizing effect of trustworthiness can be more fully appreciated upon consideration of the alternative means for verifying the factual components of a transaction. Two alternatives are available to an opposing party. The party can independently investigate the factual problem in question or employ someone else to investigate the situation. For example, a purchaser of real property can take the word of a seller's lawyer that there are no liens on the property or can obtain an independent title search. A party interested in learning the testimony of a key adverse witness can take the word of the opposing lawyer or can take the witness' deposition. Clearly, independent investigations will in many situations be preferred to reliance on the opposing lawyer. Investigations may be made when there is inadequate confidence in the particular lawyer's trustworthiness or, as in the case of independent title searches, in accordance with a convention calling for an independent investigation so that a particular lawyer's trustworthiness will not have to be put to the test.

Nevertheless, independent investigations are costly. The most definitive—and often costliest—form of independent investigation is a trial. By comparison, the cost of a reliable voucher may be slight.

The benefits of trustworthiness may be put in loftier terms by noting that the quality bestows honor upon lawyers in whom it is embodied. Yet trustworthiness is not only socially esteemed but also socially useful. It is both esteemed and useful in all social transactions—between politicians, business people, bureaucrats, acquaintances, and spouses. It is generally accepted as a prime aspect of social maturity.

Trustworthiness is especially useful for lawyers because of the kinds of transactions into which lawyers are drawn and because of lawyers' peculiar access to the facts. Lawyers are drawn into situations that have a high element of uncertainty about what will happen or what has happened—contracts with serious risk of uncertainties in the future and disputes based on ambiguous evidence of what has occurred in the past. Lawyers are rarely involved in spot market transactions or circumstances in which twenty bishops will testify to an event. By contrast, they

OBLIGATION TO BE TRUSTWORTHY

are commonly retained in transactions entailing uncertainties over which the parties may choose to litigate. Holding the stakes constant, the relative value of vouching as a means of resolving uncertainties becomes proportionately higher as uncertainty increases. Lawyers’ usefulness in vouching to matters that would otherwise remain uncertain is thus greatest in transactions whose uncertainties and stakes make the lawyer useful in the first place.8

Lawyers are in a unique position, resulting from their relationships with their clients, to make truthful recommendations and resolve uncertainties. As spokesmen for their clients’ interests, lawyers have peculiar access, arising from the lawyer-client relationship, to the facts that surround a given transaction.9 First, the client is supposed to give the lawyer the whole truth, untempered by pride or pretense. This provides the lawyer with more information than it is ordinarily possible to get under other circumstances—most if not all of the truth as perceived by the client. Second, lawyers have access to documentary and background information and normally to all other sources of information available to their clients. Finally, inquiry is greatly aided by the guarantee of confidentiality.10 These elements combine to give lawyers a more complete and accurate picture of the facts than that usually possessed by any other person involved in a given transaction.

This store of information is a highly useful resource. Strong justification has been advanced above for making it fully available to opposing parties. A question nevertheless remains whether the rules of professional conduct should require that this information be made fully available to opposing parties.

III. THE DISCLOSURE PROBLEM

The primary reason why all information available to lawyers should not be disclosed to opposing parties is that the prospect of disclosure would impair the lawyer’s investigation in the first

8. Consider the role of lawyers in negotiating the settlement that led to the release of the Americans held hostage by Iran. See N.Y. Times, Jan. 9, 1981, § A, at 8, col. 1.
9. The point about a lawyer’s peculiar access to the facts was made to me by my esteemed colleague, Professor Arthur Leff.
instance. This concern is the basis of rules that protect lawyers against disclosure of information acquired in representing clients. The attorney-client privilege provides that lawyers may not be compelled to divulge confidential information supplied by their clients.11 The work-product rule sharply limits the extent to which an opposing party may compel production of other information acquired by the lawyer in preparation for litigation.12 Finally, lawyers generally may not disclose on their own initiative information relating to the representation of a client except for the purpose of furthering the client's interests.13

The basic rules protecting the confidentiality of information gathered by lawyers while representing clients are taken as working premises for the present discussion. Within the framework of these rules, however, it is possible to argue for the proposition that when a lawyer undertakes to act for a client outside of court, a concurrent duty exists to make full disclosure of relevant facts known.14 In light of the lawyer's duty of candor inside a courtroom, a question arises whether lawyers should also be required to be fully candid when speaking for a client outside of court. Such a requirement would seem to be a true measure of trustworthiness.

Problems of lawyer trustworthiness can arise in two different contexts. The first, out-of-court transactions to resolve disputes over legal rights, can result in a trial if settlement negotiations fail. The second, out-of-court transactions that contemplate some type of contract, generally offers no further alternative if negotiations fail.

Transactions that can go to trial upon the failure of negotiations will be examined first. Debate persists over whether greater candor should be required in trials.15 With regard to disclosure in the forensic setting, the modern rules of discovery16

11. 101 S. Ct. at 682.
14. See Rubin, supra note 1, at 591.
expose a considerable portion of lawyers' evidence-gathering to the opposing party. Furthermore, the rule governing the courtroom requires that any representation of fact, as distinct from a statement about what someone else asserts as fact, that is made to the court must be truthful according to the lawyer's knowledge.\footnote{ABA Code of Professional Responsibility, DR 7-102(A)(5) (1977).} It has been urged that forensic candor go further. Marvin Frankel argued while on the bench that advocates should be required to disclose everything they know, perhaps excepting communications from clients.\footnote{See Frankel, supra note 15, at 1057-59.} That proposal has failed to attract support. Dispute also continues concerning whether lawyers must reveal the fact that their clients' testimony is perjurious when the lawyer knows that is the fact. It is my view that advocates should, to the following limited extent, vouch for their clients' testimony: they should be obliged to vouch that they have not violated their own duty to avoid use of fabricated evidence, even if the evidence is a client's testimony. Conversely, the position is defensible that lawyers should not be required to disclose their clients' perjury, especially in the case of defendants in criminal proceedings.\footnote{See Freedman, supra note 15, at 1063-66.}

Forensic disclosure, however, is peripheral to the exploration of truthfulness between opposing parties in negotiation. Trial supplies the factual premises for resolution of a transaction and imposes a resolution based on those premises. Trial is a costly and stressful alternative that can sometimes be avoided by negotiations.\footnote{See 1 M. Belli, Modern Trials § 109 (1954).} The event of a trial shows that the less costly alternative has failed in a particular case.

Trial can thus be viewed as the failure of the parties to stipulate the facts; that is, counsel have been unable to establish the facts by reciprocal representation and must establish them through trial. The causes of this failure have been alluded to: the evidence is not strong enough to enable counsel to induce the client to authorize concessions, counsel lack the competence to recognize that the evidence justifies certain concessions, or one counsel is simply willing to inflict the cost of a trial on the other side, regardless of the evidence. If any one of these conditions exists, a trial results. But if these conditions exist, it seems
futile to try to remedy the situation by demanding greater candor at trial. If concessions have not been forthcoming in the relative privacy and repose of pretrial negotiations, what inducements could make them more forthcoming in the more antagonistic circumstances of a trial?

This analysis suggests that shortfall in voluntary disclosure at trial is simply a remanifestation of shortfall in voluntary disclosure before trial. Therefore, consideration of the problem of candor at trial leads to consideration of the problem of trustworthiness in negotiations.

Although negotiations may be categorized as aimed at either settling legal disputes or trying to consummate deals, these two categories of negotiations would collapse into a single type were it not for the availability of a court to which parties could resort upon failure of negotiations concerning a legal dispute. Consider, for example, negotiations in the international situation21 or negotiation of claims based on moral rights as distinct from those based on legally recognized rights.22 No trial is available if the negotiations fail. This same situation exists when there is a collapse of negotiations aimed at a deal: the transaction aborts, leaving the parties where they stand. In any event, a trial is an event contingent upon failure of negotiations. Because trial is costly, there is some value in avoiding it. Therefore, even in dispute-settlement negotiations, a stage exists at which mutual incentives to avoid trial arise. At that stage, negotiations aimed at settlement are like negotiations aimed at a deal: there is a net value to all parties in a consensual resolution if the facts can be established on which to base that resolution.

The natural conclusion is that every inducement for increased trustworthiness should be fostered. Why then does the law of professional conduct fail to require disclosure on the part of lawyers participating in negotiations?

IV. Regulation of Trustworthiness

The present regulation of lawyers' trustworthiness is modest. The Code of Professional Responsibility, in DR 7-102(A)(5),

21. See note 8 supra.
22. Negotiations within the legislature may be regarded as negotiations over moral rights. Such negotiations are backed by the parliamentary sanction of resolution through majority vote.
provides that "[i]n his representation of a client, a lawyer shall not . . . knowingly make a false statement of law or fact." This provision might be characterized as a minimalist formulation of the law of disclosure. It prohibits only misrepresentation and requires no affirmative disclosure. It is limited to statements of "fact" as distinguished from evidence, indications, portents, opinions, possibilities, or even probabilities of which the lawyer may be aware. It is limited to matters that are false as distinguished from those of which the lawyer is skeptical or even suspicious.

The Code of Professional Responsibility contains two other provisions that augment this basic rule. Yet these standards also fail affirmatively to require a high level of trustworthiness in dealing with opposing parties. The first, DR 7-102(A)(3), provides that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal." This provision clearly does not go far in the direction of a disclosure requirement. Instead of specifying the matters that must be revealed, it incorporates by reference general requirements laid down by the law at large. Thus, rules such as those imposed on lawyers by securities regulations require affirmative revelations. The law of fraud as generally understood requires revelation where necessary to correct a material misstatement when the lawyer has become aware of an inaccuracy.

The second relevant provision is DR 7-102(B)(1), which provides that

[a] lawyer who receives information clearly establishing that . . . his client has, in the course of the representation, perpetrated a fraud upon a person . . . shall promptly call upon his client to rectify the same, and if his client refuses . . . he shall reveal the fraud to the affected person . . . except when the

24. Id., DR 7-102(A)(3).
information is protected as a privileged communication.\textsuperscript{27}

In light of the exception in the last clause, it is doubtful whether the provision can ever be operative.\textsuperscript{28} Even if it could be operative, it only applies to fraud and even then only when the fraud is "clearly" established. Thus the disclosure required by DR 7-102(B)(1) is little more than that required for lawyers to escape complicity in their clients' fraud. If so, the provision is redundant in light of DR 7-102(A)(7),\textsuperscript{29} and the net requirement of the Code of Professional Responsibility is that lawyers avoid fraudulent representations. Such a precept falls far short of requiring trustworthiness.

Comparison may be made between these provisions and those promulgated by the American Bar Association Commission on Evaluation of Professional Standards, familiarly known as the Kutak Commission. Its provision on this subject, in the Commission's Proposed Final Draft, May 30, 1981, is as follows:

Rule 4.1 Truthfulness in Statements to Others
In the course of representing a client a lawyer shall not:
(a) Knowingly make a false statement of fact or law to a third person; or
(b) Knowingly fail to disclose a fact to a third person when:
   (1) In the circumstances failure to make the disclosure is equivalent to making a material misrepresentation;
   (2) Disclosure is necessary to prevent assisting a criminal or fraudulent act, as required by Rule 1.2(d); or
   (3) Disclosure is necessary to comply with other law.\textsuperscript{30}

\textsuperscript{27} ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(B)(1) (1977).
\textsuperscript{28} See G. HAZARD, ETHICS IN THE PRACTICE OF LAW 21-33 (1978).
\textsuperscript{29} DR 7-102(A)(7) provides that "[i]n his representation of a client, a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(7) (1977).
\textsuperscript{30} ABA COMM’N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft, May 30, 1981). Proposed Rule 1.2(d) provides as follows:
A lawyer shall not counsel or assist a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows or reasonably should know are legally prohibited, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning, or application of the law.

\textit{Id.}
OBLIGATION TO BE TRUSTWORTHY

Proposed Rule 4.1(a) corresponds to DR 7-102(A)(5) and proposed Rule 4.1(b)(1) is a corollary. Proposed Rule 4.1(b)(2) corresponds to DR 7-102(A)(7). Proposed Rule 4.1(b)(3) corresponds to DR 7-102(A)(3). The only other difference between proposed rule 4.1(b) and the provisions of the present Code of Professional Responsibility concerns the question of preserving client confidences. The present Code does not explicitly determine whether the disclosure requirement of DR 7-102(A)(3) operates when the required disclosure will reveal adverse information about the client—as it almost inevitably will. The term "confidences" in the present Code, however, probably does not include information that effectuates a fraud. The Comment to proposed Rule 4.1 clarifies this point.

Upon careful consideration, it thus is clear that the Kutak Commission's proposed rules on trustworthiness do little to alter the status quo as set forth in the Code of Professional Responsibility. Yet the Commission considered and ultimately rejected a more sweeping proposal. Its Discussion Draft of January 30, 1980, included the following formulation:

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 misapprehension 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 . . . .

Proposed paragraph (a) went well beyond the fraud standard, prescribing a general requirement that lawyers be "fair." This certainly encompasses a concept of truthful representations. On

31. See text accompanying note 23 supra.
32. See text accompanying note 24 supra.
33. See 8 J. WIGMORE, TREATISE ON EVIDENCE § 2298 (McNaughton Rev. 1961 & Supp. 1980); ABA CANONS OF PROFESSIONAL ETHICS No. 37 (1908).
34. ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT 88 (Discussion Draft, Jan. 30, 1980).
the other hand, paragraph (b) restates DR 7-102(A)(5) and sub-
paragraph (b)(1) does not depart radically from the present
Code. Subparagraph (b)(2) parallels the Restatement (Second)
of Agency, which provides that under certain circumstances, if a
lawyer does not correct a manifest misapprehension on the part
of the opposing party, the lawyer could incur civil liability.35
Furthermore, the lawyer would probably be guilty, under ex-
isting legal principles, of the ethical offense of “assisting” the
client in “illegal” conduct.36

The idea underlying the Kutak Commission’s original pro-
posal was not very complicated: the lawyer, as the instrument of
a transaction, should be the guardian of its integrity.37 The pro-
posal did not purport to hold lawyers strictly liable for the integ-
rity of transactions or even burden them with a duty of reasona-
ble care. Their only duty was to disclose facts of which an
opposing party was obviously ignorant and which might affect
the integrity of the transaction.38

Much more fundamental objections were leveled at the pro-
posal, particularly at the requirement that lawyers be “fair.”
Many members of the Commission and certainly the Reporter
were surprised at the vehemence of the objections. “Vehemence”
is the correct word, since much more heat than light was forth-
coming in the reaction to the proposal. The Commission’s sur-
prise was compounded because the proposal seemed appropriate
to the lawyer’s role and appeared to reflect one interpretation of
the lawyer’s duty as established in the decisional law.39

Although the explanation of the bar’s aversion to the January
1980 proposal is complex, some concerns can be identified.
First, many members of the bar do not realize or are unwilling to
accept the fact that the law at large applies to lawyers.40 Per-
haps these members of the bar believe an immunity attaches to
lawyers against the civil liabilities imposed by the law on other

35. Restatement (Second) of Agency § 348, comment c (1957).
36. See Hazard, How Far May a Lawyer Go in Assisting a Client In Conduct that
37. See Rubin, supra note 1, at 591.
38. In this regard, use of the term “material facts” in the January 1980 proposal
would have been more precise.
39. See Kutak, Evaluating the Proposed Model Rules of Professional Conduct,
1980 Am. B. Foundation Research J. 1016, 1021 n.22.
40. See Hazard, supra note 28.
intermediaries such as real estate brokers or securities underwriters. More subtly, perhaps lawyers recognize that the law at large applies to them but do not wish to be accountable for that obligation in the context of professional discipline.

Still subtler concerns were involved. The fundamental difficulty appears to stem from the lack of a firm professional consensus regarding the standard of openness that should govern lawyers' dealings with others and the lack of settled and homogeneous standards of technique in the practice of law. This lack of consensus indicates that lawyers, at least nationally, do not share a common conception of fairness in the process of negotiation. The lack of this consensus means that lawyers lack the language to express norms of fairness in negotiation and the institutional means to give effect to these norms.

The underlying disagreement about standards of fairness is not difficult to understand. Lawyers' standards of fairness are necessarily derived from those of society as a whole, and sub-cultural variations are enormous. At one extreme lies the "rural God-fearing standard," so exacting and tedious that it often excludes the use of lawyers. At the other extreme stands "New York hardball," now played in most larger cities using the wall-to-wall indenture for a playing surface. Between these extremes are regional and local standards and further variations that depend on the business involved, the identity of the participants, and other circumstances. Against this kaleidoscopic background, it is difficult to specify a single standard that governs the parties and thus a correlative standard that should govern their legal representatives.

The second area of disagreement concerns professional technique. Lawyers differ widely in the technical sophistication they expect of themselves and of others with whom they deal. As a result, their expectations regarding their own or their opponents' knowledge in the context of a given transaction may vary widely. Among practitioners having a very high level of technique, it is

41. See White, supra note 6, at 935-37.
42. See id. at 927.
43. These were brought home to me dramatically when I entered the practice of law in Oregon after attending law school in New York City.
expected that a lawyer has carefully investigated and compiled relevant information, is familiar with recent developments in applicable law, recognizes all tax implications of a transaction, and anticipates secondary transactions likely to be involved in the transaction at hand. At another level of technique, lawyers may use a standard form for a transaction and hope for a satisfactory result. 45

Professional transactions within any given level of technique proceed according to implicitly understood conventions that allay all but ordinary anxiety on the part of the lawyers. Professional transactions that combine diverse levels of technique pose much greater difficulties. Lawyers accustomed to less sophisticated techniques are understandably fearful that they will be outmatched or even hoodwinked, with the possibility of loss to their clients and humiliation or even worse for themselves.

Lawyers accustomed to more sophisticated techniques have a correlative but perhaps less apparent dilemma. First, signs of bumbling on the other side cannot necessarily be taken at face value; there is such a thing as country-slickering and it occurs even in the city. Second, sophisticated lawyers are at risk precisely because of their technical sophistication. High-level technicians recognize aspects of transactions that lawyers of lesser sophistication may overlook. But what is to be done with that knowledge? If it is withheld, the transaction becomes vulnerable to rescission because of the lawyer’s nondisclosure. The lawyer’s professional competence, if not fully deployed for the benefit of the opposing party, thus becomes a potential infirmity for the transaction. 46 Conversely, if the lawyer’s competence is deployed for the benefit of the opposing party, where does the deployment properly stop, short of a takeover of the transaction and assumption of responsibility for the interests of both parties? 47

In the ebb and flow of practice, lawyers can and do adjust to these exigencies. The high level technicians deal with each other

46. This consideration became pivotal in the Kutak Commission’s decision to withdraw proposed Rule 4.1(a) of the Discussion Draft, Jan. 30, 1980.
47. Cf. 329 U.S. at 516 (Jackson, J., concurring) (“Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.”).
with circumspection but confidence. Lawyers in other strata of the professional community have their own conventions. When levels are crossed, the less sophisticated lawyer must decide whether to trust the opponent or to associate someone else, research into the night, or perhaps even abort the transaction. The more sophisticated lawyer must decide whether to risk later recriminations about the transaction if the bargain is too hard, whether to make particular disclosures to protect the deal but at the risk also of killing the deal, or whether to handle the transaction for both sides.

This range of possibilities is difficult to govern by regulation. A rule based on the premise that the legal profession is substantially homogeneous in technical sophistication would put the technically sophisticated lawyer in a hopeless dilemma when dealing with an unsophisticated opposing counsel. Such a lawyer could straightforwardly be a partisan of his own client unless it became evident that the other side was inadequately represented. But in that case, the superior technician would have to assist the other side to guard against the risk of a subsequent charge of nondisclosure or fraud. Yet until a transaction is well underway, a lawyer cannot know which course of action is required. At the same time, the lawyer who is unsophisticated or is simply acting according to his idea of the applicable conventions of openness would be in jeopardy of giving away his client’s position. Thus, in a situation where the opposing lawyers differ substantially in technical sophistication, a rule requiring reciprocal disclosure could not yield genuine reciprocity.

On the other hand, it would be practically impossible to formulate a general rule that accounts for variations in technical sophistication. Consider the difficulties with the concept of specialization and with the definition of specialization once the concept was accepted,48 or with the problem of “incompetence” among the trial bar.49 Could we imagine rules of disclosure that were based on a distinction between Type A Lawyers and Type B Lawyers? Anyone who is sanguine about overcoming these difficulties should try drafting the criteria by which to differentiate the technically sophisticated practitioner from the bar at large.

In light of these constraints, legal regulation of trustworthiness cannot go much further than to proscribe fraud. That is disquieting but not necessarily occasion for despair. It simply indicates limitations on improving the bar by legal regulation. 50

Legal Ethics in the Context of Negotiations

by Gianfranco A. Pietrafesa

Most of the Rules of Professional Conduct (RPCs) are drafted in the context of litigation and other contested matters, and not in the context of transactional matters and negotiations. This article examines some of the RPCs frequently encountered in the context of negotiations. In particular, the article examines a few RPCs referring to a lawyer’s obligations to make truthful statements when negotiating on behalf of clients, and to disclose information to third parties to prevent certain “bad acts” of clients.

When Representing a Client, I Cannot Tell a Lie

About Material Facts

A lawyer cannot lie about material facts. RPC 4.1(a)(1) states that: “In representing a client, a lawer shall not knowingly make a false statement of material fact or law to a third person.” The two key terms in this rule are “knowingly” and “material facts.”

RPC 1.0(f) defines “knowingly” as “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Thus, there is no violation of RPC 4.1(a) if the lawyer does not know that his or her statement is false. Consider the following example.

Example #1: A lawyer represents a client selling a business. In response to a buyer’s request for due diligence, the client sends his lawyer unaudited financial statements with instructions to forward them to an interested buyer. The financial statements are false, and show inflated income. The lawyer is conveying false information from his client to the other party, but if the lawyer does not know the information is false, he is not knowingly making a false statement.

The term “material fact” is not defined in the RPCs. A fact is material if it has real importance or great consequence, one that goes to the heart of the matter. That is, “a fact is material when, if the representation had not been made, the contract or transaction would not have been entered into. Conversely, a representation is not material when it appears that the transaction would have been entered into notwithstanding it.” Consider the following two examples to distinguish between material and immaterial facts.

Example #2: A buyer wants to purchase an office building for its rental income. When representing the seller of an office building, a lawyer states to the buyer that the building sits on two acres of land when she knows that the actual size is 1.90 acres. The size of the land in this context is probably an immaterial fact because the buyer seeks the rental income and the transaction would probably happen regardless of the size of the land.

Example #3: When representing the seller of vacant land, a lawyer states to the buyer that there are five acres of vacant land when he knows that the actual size of the land is 4.90 acres. The size of the land in this context may be a material fact if the buyer has indicated that he intends to develop the vacant land into five one-acre lots in accordance with applicable land use laws. The transaction may not happen, or certainly would not happen at the same price, if the buyer knew that he could subdivide the land into only four instead of five lots, or that he could subdivide the land into five lots only if he bears the additional cost of seeking applicable variances.

About the Law

RPC 4.1(a)(1) states that “a lawyer shall not knowingly make a false statement of material fact or law to a third person.” The rule prohibits a lawyer from knowingly misstating the law to another person, including another lawyer, because the other person may rely on the misstatement.
regard, two authorities on legal ethics have written:

[When one lawyer addresses another, she must not deliberately distort what she knows to be the law, for the circumstances may be such that the other lawyer will not have an opportunity to research the point, and will make a hasty decision or forgo certain rights in reliance on such a misstatement.]

It has been observed, however, that this rule does not require one lawyer to do the work of another. Consider the following examples.

Example #4: A lawyer represents the seller of business assets. The lawyer representing the buyer fails to request the information necessary to submit a notice of bulk transfer to the New Jersey Division of Taxation. As a result, the buyer may become liable for any taxes the seller owes to the state of New Jersey. The seller’s lawyer is not required to disclose to the other lawyer that it would be prudent to submit the notice.

Example #5: Consider the same facts as Example #4, except that the buyer’s lawyer asks the seller’s lawyer whether a notice of bulk transfer should be submitted to the Division of Taxation. What should the seller’s lawyer do? At a minimum, she cannot misstate the law by stating that the form is unnecessary, but can remain silent or advise the buyer’s lawyer to do her own research.

Example #6: Consider the same facts as Example #4, except that the buyer’s lawyer asks the seller’s lawyer whether a notice of bulk transfer should be submitted to the Division of Taxation. What should the seller’s lawyer do? The rule does not require one lawyer to do the work of another. The lawyer can remain silent, but must consider his or her integrity and reputation.

Example #7: A lawyer represents Party A to a contract negotiation. The lawyer for Party B wants to schedule a conference call on the following day for both parties and their lawyers to discuss some issues with the contract. The lawyer for Party A, who wants time to speak with his client, falsely states to the other lawyer that Party A is not available on the following day but will be available in two days. This is a false statement of an immaterial fact.

Example #8: In order to increase the offer of an interested buyer, a lawyer states to the interested buyer that his client already has a firm offer of $1 million, when in fact he does not. The lawyer has knowingly made a false statement of fact, which is material and thus a violation of RPC 4.1(a)(1).

Example #9: In order to make a quick sale, a lawyer states to interested buyers that the business will sell quickly, and that they should make their highest and best offers. The lawyer has not made a statement of fact in violation of RPC 4.1(a)(1). Whether the business will sell quickly is a matter of opinion.

Example #10: A client tells her lawyer that she has a firm offer of $1 million, and asks the lawyer to convey that information to interested buyers. The lawyer is unaware that the client does not have such an offer. Without knowledge of its falsity, the lawyer has not violated RPC 4.1(a)(1), even though he has made a false statement of material fact.

Example #11: A lawyer is negotiating the terms of her client’s purchase of a business. The buyer has advised his lawyer that he is willing to pay up to $5,000,000 for the business. The seller asks whether the buyer is willing to pay $4,500,000. Can the buyer’s lawyer state that she is not sure her client will be willing to pay such a high price? Yes, this is considered acceptable bluffing or posturing during negotiations, and not a violation of RPC 4.1(a)(1).

Example #12: A lawyer is representing a client in a transaction. The lawyer’s client asks the lawyer to convey a statement to the other party indicating that the lawyer’s client is not sure whether the other party will accept the offer. The lawyer advises the other party that the lawyer’s client is not sure whether the offer will be accepted. The lawyer’s client has an offer of $1 million, and asks the lawyer to convey that information to interested buyers. Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed...

But Little White Lies are OK

The rule does not prevent a lawyer from making false statements of immaterial facts (i.e., telling little white lies). However, consider that a lawyer’s word is his or her bond, and a lawyer’s reputation for integrity is paramount. If a lawyer lies, he or she will soon earn a reputation as an untrustworthy person.

Example #7: A lawyer represents Party A to a contract negotiation. The lawyer for Party B wants to schedule a conference call on the following day for both parties and their lawyers to discuss some issues with the contract. The lawyer for Party A, who wants time to speak with his client, falsely states to the other lawyer that Party A is not available on the following day but will be available in two days. This is a false statement of an immaterial fact.

Bluffing, Puffing, Posturing and Opinions are OK

RPC 4.1 concerns facts, and not expressions of opinion, bluffing, puffing, posturing, etc. by a lawyer. Some misstatements are generally accepted and even expected in negotiations; for example, a lawyer’s opinion on the purchase price of a business. Likewise, bluffing about whether a price will be acceptable to a client is expected. In this regard, Comment 2 to the American Bar Association (ABA) Model Rules states:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category.

Consider the following examples.
would regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement or as merely an expression of the speaker's state of mind. Assessment depends on the circumstances in which the statement is made, including the past relationship of the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related communication between the persons involved, the known negotiating practices of the community in which both are negotiating, and similar circumstances. In general, a lawyer who is known to represent a person in a negotiation will be understood by nonclients to be making nonimpartial statements, in the same manner as would the lawyer's client. Subject to such an understanding, the lawyer is not privileged to make misrepresentations described in this Section.9

No Affirmative Duty to Disclose

Although RPC 4.1(a)(1) prohibits a lawyer from lying about material facts, generally it does not create an affirmative duty to disclose any facts to third persons. The ABA Comments state that “A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.”10

Example #12: A lawyer represents a manufacturer of watches, and is negotiating an agreement with a retailer. Both the manufacturer and the lawyer know that a competitor will soon introduce a superior watch at a reduced price. The competing watch is likely to undercut demand for the client’s watch.11 Under the arrangement, the retailer presumably will be required to purchase watches, spend money on advertising, etc. Neither the client nor the lawyer has made any statement about competing watches.

As noted, RPC 4.1(a)(1) does not create an affirmative duty to disclose any facts to third persons. Therefore, the lawyer does not have to disclose the competing watch to the opposing side, the retailer. The lawyer’s duty is to the client and that duty is to maintain the confidentiality of the information.

Example #13: Consider the same facts as Example #12, with the following additional facts: “As negotiations are being wrapped up, the lawyer for the retailer’s lawyer asks the manufacturer’s lawyer whether there are any new models being introduced in the market that could hurt sales.”12

The client did not make any statements to the retailer or its lawyer; therefore, there is no duty to disclose the material fact about the competing watches because there was no fraud by the client. RPC 4.1(a)(2) provides that “a lawyer shall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.”

However, if the client did make a statement about the lack of competition or the quality of the watches on the market, and knew that the competing watch would have an adverse effect on its watches, and thus on the retailer, this amounts to fraud, and requires the lawyer’s disclosure of the material fact about the competing watches to the retailer.13

My Client Was So Bad, I Had to Tell Someone

A Lawyer’s Duty to Disclose to Prevent Crime and Fraud

Under RPC 4.1(a)(2), a lawyer must disclose a material fact to a third party when disclosure is necessary to prevent a client from committing a crime or fraud.14 Significantly, not only must a lawyer disclose material facts, but under RPC 4.1(b) a lawyer must make a disclosure even if he or she is required to disclose confidential information otherwise protected under RPC 1.6.15

In addition to RPC 4.1(a)(2), RPC 1.6(b)(1) requires a lawyer to: 1) disclose information 2) to the proper authorities 3) to prevent a client or another person from committing a criminal, illegal or fraudulent act 4) that the lawyer reasonably believes is likely 5) to result in death, substantial bodily harm or substantial injury to the financial interest or property of another.16

The purpose of RPC 1.6(b) is to require disclosure of information to prevent a client’s criminal, illegal and fraudulent acts the lawyer reasonably believes is likely to result in death, substantial bodily harm or substantial injury to the financial interest or property of another. Three key terms in RPC 1.6(b) are “proper authorities,” “substantial injury to the financial interest or property of another” and “reasonably believes.”17

In transactional matters, the proper authorities may include the Securities and Exchange Commission, the New Jersey Department of Environmental Protection (NJDEP) and the New Jersey Division of Taxation, among others. However, when dealing with criminal, illegal and fraudulent acts that may result in death, substantial bodily harm or substantial financial or property damages, these disclosures could or should be made to the police, the county prosecutor or the Attorney General’s Office. When in doubt, disclose the information to the county prosecutor.

There must be more than a remote possibility of potential harm to constitute a substantial injury to the financial interest or property of another.18 Under RPC 1.0(m), the term “‘substantial’ when used in reference to degree or extent denotes a material matter of clear and weighty importance.”19

Under RPC 1.6(e), the term “reasonable belief” means “the belief or conclu-
sion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes *prima facie* evidence of the matters referred to in subsections (b), (c), or (d).” Likewise, “reasonable belief” or “reasonably believes” means “the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.”

“Reasonable” or “reasonably” means “the conduct of a reasonably prudent and competent lawyer.”

“Belief” or “believes” means a lawyer “actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.”

The following are examples of mandatory disclosures under RPC 1.6(b).

**Example #14:** A client is being investigated by an administrative agency. The client and its lawyer advised the agency that the client did not compensate its landlord based on the revenues generated at the leased premises. The agency terminated its investigation of the client. Later, the lawyer discovers the client was, in fact, compensating an out-of-state affiliate of the landlord based on the revenues generated at the leased premises.

The lawyer reasonably believes the information was relevant to the agency’s termination of its investigation, and that the client was perpetrating a fraud on the agency. When the client refused to disclose the information to the agency, the lawyer made the disclosure to the agency.

**Example #15:** A lawyer is representing the seller of real estate with a leaking underground storage tank. For unknown reasons, the buyer’s environmental expert did not locate the abandoned tank or evidence of a significant discharge of heating oil. The seller refuses to disclose the tank or the discharge to the buyer or the NJDEP. The lawyer reasonably believes the buyer is likely to incur substantial expenses in an environmental cleanup. The lawyer must disclose the discharge to the NJDEP to prevent his client from committing illegal and fraudulent acts (namely, failing to disclose the discharge to the NJDEP and failing to disclose the tank and the discharge to the buyer) that are likely to result in substantial injury to the financial interest or property of the buyer.

If a lawyer makes a disclosure to the proper authorities, under RPC 1.6(c) the lawyer may also disclose the information to the buyer to the extent the lawyer reasonably believes is necessary to protect the buyer from death, substantial bodily harm or substantial injury to a financial interest or property. However, even if a lawyer does not make a disclosure to the proper authorities under RPC 1.6(b), he or she is required to disclose a material fact to the buyer under RPC 4.1(a)(2) instead of under RPC 1.6(c).

In conclusion, when negotiating on behalf of a client, a lawyer must be cognizant of his or her obligations under the Rules of Professional Conduct and the relevant case law, and must be prepared to make difficult decisions about disclosure of material facts, and perhaps even confidential information, to third parties.

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**Endnotes**

1. Accord, RPC 8.4(c) (“It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”). See also Restatement (Third) of the Law Governing Lawyers, §98(1) (2000) (“A lawyer communicating on behalf of a client with a non-client may not knowingly make a false statement of material fact or law to the non-client.”).


6. Hazard and Hodes, §37.3.

7. Hazard and Hodes, §37.3.

8. See, e.g., Hazard and Hodes, §37.3 (“a lawyer is not prohibited from making deliberate misstatements to a third party during representation of a client, so long as only immaterial falsehoods or misrepresentations are at issue.”) (emphasis in original).

9. Restatement, §98, Comment c.

10. ABA Model Rule 4.1, Comment 1. Accord, Restatement, §98, comment e (“In general, a lawyer has no legal duty to make an affirmative disclosure of fact or law when dealing with a non-client.”).

11. See Hazard and Hodes, §37.3, Illustration 37-1, ¶1.

12. See Hazard and Hodes, §37.3, Illustration 37-1, ¶2.


14. Accord, RPC 1.2(d) (“A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent ...”); RPC 1.6(b)(1), (c) and (d)(1). See also Restatement, §98(3) (“A lawyer communicating on behalf of a client with a non-client may not fail to make a disclosure of information required by law.”). Note that New Jersey is different from other jurisdictions. Whereas New Jersey requires disclosure, ABA Model Rule 4.1(b), for example, merely permits disclosure.
15. Accord, RPC 1.6(b)(1), (c) and (d)(1).
16. Again, New Jersey is different from other jurisdictions. RPC 1.6(b)(1) requires disclosure, whereas ABA Model Rule 1.6(b)(1) merely permits disclosure. See A v. B., 158 N.J. 51, 59 (1999); Advisory Comm. Op. 677 (Oct. 10, 1994). Also, New Jersey includes the term “illegal” in RPC 1.6(b) whereas the ABA Model Rule does not. See Kevin H. Michels, New Jersey Attorney Ethics (Gann), § 15:3-3(a).
17. This article concerns disclosures to prevent a client’s bad acts. A lawyer should review RPC 1.6(d) for disclosures he or she reasonably believes necessary to rectify the consequences of a client’s bad acts when the client has used the lawyer’s services to commit such acts. A lawyer should also review RPC 1.2(d) and RPC 1.16 for circumstances when a lawyer must withdraw as counsel to a client.
19. See also Michels, § 15:3-3(d).
20. RPC 1.0(j).
21. RPC 1.0(i).
22. RPC 1.0(a).

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NEGOTIATION ETHICS

By Charles B. Craver

When I teach negotiation courses to attorneys and business people, I often begin by indicating that I have rarely participated in professional negotiations during which both sides did not lie, yet I have encountered very few negotiators I thought were dishonest. How can negotiators lie without being dishonest? They misrepresent matters they are not expected to discuss truthfully.

Two people get together to negotiate. One is authorized to accept any amount over $100,000, while the other is authorized to pay up to $130,000. They thus have a $30,000 settlement range between their respective bottom lines. They initially exchange small talk, then begin to explore the substantive issues of their exchange. The person who hopes to obtain money states that he cannot accept anything below $150,000, while the person willing to pay money indicates that she cannot go a penny over $75,000. They are pleased to have begun their interaction successfully, yet both have begun with bold-faced lies.

Model Rule 4.1, which regulates the ethics of lawyers, provides that an attorney “shall not knowingly make a false statement of material fact or law to a third person.” This unequivocally indicates that lawyers may not lie. When is a lie not a lie, when it’s by a lawyer? When this rule was being drafted, people who teach negotiation skills pointed out that if all lies were forbidden, when attorneys negotiated most would be subject to discipline because of what is euphemistically characterized as “puffing.” As a result, a Reporter’s Comment was included with Rule 4.1 indicating that different expectations are involved when attorneys are negotiating.

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category.

As a result, if one party offered to pay the other $115,000, the offer recipient could ethically indicate that this sum was unacceptable to his side even though he knew it was perfectly acceptable. If the other side requested a non-admission provision indicating that her side wished to disclaim any admission of legal responsibility for what was being resolved, the first party could vehemently oppose such a provision even though he knows that his client doesn’t care about such a provision. He does this in an effort to obtain more money for his client in exchange for the non-admission clause the other side values. Both of these statements are considered “puffing” since they pertain to nonmaterial information.

I have no difficulty with the Reporter’s Comment indicating that statements concerning one’s actual settlement intentions and the subjective value placed on items being exchanged do not have to be truthful. They pertain to “puffing” and do not involve matters one expects to be discussed with complete candor. On the other hand, I find it odd to state that these matters do not
concern “material fact.” When we negotiate, the factual, legal, economic, and political issues underlying the instant transaction are really secondary. What parties have to determine through the negotiation process is how the other side values the items being exchanged and how much of each must be offered to induce the other side to enter into an agreement. Nonetheless, I do expect such “puffing” and am not offended by persons who over or under state the value of items for strategic purposes or who are not forthright regarding their true settlement intentions.

The principal difficulty professional organizations have regulating the behavior of negotiators concerns the unique circumstances in which most bargaining interactions are conducted. They are usually done on a one-on-one basis in person or over the telephone. If one person is a lying scoundrel and they are accused of dishonesty by another party, they lie to the disciplinary authority. It is extremely difficult for such a body to determine which side is telling the truth. What really regulates this area is the market place. If persons behave in a questionable manner, their reputations will be quickly tarnished. When someone encounters others who will lie about what they have the right to know, they usually tell their friends and associates. Those deceivers begin to encounter difficulties when they negotiate. Individuals don’t trust them. Their statements have to be independently verified, and their agreements have to be reduced to writing. Their negotiations become more cumbersome and less efficient. If they try to regain reputations for honesty, they discover how difficult it is to overcome stories about their past. Any negotiator who contemplates improper behavior during bargaining interactions should appreciate the substantial risks involved. A short-term gain may easily become a long-term stumbling block to future deals.

The three basic areas of misrepresentations concern affirmative misrepresentations, truthful statements that are incomplete and misleading, and the failure to disclose information necessary to prevent misunderstandings by the other side.

1. **Affirmative Misrepresentations**

Suppose my client is thinking of selling her company and another party has approached us to discuss their possible purchase of this firm. Assume that the corporate owner has told her negotiator that she would like to get at least $50 million, but might go as low as $45 million if necessary. The prospective buyer asks how much it would take to buy this firm. Can I ethically suggest $60 million? Clearly the answer is yes, because this pertains to non-material information — our settlement intentions — and is considered acceptable “puffing.” They then offer $35 million and I ask if they would consider going higher. Could they ethically suggest an unwillingness to increase their offer? Again yes, since this is still “puffing.”

If no one else has indicated an interest in my client’s business, could I ethically indicate that other bidders are involved? Although I have had a few attorneys suggest that this type of statement is mere “puffing,” I don’t agree. I think this is highly material fact information that must be discussed honestly if it is mentioned at all. As a result, if I state that other prospective buyers are in the picture, I have to convey truthful information. If several other parties have expressed an interest in the same firm and have offered us $40 million, could I ethically state that we have been offered $50 million? Since I consider this to be material fact information this
possible buyer has the right to rely upon, I don’t believe I can make such a misrepresentation. I might, however, be able to avoid the ethical dilemma by indicating that other parties are interested in our firm and stating that someone will have to pay $50 million of they wish to purchase the company. I am not disclosing what offers have actually been received, but am only indicating — truthfully — that some offers have been tendered. Without disclosing the actual amounts involved, I am merely stating that it will take $50 million to buy the company. Even if my client is willing to sell for less, this is nonmaterial “puffing.”

To what degree may I overstate the true value of the company my client is selling? May I suggest it has a rosy future, even if that is not entirely clear? May I say we are on the verge of an important product development when that is incorrect? May I indicate that we have accounts receivable of $540,000, when those accounts total only $150,000? The first statement of a wholly subjective nature is probably acceptable if I don’t embellish too greatly. The other two would be improper, because they concern material fact information the other party has the right to know truthfully. While I may have no affirmative obligation to disclose these facts, if I choose to discuss them I must do so honestly.

II. Partially True Statements

Some seemingly truthful statements can be misleading. A famous legal case involves a person injured in an automobile accident. His ribs are cracked and he suffers soft tissue injuries. With the passage of time, the ribs and the affected tissue heal. The defense lawyer sends the plaintiff to a physician who will be used as an expert for the defense at trial. That doctor verifies that the ribs have healed, but finds a life-threatening aneurism on that person’s aorta. If asked by the claimant’s attorney about the examining physician’s findings, could the defense lawyer respond that everything is fine? Clearly not, because this would be a misrepresentation of material fact. What if that lawyer merely states that “the ribs have healed nicely?” Would this truthful statement be acceptable, or does it deceitfully imply that nothing else has been discovered? The vast majority of lawyers asked this question suggest that this would be an impermissible misrepresentation — despite the truth of what is being said — due to the fact the person making the statement knows that the listener is likely to misinterpret what is being said to mean that everything has healed. Ethical opinions have held that truthful statements may constitute actionable misrepresentations when they are made under circumstances in which the person making the statements knows the other party is misinterpreting what is being conveyed. While the defense lawyer may not have to answer the question about the doctor’s findings, she should not be permitted to say something she knows will be misleading.

A similar issue might arise when someone is thinking of purchasing a house that suffered substantial damage in a hurricane but seems to have been repaired. What if the prospective purchaser asks if the storm damage has been repaired? Could the seller truthfully indicate that the roof has been completely replaced, but say nothing about the fact the eves under the roof still leak when it rains? Since it should be apparent that the person hearing this representation would be likely to assume that the storm damage has been entirely repaired, the seller should either have to remain silent or include information indicating that additional leaks exist. In many states requiring house sellers to disclose known defects of a serious nature, the seller would be obliged
to disclose the leaking eves even if they are not specifically asked about this issue.

When negotiators are asked about delicate issues or decide to raise those matters on their own, their statements should be phrased in a manner that conveys - both explicitly and implicitly - truthful information. They should not use half-truths they know are likely to induce listeners to misunderstand the actual circumstances. If they are not sure what to say, they may remain silent. If they choose to speak, however, they must do so in a way that is not misleading.

III. **Impermissible Omissions**

In many business and legal interactions the basic rule is caveat emptor – buyer beware. If the buyer does not ask the right questions and the seller makes no affirmative misrepresentations, the buyer has no recourse if he subsequently discovers problems. When might seller silence give rise to legal liability? Whenever the law imposes an affirmative duty to disclose. As noted above, the laws in many states require home sellers to disclose known defects of a serious nature. Sellers who fail to satisfy this duty may be sued for the damages caused by the undisclosed defects.

Similar affirmative duties are imposed upon stock and bond sellers by securities laws. Before selling stock or bonds to buyers, owners are required to provide prospectuses that include detailed financial information. If they fail to include relevant positive and negative information, they can be held liable for their omissions.

What about the defense lawyer who knows about the aortic aneurism. When that actual case arose, the defense attorney was not only under no obligation to disclose the negative information – he was under an ethical duty not to volunteer that information because of the confidential nature of the medical news obtained from his own expert witness. Several years ago, the American Bar Association modified Model Rule 1.6 covering confidentiality to indicate that lawyers *may* – but are still not required to – disclose confidential information when such disclosure is necessary to prevent death or serious bodily injury. Although some people thought this modification should have required disclosure in such circumstances, mandatory disclosure was rejected. While defense attorneys possessing such negative information cannot ethically misrepresent the operative facts – either directly or through partially truthful statements they know are misleading – they still don’t have to volunteer that information. I personally would have preferred a rule that required such disclosure, both because of the moral implications involved and to avoid possible economic harm to attorneys who do the right thing and lose business to lawyers who promise not to disclose such information unless specifically directed to do so by their clients.

IV. **Conclusion**

Although some misrepresentations are considered acceptable “puffing,” others are clearly inappropriate. It is not always easy to draw the line between statements the other side does not have the right to rely upon and those they may consider sacrosanct. When my students ask about the proper demarcation, I tell them to ask how they would feel if their opponent were to make the misrepresentation they are contemplating. If they would consider their opponent dishonest, then they should refrain from such conduct themselves. I like to leave them with a quote from Mark
Twain: “Always do right. This will gratify some people and astonish the rest.”

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Negotiation Ethics
From the Committee on Professional Responsibility, William Freivogel, Chair

*Note on rules: all references to rules here will be to the ABA Model Rules of Professional Conduct. Where states’ rules vary with the Model Rules, we will say so.*

**Lawyer Conduct – Keeping Client Informed.** Rule 1.4 and its sub-parts basically provide that a lawyer must keep her client informed about what the client needs to know to make decisions about the subject of the representation. In the negotiation context that means that when the other side makes an offer, the lawyer must convey the offer to the client. Obviously, when the lawyer makes an offer on behalf of the client, or intends to make such an offer, the lawyer must tell the client what she’s done or what she intends to do.

**Lawyer Conduct – Maintaining Client Confidences.** The lawyer’s duty to maintain client confidences is found at Rule 1.6. In most states the protected information is “information relating to the representation.” The lawyer may reveal client information with the client’s “informed consent,” or where the disclosure is “impliedly authorized.” Thus, where it is clear that the lawyer must make certain disclosures in order to keep the negotiation moving, but not unduly harm her client, she may be able to do so. Rule 1.6 also has exceptions for client misconduct, including client fraud. We will touch on those exceptions below.

**Lawyer Conduct – Contacting other Side.** Suppose that, during a negotiation, you strongly suspect that the opposing lawyer is not conveying your offers to his client. May you call the other party directly to find out? No. The Rule is 4.2, which prohibits lawyer contacts with represented parties. May you prompt your client to do so? There is no rule prohibiting clients from contacting one another directly. Older wisdom was that lawyers could not discuss with their clients the possibility of such communications. That has softened. For example, in Formal Opinion 92-362 (2002) the ABA Standing Committee on Ethics and Professional Responsibility (“ABA Ethics Committee”) held that a lawyer could ethically discuss with her client the possibility of talking to the other party in just such a circumstance. More recently, the Committee held that a lawyer could communicate with an in-house lawyer for a party, even though the party was represented by an outside lawyer, Formal Opinion 06-443 (2006). These opinions do not have the force of law, so you should consult with the rules and opinions in your jurisdiction before conducting either type of communication.

**Lawyer Conduct – Truthfulness.** Obviously, a lawyer may never lie to her client. As to third parties, the most important rule on truthfulness is Model Rule 4.1(a), which says a lawyer may not lie to a third person. The rule contains no exception for negotiations. Model Rule 8.4(c) overlaps with Rule 4.1(a) in providing that a lawyer may not engage in “dishonesty, fraud, deceit or misrepresentation.”

In April 2006 the ABA Ethics Committee issued its Formal Opinion 06-439, entitled, “Lawyer’s Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation.” It repeats the obvious that a lawyer may not lie. The opinion does recognize that lawyers may be expected to “puff” as to certain issues.
Let’s use a negotiation to sell a business asset as an example. The lawyer for the seller may not say that the seller already has a firm offer from another buyer for X dollars, when no one has made an offer at all. The lawyer may, however, say that she believes the asset is worth at least X dollars, or that she expects the asset to sell quickly.

Client Conduct. The situation gets trickier when, during negotiations, it is the client who is lying. Rule 1.2(d) provides that a lawyer may not assist the client in committing a crime or fraud. All states have such a rule. Moreover, Rule 1.16(a)(1) provides that the lawyer must withdraw from the representation where to continue would cause a violation of a rule.

Suppose a lawyer is aware that her client is lying to the other side in a negotiation. We have just seen that the lawyer cannot continue if the client persists. Under what circumstances may, or must, a lawyer warn others of a client’s intention to commit a fraud? Rule 1.6, the confidentiality rule, plays a role. Rule 1.6(b)(2) & (3) now allows a lawyer to “blow the whistle” (our phrase) to prevent the client from committing a fraud on another or to rectify a fraud that has already occurred. Most states have comparable exceptions to their versions of Rule 1.6. A few states provide in their rule that a lawyer must report client fraud.

Now, return to Rule 4.1. Recall that Rule 4.1(a) says that a lawyer may not lie. Rule 4.1(b), however, says a lawyer must disclose a client’s lie when it is “necessary to avoid assisting a criminal or fraudulent act by a client.” That sentence ends with “unless disclosure is prohibited by Rule 1.6.” Recall, though, that most states have provisions in their versions of Rule 1.6 that permit disclosure. Thus, in many states, the lawyer may have the obligation to blow the whistle on a client.

Conduct within an Organization. Where the client is an organization, Rule 1.13 (“Organization as Client”) is implicated. Assume that the lawyer and an officer of the client are negotiating a transaction with another party. Assume further that the officer is making claims that the lawyer knows (or strongly suspects) are not true. The lawyer should first attempt to ascertain the truth and, if necessary, straighten out the officer. Failing that, Rule 1.13(b) provides that the lawyer must, under some circumstances, go over the officer’s head (“climb the ladder”), to the officer’s boss, to the general counsel, even to the board of directors, if necessary. Prior to 2003, Rule 1.13 did not make climbing the ladder mandatory, nor did the rules of most states. Subsequent to the ABA changes in 2003, many states have amended their versions of Rule 1.13 to make climbing the ladder mandatory.

As to public companies, the SEC has adopted 17 C.F.R Part 205, which, among other things, requires the lawyer, under certain circumstances, to climb the organizational ladder. To illustrate the complexity of the SEC requirements, many well-run law firms have committees of lawyers devoted to seeing that the regulation is followed and providing training to securities lawyers on the regulation.

A final caution: the interplay of the rules on confidentiality and client fraud is extraordinarily complex, and the consequences of acting under them can be enormous.
The average good lawyer needs to consult with an ethics expert before deciding on a strategy to deal with suspected client fraud.
AMERICAN BAR ASSOCIATION

BUSINESS LAW SECTION

UNIFORM COMMERCIAL CODE COMMITTEE

ETHICAL AND RISK MANAGEMENT ISSUES IN COMMERCIAL TRANSACTIONS

Las Vegas, Nevada

March 22, 2012

11:30 A.M.

1. A Piece of What?
2. The Gift?
3. On Creating Unintended Post-Closing Obligations
4. Underlying Work
5. Client (Non)Disclosure / Lawyer Exposure?

Selected Model Rules—p. APP - 1
Selected Reference Points—p. APP - 10

Michael H. Rubin
McGlinchey Stafford PLLC
Baton Rouge, LA

Nancy Rapoport
Boyd School of law
Las Vegas, NV

Henry S. Bryans
Aon Risk Solutions
Radnor, PA
1. A Piece of *What*?

You thread your way through Grand Central. A buck in the pot for the Salvation Army Santa. It’s December 22 and you don’t yet even have perfume for She Who Must Be Obeyed. You glance at the BlackBerry. The CFO of a client you started working for in April. Wish you understood their business better. Privately held. But holds controlling position in Transcontinental Smelting, which trades on the NASDAQ. Love to get that work also. The email reads:

Chuck: Same deal we did in June and September. 10 day advance to us. This time the lender is Ridgefield Partners. The note will be $210 million. As before, guaranteed by Transcon. I attach the form of guaranty (same as last time) and the form of opinion that Ridgefield wants from you (pretty much the same as last time). Assume due authorization, no conflicts, etc. We’ll need your opinion by 2:30. Loan funds tomorrow at 10:00. Thanks.

Steve

You stop and look up at the morning winter sun streaming through the high windows of the main concourse. You furrow your brow: “What the *deuce* are these guys doing?”

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**REPORT OF THE NEW YORK CITY BAR ASSOCIATION TASK FORCE ON THE LAWYER’S ROLE IN CORPORATE GOVERNANCE—NOVEMBER 2006** at 114-16 (excerpted for publication at 62 BUS. LAW. 427 (2007)).
B. Recommendations

1. Understand the context of assignments

Outside counsel, through dialogue with the company’s General Counsel or management, should endeavor to be aware of the context in which and the purpose for which its services are being requested and used. In the example of LLCs cited above (see pp. 54-55), if counsel for a public company is asked to form a series of LLCs in circumstances that raise a concern that such LLCs may be used to remove improperly expenses or debt from the company’s financial reports, counsel should ask questions to gain reasonable assurance that no such use is planned.

Counsel cannot guarantee that her services will not be put to some improper purpose, but she can reduce this risk through appropriate inquiries when circumstances suggest some reason for concern. Further, concerns about wrongdoing aside, understanding the context in which counsel is working may facilitate better or more efficient legal services.

2. Focus on risks to the client, not mere implementation

Once the context of the requested service is understood, a lawyer owes the client advice on the legal and other risks perceived by the lawyer to be posed by a proposed transaction or disclosure (see pp. 67-69, above). If a lawyer avoids giving counsel on these broader questions and implications, and instead confines her role solely to drafting the disclosure or structuring the deal, her services may fall short of what the client can reasonably expect from counsel. See p. 102, above (Enron Examiner criticizing its lawyers who “saw their role in very narrow terms, as an implementer, not a counselor”).
3. **Inquire when a concern arises**

When in the course of the representation a lawyer becomes seriously concerned about the legality of the company’s actual or intended conduct, the lawyer will need to consider whether his concern rises to the level of requiring a report up under the SEC’s lawyer conduct rules, or applicable ethical rules (see pp. 70-73, above). But counsel should not limit his consideration to this narrow question for in fact he is concerned, regardless of whether he must report up. The best practice when the SEC’s trigger point for reporting up has not been reached, but counsel nonetheless has a serious concern, is to make reasonable inquiry of the company, i.e., in essence to report up the concern. If such inquiries and consequent counseling do not allay the concern, counsel should seriously consider withdrawing from the representation.

Absent the pressing of such inquiries, both the existing ethical responsibility to avoid facilitating a fraud and the SOX and ethical duties to report up evidence of a likely fraud are deprived of much of their potential positive impact. An attorney avoiding inquiry may well miss an opportunity to detect, or avoid unwitting involvement in, a fraud damaging to the client.

There is no way generally to define in words the circumstances that would create a level of concern warranting such an inquiry. An experienced lawyer – or a less experienced one consulting with more experienced colleagues – is likely to sense when questions need to be asked about the client’s conduct. It is not a matter of seeing a “red flag” pointing to likely fraud. Rather, the impetus to inquire will arise at a lower threshold, when the client’s conduct illuminates for the prudent lawyer a yellow light of caution: do not proceed without a better understanding of the client’s plans and purposes.

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155 SOX §307, and the SEC’s lawyer conduct rules, do not themselves appear to impose a duty of inquiry. See Fisch & Rosen, 48 Vill. L. Rev. at 1115.
2. The Gift?

“Chuck, we need to talk.”

“Buz! I was going to call you before I went out for some Christmas shopping. Is the Roofing Materials facility signed up?”

“That’s exactly why I’m here. As you recall, Last Federal has been hanging tough on the notion that they need the right to terminate the revolver on seven days notice if the court declares a class in the Stevens litigation. That’s the case where the plaintiff is alleging that our Wearever line of shingles degrade in direct sun. We would have signed it up last week if the bank would have backed off, but they wouldn’t. About noon yesterday, the client told me to give it to them. They really need to move forward with this facility.”

“Great. So we’re done, right?”

“Not exactly. I held out until about 8:00 last evening to make sure that everything else was where we wanted it. Then I caved. I even gave them the language that we’d accept.”

“Hmm. Not so great, I guess. But it was clearly the client’s decision to make. So we’re done, right?”

“Not exactly. I thought we were done. I even got our troops gearing up for a closing next Thursday. About an hour ago, Last National’s counsel hand delivered the execution copies, all signed up by the Bank.”

“Great. So we’re done, right?”

“Not exactly. I was about to have it messengered across town for execution by the client. I took a quick look at the marked copy to make sure that they didn’t mess with the language that I gave them. The revolver termination provision wasn’t in the marked copy. I assumed that the marked copy was screwed up, so I started to review the execution copies. Chuck, they never got the darn provision we agreed to in the document.”

“Hmm.”

“Chuck, I know our guys at Roofing Materials pretty well. They obviously don’t want the termination provision. If we tell him what happened, they may well just sign it up anyway. They’ll say they changed their mind or something.”

“Well ... I think we need to tell the client. But ... maybe not. What do you think?”

* * * * *

Model Rules 1.2(d), 1.4 and 8.4(c)
ABA Informal Opinion 86-1518 (February 9, 1986)

Maryland Opinion 89-44

*Cf.*, ABA Section of Taxation – Standards of Practice, Issues Statement 1999-1
Informal Opinion 86-1518
Notice to Opposing Counsel of
Inadvertent Omission of Contract Provision

Where the lawyer for A has received for signature from the lawyer for B the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error.

A and B, with the assistance of their lawyers, have negotiated a commercial contract. After deliberation with counsel, A ultimately acquiesced in the final provision insisted upon by B, previously in dispute between the parties and without which B would have refused to come to overall agreement. However, A's lawyer discovered that the final draft of the contract typed in the office of B's lawyer did not contain the provision which had been in dispute. The Committee has been asked to give its opinion as to the ethical duty of A's lawyer in that circumstance.

The Committee considers this situation to involve merely a scrivener's error, not an intentional change in position by the other party. A meeting of the minds has already occurred. The Committee concludes that the error is appropriate for correction between the lawyers without client consultation.1

A's lawyer does not have a duty to advise A of the error pursuant to any obligation of communication under Rule 1.4 of the ABA Model Rules of Professional Conduct (1983). "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation." Comment to Rule 1.4. In this circumstance there is no "informed decision," in the language of Rule 1.4, that A needs to make; the decision on the contract has already been made by the client. Furthermore, the Comment to Rule 1.2 points out that the lawyer may decide the "technical" means to be employed to carry out the objective of the representation, without consultation with the client.

The client does not have a right to take unfair advantage of the error. The client's right pursuant to Rule 1.2 to expect committed and dedicated representation is not unlimited. Indeed, for A's lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by B and B's lawyer, might raise a serious question of the violation of the duty of A's lawyer under Rule 1.2(d) not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, Rule 4.1(b) admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client, and Rule 8.4(c) prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

1. Assuming for purposes of discussion that the error is "information relating to [the] representation," under Rule 1.6 disclosure would be "impliedly authorized in order to carry out the representation." The Comment to Rule 1.6 points out that a lawyer has implied authority to make "a disclosure that facilitates a satisfactory conclusion"—in this case completing the commercial contract already agreed upon and left to the lawyers to memorialize. We do not here reach the issue of the lawyer's duty if the client wishes to exploit the error.
The result would be the same under the predecessor ABA Model Code of Professional Responsibility (1969, revised 1980). While EC 7-8 teaches that a lawyer should use best efforts to ensure that the client's decisions are made after the client has been informed of relevant considerations, and EC 9-2 charges the lawyer with fully and promptly informing the client of material developments, the scrivener's error is neither a relevant consideration nor a material development and therefore does not establish an opportunity for a client's decision. The duty of zealous representation in DR 7-101 is limited to lawful objectives. See DR 7-102. Rule 1.2 evolved from DR 7-102(A)(7), which prohibits a lawyer from counseling or assisting the client in conduct known to be fraudulent. See also DR 1-102(A)(4), the precursor of Rule 8.4(c), prohibiting the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

2. The delivery of the erroneous document is not a "material development" of which the client should be informed under EC 9-2 of the Model Code of Professional Responsibility, but the omission of the provision from the document is a "material fact" which under Rule 4.1(b) of the Model Rules of Professional Conduct must be disclosed to B's lawyer.
MARYLAND STATE BAR ASSOCIATION, INC.

COMMITTEE ON ETHICS

ETHICS DOCKET 89-44

Communication with and/or Attorney Adversary

Your letter consists of four pages describing a very complex and detailed factual summary of various transactions, which I will not attempt to summarize in this Opinion. However, the Committee will attempt to present the issue in such a way as to be responsive to your inquiry as well as to be of some guidance to others facing similar problems. The issue which you raise is basically as follows: what duty of disclosure, if any, does a lawyer have in negotiating a transaction when the other party's counsel has drafted contracts which fail to set forth all of the terms which you believe have been agreed to, and where the omission results in favor of your client? It is assumed in the foregoing question, based on the facts set forth in your letter, that neither you nor your client in any way induced the other lawyer and his client to omit the material terms, and, indeed, throughout the negotiations, you and your client conducted yourselves in a way which implicitly should have caused the other lawyer to include the material terms. Finally, the foregoing question assumes, based on the facts set forth in your letter, that your client has instructed you not to disclose the omission to the other attorney.

The Committee believes that the answer to the foregoing question is governed by Rule 4.1 of the Maryland Rules of Professional Conduct, which provides as follows:

Rule 4.1 Truthfulness in Statements to others

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

(1) make a false statement of material fact or law to a third person;

or

(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Based on the facts set forth in your letter, the Committee is of the opinion that you are under no obligation to reveal to the other counsel his omission of a material term in the transaction. Based on the facts set forth in your letter, it does not appear that you or your client have made any false statement of material fact or law to the other side at any time during the negotiations, and, furthermore, the omission in no way is attributable to a fraudulent act committed by you or your client. To the contrary, it appears that the omission was made by the other counsel either negligently or, conceivably, because they do not believe that the terms were part of the transaction. In either case, Rule 4.1(a), based on these facts, does not require you to bring the omission to the other side's attention.

We must point out that if the omission had been because of a false statement made by you or your client or because of a false statement made by you or your client or as a result of a fraudulent act by your client, then Rule 4.1(b) would have required you to brine, this omission to the attention of the other side notwithstanding the confidentiality requirements set forth in Rule 1.6. However, as stated above, Rule 4.1(a) does not require disclosure based on the facts set forth in your letter. Accordingly, the confidentiality requirements of Rule 1.6 govern your conduct in this situation. In your letter you state that your client has specifically instructed you not to bring the omission to the attention of the other lawyer or his client. Rule 1.6 obligates you to obey this instruction in your letter.

Another Rule implicated by your inquiry is Rule 1.4(b), which requires a lawyer to explain matters to the client to an extent reasonably necessary to permit the client to make informed decisions. In the context of your inquiry, the Committee believes that you should explain to your client, if you have not already done so, what legal action might be commenced by the other party to reform the contracts, the likelihood of success of such an action, the expense of defending such an action, and any other matters which may impact on your client's decision as to whether to bring the omission to the attention of the other party or his counsel. If, after such a consultation, your client still instructs you not to reveal the omission, you are bound to adhere to this instruction pursuant to Rule 1.6.
3. On Creating Unintended Post-Closing Obligations

“Chuck? Maria.”

“Maria! What’s up?”

“Well, this is a bit convoluted. It relates to a 15-year secured deal where you apparently represented Fruit of the Mill.”

“Wow. That was almost ten years ago. So what’s up?”

“Well, I just got a call from Fourth Second Bancorp. The trustee on the deal. Some new guy over there decided to do UCC searches on all of their secured issues. He said that their financing statements against Fruit of the Mill had lapsed and there were others now priming their collateral.”

“Well, the original financing statements that we filed would surely have lapsed. But they must have filed continuation statements.”

“Actually, apparently they didn’t.”

“Well, that not so good. But it sure isn’t our fault. Our opinion would have clearly stated the window for filing continuation statements and that it would be the trustee’s obligation to do so.”

“Actually, I looked for that in the opinion, but I didn’t see it. I spoke with John. He said that we only started using that language in 2005.”

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Model Rule 1.4

278 Ga. 788

BARNES et al.
v.
TURNER.

No. S04G0813.

Supreme Court of Georgia.


Jones, Jensen & Harris, Taylor W. Jones, Richard E. Harris, Atlanta, for appellants.

Carlock, Copeland, Semler & Stair, Johannes S. Kingma, John C. Rogers, Atlanta, for appellee.

FLETCHER, Chief Justice.

The issue in this legal malpractice case is what duty attorney David Turner, Jr. owed his client, William Barnes, Jr., with respect to maintaining Barnes's security interest that lapsed. The Court of Appeals held that Turner's 850*850 only duty was to inform Barnes that his security interest required renewal in five years.\[1\] Because under that view the statute of limitations expired before Barnes filed his malpractice action, the Court of Appeals affirmed the trial court's decision to grant Turner's motion to dismiss. We conclude, however, that if Turner failed to inform Barnes of the renewal requirement, Turner undertook a duty to renew the security interest himself. The statute of limitations has not expired for an alleged breach of that duty, and therefore we reverse.

On October 1, 1996, Barnes sold his company, William Barnes' Quality Auto Parts, Inc., to James and Rhonda Lipp for $220,000. The Lipps paid $40,000 at the closing and executed a ten-year promissory note in favor of Barnes for the $180,000 balance. The note was secured by a blanket lien on the Lipps's assets. On October 30, 1996, Turner perfected Barnes's security interest by filing UCC financing statements. Viewing the facts in the light most favorable to Barnes (as the non-moving party),\[2\] Turner did not, however, inform Barnes that under OCGA § 11-9-515, financing statements are only effective for five years, although their renewal for another five years is expressly provided for in that statute. The renewal is effected by filing continuation statements no earlier than six months before the end of the initial period.\[3\] No renewal statements were filed, and on October 30, 2001, the original statements lapsed.

Unknown to Barnes, the Lipps had pledged the same collateral to F&M Bank and Trust Company and to Mid-State Automotive Distributors on December 28, 1998 and January 29, 2001, respectively. Both of these companies filed UCC financing statements, which put them in a senior position to Barnes when his financing statements lapsed. Barnes is still owed more than $142,792.09 under the promissory note, and James Lipp is now in Chapter 7 bankruptcy.

Barnes sued Turner for malpractice on October 18, 2002. The trial court granted Turner's motion to dismiss. Finding that the only possible incident of malpractice was Turner's failure to inform Barnes of the renewal requirement in October 1996, the Court of Appeals held that the four-year statute of limitations had run and affirmed the trial court.\[4\] We granted Barnes's petition for certiorari.

1. Barnes contends that the Court of Appeals erred in simply looking to Turner's actions in October 1996 as constituting the malpractice. If Turner had renewed the financing statements in 2001, Barnes argues, there would have been no lapse in his security interest and thus no malpractice. Barnes contends that Turner's
duty was to safeguard his security interest, which Turner could have satisfied by either informing Barnes of the renewal requirement or renewing the financing statements in 2001. Under this view, Turner breached his duty in 2001, when he failed to do both, and thus the statute of limitations on Barnes's action has not expired. For the following reasons, we agree.

A motion to dismiss should only be granted if "the allegations of the complaint, when construed in the light most favorable to the plaintiff with all doubts resolved in the plaintiff's favor, disclose with certainty that the plaintiff would not be entitled to relief under any state of proved facts." Accordingly, the grant of Turner's motion to dismiss was only proper if Barnes's duty ended in 1996.

851 Turner contends that he was not retained to file renewal statements. While Georgia's appellate courts have not previously addressed this issue, decisions from other states make clear that an attorney in Turner's position must at least file original UCC financing statements, even absent specific direction from the client. We agree. An attorney has the duty to act with ordinary care, skill, and diligence in representing his client. In sale of business transactions where the purchase price is to be paid over time and collateralized, it is paramount that the seller's attorney prepare and file UCC financing statements to perfect his client's security interest. We further hold, for the reasons given below, that if the financing statements require renewal before full payment is made to the seller, then the attorney has some duty regarding this renewal. Otherwise the unpaid portion of the purchase price becomes unsecured and the seller did not receive the protection he bargained for.

Safeguarding a security interest is not some unexpected duty imposed upon the unwitting lawyer; it goes to the very heart of why Turner was retained: to sell Barnes's business in exchange for payment. We do not, as the dissent contends, demand that the lawyer "ascertain the full extent of the client's objectives;" only that the lawyer take reasonable, legal steps to fulfill the client's main, known objective — to be paid for the business he sold.

The dissent views only the sale of the business as important since this is what happens at the closing; but why does a client sell his business if not to receive payment? When the dissent argues that Turner's duty was simply to "close" the transaction, it fails to recognize that closing this particular transaction meant taking the reasonable steps that competent attorneys would take to legally secure their clients' right to receive payment for the businesses they have sold. Where payment is to be made in less than five years, Georgia law does not require renewal of the initial financing statements and thus the lawyer's duty is only to file the initial statements. But where payment is to take longer than five years, the lawyer — being trusted by his client to know how to safeguard his security interest under Georgia law — has some duty regarding renewal of the financing statements. The question is the nature of that duty.

Under the dissent's view, a client has to specifically ask his lawyer to renew the financing statements for this to be among the lawyer's duties. But how can the client be expected to know of this legal requirement? He hires the lawyer because the lawyer knows the law. The client cannot be expected to explicitly ask the lawyer to engage in every task necessary to fulfill the client's objectives.

The Court of Appeals held that a failure to inform by Turner was the sole possible grounds for malpractice. But this is too narrow a definition of Turner's duty. The duty was not necessarily to inform Barnes of the renewal requirement; often transactional attorneys do no such thing and simply renew the financing statements themselves. These attorneys have not breached a duty. Turner's duty was to safeguard Barnes's security interest. There were two means of doing so: by informing Barnes of the renewal requirement, or by renewing the financing statements himself in 2001. Either one would have been sufficient to comply with Turner's duty, and any breach of that duty occurred only upon Turner's failure to do both.

Further, if Turner's only duty arose in 1996, then Barnes had to bring suit before the financing statements could even be renewed to comply with the four-year statute of limitations. Barnes contends that any such action would have been dismissed as unripe because he was still a secured party at the time. He is correct.
The dissent's view deprives Barnes and any clients in his position of any remedy for malpractice. The dissent's view precludes Barnes from ever maintaining a malpractice suit against Turner, who failed to take a simple, necessary action that will likely leave Barnes without his business and without over 78% of the purchase price he is still owed for that business.

The dissent's hyperbole about the effect of this opinion mischaracterizes our holding, which is based on a unique set of facts: a collateralized, payment-over-time arrangement in exchange for a sale of business where the payment period exceeds the five-year life span afforded to initial financing statements under OCGA § 11-9-515. The lawyer, being retained to protect his client's interests in connection with the sale of his business, is the only party who knows the legal requirements for maintaining the effectiveness of the security interest. He can either share this knowledge with his client — a very simple step — or renew the financing statements before they expire — an equally simple step. The dissent's concern over the expansion of attorney duties is unwarranted.

2. The dissent also argues that imposing a duty to renew on Turner is an adoption of the "continuous representation rule," which Georgia courts have rejected except in personal injury cases. Under this rule, a continuing relationship or continuing wrong can toll the statute of limitations. In the case cited by the dissent, Hunter, Maclean, Exley & Dunn, P.C. v. Frame, the alleged malpractice was only that material financial information was omitted from the closing documents; there was not, as in the present case, some further action beyond the closing at issue, and thus Hunter, Maclean is inapposite to our situation. The continuous representation rule is not implicated in this case. We are not holding that a failure to inform by Turner in 1996 was a continuing wrong that tolled the statute of limitations until 2001. To the contrary, we are holding that a failure to inform in 1996 means that Turner undertook a duty to renew in 2001, and the statute of limitations began running from the date of alleged breach of that duty.

In light of the foregoing considerations, we reverse the Court of Appeals' decision that affirmed the trial court's grant of Turner's motion to dismiss. Barnes's malpractice action was filed within four years of the failure to renew the financing statements in 2001, and thus may proceed.

Judgment reversed.

All the Justices concur, except BENHAM, THOMPSON and HINES, JJ., who dissent.

BENHAM, Justice, dissenting.

For the purpose of ensuring recompense for a client who may have been caused a 853*853 grievous financial loss by his attorney's alleged failure to perform a simple duty, a majority of this court has ignored pertinent law and created a new species of duties which arise not from employment but from the occurrence of an initial mistake.

The central question in this legal malpractice case concerns the duty undertaken by Turner when he represented Barnes and his corporation in the sale of a business. The majority opinion begins with a statement of the issue which supposes the ultimate question by starting from the premise, as did the question posed in the grant of the writ of certiorari and set out in the majority opinion, that Turner owed a duty to maintain, as opposed to create, a security interest for Barnes. The holding of the majority opinion that Turner owed a duty to renew the security interest when it expired is thus based not on reasoning or the law, but on an unsupported assumption.

"It is axiomatic that the element of breach of duty in a legal malpractice case — the failure to exercise ordinary care, skill, and diligence — must relate directly to the duty of the attorney, that is, the duty to perform the task for which [the attorney] was employed. Tantle v. Herring, 264 Ga. 694(1), 453 S.E.2d 686 (1994). Here, the task for which Turner was employed was to perform the services attendant to the closing of the sale of the business, including filing the UCC financing statements. He breached the duties arising from that employment, or did not, at that time. If he had a duty to inform Barnes of the need in the future to
renew the statement, and did not do so, he breached the duty then and his potential liability came into existence. The record shows that Barnes asserts he continued to employ Turner for legal tasks, but not that Turner was engaged on an ongoing basis to protect Barnes's interests in all legal matters which arose or might have arisen. To assert Turner had a duty arising from his representation during the closing which would not manifest itself for five years "would essentially be an adoption of the 'continuing representation rule,' which has been consistently rejected by Georgia courts in the malpractice context...." Hunter, Maclean, Exley & Dunn, P.C. v. Frame, 269 Ga. 844, 849, 507 S.E.2d 411 (1998).

The majority, however, imposes as a matter of law duties which were not undertaken by Turner and were not within the scope of his employment to close the sale of the business. The majority holds the asserted failure to inform Barnes of the future need to renew the UCC statements somehow created a duty on Turner's part to renew the filings without having been retained to do so. The majority thus creates new duties that could outlast not only the period of the attorney-client relationship, but even the attorney's life. In addition, by attaching to the asserted breach of one duty the conditional creation of a new and potentially more onerous duty, the majority destroys any notion of finality attorneys may hope to have in any aspect of their employment. No attorney can safely close a file and, apparently, no passage of time can insulate a mistake since the very happening of a mistake creates, under the majority's view, another duty. Under the conditional duty concept created from the whole cloth by the majority, for which no authority or valid reasoning is offered, any change in employment status must trigger a full examination of every past transaction to be sure some inadvertence in the past has not created a new duty which would start a period of limitation running again.

Not only does this new duty, which can only be ascertained to have existed after damage from an original mistake has manifested, and perhaps (though the majority opinion is unclear on the point) after the expiration of the period of limitation has barred suit for the first mistake, add to every attorney's potential liability to clients, it adds such uncertainty and lack of finality to every transaction that malpractice insurance carriers S54*S54 will be unable to make accurate assessments of their exposure. This will inevitably result in higher premiums, which will necessarily be passed on to clients. In addition to adding to the direct expense of legal representation, the increase in premiums and the need to institute greater safeguards to avoid liability will result in further consolidation of the practice of law in larger and larger firms because they will have greater resources to help prevent any oversight, and will require contracts of employment that stringently restrict the scope of representation by use of disclaimers intended to protect attorneys from any responsibility to clients other than the most narrow definition of the tasks for which attorneys are employed. The damage wrought by these restrictions will fall most heavily on the very class to which the plaintiff in this case belongs and which the majority purports to wish to protect, the proprietors of small businesses.

The majority's resolution of the present case is not just short-sighted from a policy standpoint, but lacks a rational basis. It cites foreign authority for a proposition not contested by anyone, that Turner had a duty to file the financing statements, which he did, and thenaults without reasoning or authority to the creation of an additional duty to safeguard the security interest just created. It is at that point the majority invents, as noted above, a duty to "provide for payment to Barnes." Thus, the simple act of performing the duty to create a security interest becomes a duty of indeterminate duration to ensure the payment of the obligation secured. To justify such a vast extension of the attorney's duty, the majority suggests that the duty is not, as this Court held in Tantt v. Herring, supra, "the duty to perform the task for which [the attorney] was employed," but is rather, in some unspecified fashion, to ascertain the full extent of the client's "objectives" in undertaking the transaction and then take whatever actions are necessary to see that the objectives are fulfilled. Apparently, the majority has created a new standard of care to be employed in reviewing an attorney's success in ferreting out and guaranteeing accomplishment of all of a client's objectives: what lawyers often do. That has never been the standard of care employed in legal malpractice cases and should not be applied here as the majority does.

That the majority's approach here is dictated by a desired result rather than by law or reason is apparent from its frequent return to the lament that without the creation of this new duty to take all possible steps to guarantee payment of the obligation owed to the client, Barnes will not be able to recover his losses
because the statute of limitation bars recovery for the breach of Turner's duty to inform Barnes of the need to renew the financing statements in the future. That issue was resolved in the Court of Appeals and, as noted above, is not properly within the scope of the question posed by the Court in granting the writ of certiorari. Thus, the issue is not properly before us and, even if it were, would not warrant the creation of a new duty to avoid the unfortunate effect the correct application of statute-of-limitation law has had on Barnes.

Finally, it must be noted that the question of a duty to renew was properly omitted from the Court of Appeals' consideration of this case and should never have been taken up by this Court for the simple reason that it was not litigated below. The majority seeks to avoid this problem with a reference to the pleadings, but ignores the fact that the trial court did not rule on that claim and the Court of Appeals, whose judgment we purport to review, did not rule on that issue. As this Court held in Pfeiffer v. Georgia Dep't of Transp., 275 Ga. 827, 829, 573 S.E.2d 389 (2002),

our appellate courts are courts for the correction of errors of law committed in the trial court. Routinely, this Court refuses to review issues not raised in the trial court. "[T]o consider the case on a completely different basis from that presented below ... would be contrary to the line of cases ... holding, "He must stand or fall upon the position taken in the trial court."" Fairness to the trial court and to the parties demands that legal issues be asserted in the trial court.

(Footnoted citations omitted). While Barnes raised in an initial pleading and in a written response 855*855 to the motion to dismiss the assertion that Turner had a duty to renew the financing statements, that issue was not addressed in the actual defense of the motion and was not decided by the trial court. Notwithstanding the lack of any ruling on the issue below, a majority of this Court bases its judgment on it, becoming in effect a "super trial court" with authority to decide issues for the first time. That is not the proper role for this Court.

Notwithstanding the twists and turns employed by the majority to reach its desired result, this case is simple. Turner was employed to close a commercial transaction. Whatever duty he undertook was in connection with that employment and was breached or not at that time. There being no duty to renew the UCC statements in 2001, Turner's failure to do so could not constitute a breach of duty which would support the legal malpractice claim against him. That being so, no basis exists for reversing the judgment of the Court of Appeals or of the trial court. I must, therefore, dissent to the majority's result-oriented distortion of legal malpractice law to create a new duty of indeterminate duration which arises only upon the breach of an earlier duty.

I am authorized to state that Justices Thompson and Justice Hines join in this dissent.


[6] The dissent's reliance on Pfeiffer v. Georgia Dep't of Transp., 275 Ga. 827, 573 S.E.2d 389 (2002) is inapposite. In Pfeiffer, we held that a party could not seek to reverse a grant of summary judgment by raising a new argument for the first time on appeal. However, this case involved the grant of a motion to dismiss. In reviewing the grant of a motion to dismiss, it is the duty of the appellate court to "construe the pleadings in the light most favorable to [the appellant] with all doubts resolved in [appellant's] favor."
**Alford v. Public Service Commission**, 262 Ga. 386, n. 2, 418 S.E.2d 13 (1992). By considering all the allegations of the complaint, including the failure to renew, this Court is simply applying the correct standard of review.


[9] The dissent argues that the failure to inform is not within the scope of our question posed on certiorari and thus does not consider it. But this is incorrect. Our certiorari question asked:

"Whether the statute of limitation began to run on petitioner's malpractice claim in October 1996 when Turner assumed the on-going duty to renew the UCC forms or when Turner breached that on-going duty in October 2001 or must the breach necessarily relate back to the date on which the on-going duty was assumed?"

The only possible way for Turner to have assumed a duty to renew was by failing to inform Barnes of the renewal requirement; therefore, the question assumes that he so failed to inform Barnes. Both parties argued the failure to inform in their briefs and at oral argument. Turner's actions in 1996 are integral to understanding the duty he undertook in 2001, and were clearly contemplated by our certiorari question.


[13] The sole issue before us is the scope of the duty allegedly breached. Therefore, we do not address the other elements of Barnes's malpractice claim: breach of duty, causation, and damages. See, e.g., **Tarte, 264 Ga.** at 694, 453 S.E.2d 686.

[1] The correctness of the decision of the Court of Appeals that the statute of limitation barred Barnes's claim based on Turner's failure to inform Barnes of the need to renew the filing is not within the scope of the question posed, which clearly dealt only with the duty to renew which the majority wrongly assumes, and should not be considered in this appeal. See **Handson v. HCA Health Services of Georgia, Inc.**, 264 Ga. 293, (n. 1), 443 S.E.2d 831 (1994).
4. Underlying Work

A messy multi-state mortgage deal. Syndicated. And now it’s in the tank. I really shouldn’t have run off to all of those big brown trout in the Big Horn and left it in the hands of those three young associates to close it for the agent bank. But, no harm, no foul. It’s not their fault the borrower is toast. Lucky we used those bankruptcy-remote vehicles or we’d be staring at an eleven right now.

The phone rings. “Chuck, David Miller here. Chicago office. My team here is teeing up the foreclosures in the Multi-Mall default.”

“Sure David. What’s up?”

“Well, we’re making progress. But I’d appreciate your input. Do you have any preferences for local counsel in Utah, New Mexico, and Nevada?”

“Not really. Why not use the firms that we got local counsel opinions from on the master mortgage. We’ve vetted all of the firms on our list and they all have sufficient capability.”

“Well, ... sure. Normally, that’s what we’d do. But there are no local counsel opinions for those jurisdictions in the file. No question that they’re on the closing checklist. But they’re not checked off.”

“Hmm. That’s odd. Well, I’ll get someone to send you the names of the firms that we would have used. No harm, no foul.”

“I’m not quite sure about that. One of our associates here in Chicago took a look at the mortgage and concluded that the remedies that we planned to rely on may not work just perfectly in Utah and New Mexico.”

“Really? Well David, you’re an old hand at this stuff. I’m sure you can come up with a work around.”

* * * * *

Model Rule 1.7


VERAS INVESTMENT PARTNERS, LLC; VERAS INVESTMENT GROUP, LP; VERAS CAPITAL PARTNERS, LLP; VERAS CAPITAL PARTNERS (QP), LP; VERAS ENHANCED YIELD (QP), LP; VERAS CAPITAL PARTNERS OFFSHORE, LTD.; VERAS ENHANCED YIELD OFFSHORE, LTD.; VERAS CAPITAL MASTER FUND; VY PARTNERS MASTER FUND; JAMES R. McBRIDE; KEVIN D. LARSEN; and BRIAN VIRGINIA, Plaintiffs,

v.

AKIN GUMP STRAUSS HAUER & FELD LLP, Defendant.


Supreme Court of the State of New York, New York County.

Decided September 27, 2007.

Flemming Zulack Williamson, Zauderer LLP, New York, New York, for Plaintiffs.

Of Counsel: Linda M. Marino, Esq., Gerald G. Paul, Esq., Megan P. Davis, Esq.,

Patterson Belknap Webb & Tyler LLP, New York, New York, for Defendant.

Of Counsel: Philip R. Forlenza, Esq., Thomas W. Pippert, Esq., Karla G. Sanchez, Esq., Kristen Liebensperger, Esq.

BERNARD J. FRIED, J.

This is a motion by the defendant law firm Akin Gump Strauss Hauer & Feld LLP (Akin Gump) to dismiss the Second, Third, Fifth, Seventh and Ninth causes of action alleged in plaintiffs’ complaint, as redundant, pursuant to CPLR 3211 (a) (7), and to dismiss the Sixth cause of action alleged in plaintiffs’ complaint, in part, pursuant to CPLR 3211 (a) (1), to the extent that plaintiffs allege that defendant failed to disclose conflicts of interest.

Plaintiffs, Veras Investment Partners, LLC, and Veras Investment Group, LP (the managing entities), are the managing partners for the plaintiff hedge funds, Veras Capital Partners LP, Veras Capital Partners (QP), LP, Veras Enhanced Yield PQ, LP, Veras Capital Partners Offshore, LTD, Veras Enhanced Yield Offshore LTD. Plaintiffs Veras Capital Master Fund and Vey Partners Master Fund, are entities created to facilitate the hedge funds’ transactions. The entities are referred to together herein as "the Veras Entities." Plaintiffs James R. McBride and Kevin D. Larson are the original principals of the management entities. Plaintiff Brian Virginia joined the management entities in December 2001.

According to plaintiffs’ complaint, McBride and Larson retained Akin Gump on or about September 27, 2001, to advise and assist them in forming a hedge fund or funds to engage in "market timing" trading strategies, which are designed to take advantage of inaccuracies in information about mutual fund values, by exploiting the time lag in the posting information on, inter alia, “sticky assets” between the close of business in one market (i.e. Japan), and the opening of business in another (i.e. New York). To take advantage of this strategy, plaintiffs were required to execute trades after the close of business of certain markets, and to create subsidiary entities to by-pass certain mutual fund trading restrictions. Plaintiffs’ complaint alleges that Akin Gump partner, Elliot D. Raffkind, who was ranked number one on the "Hedge World Legal Counsel League Table, 4Q2000," and other attorneys at Akin Gump, on a number of occasions, as detailed more fully in the complaint, assured plaintiffs that their trading activities and strategies did not violate any applicable rules or regulations, and more likely than not, were not subject to sanction. Plaintiffs' complaint alleges that in accordance with the terms of the September 27, 2001 retainer
agreement, Akin Gump set up or created all of the Veras Entities, prepared all organizational documents, prepared all client documentation and disclosures, and was responsible for processing and maintaining all regulatory documentation and filings. According to plaintiffs' complaint, Akin Gump created most of the initial Veras Entities between October and December 2001, and the funds commenced operation between January and March of 2002, and operated successfully from January 2002 through early September 2003, attracting approximately $1 billion dollars of investor equity.

Plaintiffs' complaint alleges that the New York State Attorney General's office (the NYAG) and the Securities and Exchange Commission (SEC) began investigating "late trading" in August 2003. Late trading is defined as placing orders for mutual funds after the close of the stock market, 4PM Eastern Standard Time, and purchasing or selling the shares at the day's net asset value rather than at the net asset value for the following day. On September 11, 2003 and September 15, 2003, the NYAG and the SEC served subpoenas on the management entities, seeking documents and information relating to their late trading and market timing. Shortly thereafter, in October 2003 and November 2003, one of the Veras management entities came under investigation by the Texas Securities Board (TSB) and the Commodity Futures Trading Commission (CFTC). The TSB determined that the licensing or filing instruments for Veras Investment partners, LLC and MC Bride were not accurate and up-to-date, and that Larson's registration with the Texas Securities Commissioner had lapsed on or about January 2003. Plaintiffs allege that it was Akin Gump's responsibility to assure the accuracy and timeliness of those filings.

Plaintiffs' complaint alleges that Aiken Gump undertook to represent plaintiffs in relation to the NYAG, SEC, TSB and CFTC investigations without disclosing that they had an inherent conflict of interest that was not waivable by plaintiffs, as clients, resulting from the fact that Akin Gump, at all times advised and assisted plaintiffs in carrying out the activities that were under investigation. Plaintiffs allege that Akin Gump, simultaneously undertook the representation and defense of Raftkind, and that these conflicts of interest adversely affected its ability to defend plaintiffs, and caused Akin Gump to place its own interests above those of plaintiffs by, among other things, not providing plaintiffs with the opinion letter it promised but never delivered, and not advising plaintiffs of the "advice of counsel" defense.

Plaintiffs' complaint alleges that as a result of Akin Gump's "innumerable failures in its representation," plaintiffs were forced to liquidate and discontinue operation of the hedge funds, and to pay more than $36 million dollars to resolve the investigations. Plaintiffs further allege, that as a result of Akin Gump's innumerable failures in representation, plaintiffs have been exposed to class action law suits by investors in certain mutual funds, have lost hundreds of millions of dollars in past and future profits, have paid Akin Gump approximately $5 million dollars for its faulty advice, and will have to pay millions more in future legal representation to extricate themselves from the position that Akin Gump placed them in.

Plaintiffs' complaint asserts eleven causes of action. The first, second and third causes of action are for legal malpractice, gross negligence, and negligent misrepresentation, respectively, arising out advice and services performed in connection with the set up and functioning of the hedge funds. The fourth cause of action for legal malpractice, and the fifth cause of action for gross negligence, arise out of Akin Gump's alleged failure to maintain proper licensing or registration materials. The sixth cause of action, for fraud, the seventh cause of action for breach of fiduciary duty, the eighth cause of action for legal malpractice, the ninth cause of action for gross negligence, and the tenth and eleventh causes of action alleging violation of the Texas Deceptive Trade Practices-Consumer Protection Act, arise out of Akin Gump's defense and representation of plaintiffs in connection with the NYAG, SEC, TSB and CFTC investigations.

With respect to the sixth cause of action for fraud, plaintiffs' complaint alleges that Akin Gump made material misrepresentations of fact when, among other things, it assured plaintiffs that its interests were aligned with plaintiffs, and that any potential conflicts of interest were manageable. Plaintiffs allege that Akin Gump fraudulently failed to advise plaintiffs of the inherent and unwaivable nature of the conflicts of interest, and intentionally and purposefully acted to place its own interests above those of plaintiffs by, among other things, purposefully omitting to present and "sweep[ing]...under the rug" the advice of counsel defense, withholding evidence, waiving plaintiffs' privilege, and advising plaintiffs to do things, and make
compromises that were not in plaintiffs' best interest, all in order to avoid being brought into question for its own participation in the underlying transactions.

Defendant's motion, pursuant to CPLR 3211 (a) (7), to dismiss plaintiffs' second, fifth and ninth causes of action, for gross negligence, the third cause of action for negligent misrepresentation and the seventh cause of action, for breach of fiduciary duty, as redundant of the legal malpractice claims, is granted. It is well settled, in this Department, that gross negligence, negligent misrepresentation, and breach of fiduciary duty claims, arising out of the same set of operative facts, and seeking the same damages or relief, as a viable legal malpractice claim, are redundant, and subject to dismissal pursuant to CPLR 3211 (a) (7) (see Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 AD3d 267 [1st Dep't 2004]; Inkine Pharmaceutical Co., Inc. v. Coleman, 305 AD2d 151 [1st Dep't 2003]; Mecca v. Shang, 258 AD2d 569 [2d Dep't 1999]). As accurately outlined by defendant, the second cause of action asserted in plaintiffs' complaint for gross negligence, and the third cause of action for negligent misrepresentation, arise out of the identical facts, and seek the same relief as plaintiffs' first cause of action for malpractice. The fifth cause of action for gross negligence and the seventh cause of action for breach of fiduciary duty arise out of the same operative facts, and seek the same relief, as the fourth cause of action for malpractice, and the ninth cause of action for gross negligence arises out of the same facts, and asserts damages identical to the facts and damages alleged under the eighth cause of action for legal malpractice. Plaintiffs' argument, that the claims should be reviewed under Texas law, does not mandate a different result (see Camp v. RCW & Co., Inc., 2007 WL 1306841, *5 [SD Tex 2007], quoting Goffney v. Rabson, 56 SW 3d 186, 190 [Tex App, Houston 2001])"Texas law does not permit a plaintiff to divide or fracture her legal malpractice claims into additional causes of action"; see also Aiken v. Hancock, 115 SW 3d 26, 28 [Tex App, San Antonio 2002]; Ersek v. Davis & Davis, P.C., 69 SW 3d 268, 274 [Tex App, Austin 2002]). Plaintiffs' request for leave to amend the eighth cause of action is denied, as the proposed amendment does not cure the redundancy (see Feldman v. Jasne, 294 AD2d 307 [1st Dep't 2002]; Bencivenga & Co. v. Phyfe, 210 AD2d 22 [1st Dep't 1994]).

That portion of defendants' motion which seeks partial dismissal of plaintiffs' sixth cause of action for fraud, on documentary evidence, pursuant to CPLR 3211 (a) (1), is denied. On a motion pursuant to 3211 (a) (1), the court must accept the complaint's factual allegations as true, according plaintiffs the benefit of every possible favorable inference, and dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (Arnav Indus. Inc., Retirement Trust v. Brown, Raysman, Millstein, Felder & Stein. LLP, 96 NY2d 300, 303 [2001]; Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 AD3d at 271-71). The documentary evidence relied upon by the defendant in this matter consists of a June 28, 2004 letter executed by McBride on behalf of the Veras entities, and by McBride, Larson and Virginia in their individual capacities, acknowledging the existence of potential conflicts of interest, including but not limited to those alleged in the instant complaint. Defendants also annex various drafts of the letter. All drafts were prepared in or around June 2004, after the individual plaintiffs retained independent counsel.

The document, executed nearly a year after the investigations commenced, has little probative value with respect to plaintiffs' allegations that, when Akin Gump undertook plaintiffs' defense in or around September 2003, it knowingly and purposefully failed to disclose inherent and nonwaivable conflicts of interest, or with respect to acts occurring prior to the negotiation or execution of the letter. Plaintiffs' allegations also raise issues of fact with respect to whether the consent letter is effective in these circumstances (see Kelly v. Greason, 23 NY2d 368, 378-79 [1968][in certain situations, there can be no effective consent]; see also, e.g. Parklex Assoc. v. Parklex Assoc., 15 Misc 3d 1125(A), 2007 WL 1203617, *5 [Sup Ct, Kings County 2007][attorneys could not rely on purported waiver of conflict of interest where such conflict could subject an attorney to disciplinary action under DR-105, 22 NYCCR §1200.24(c)]; Booth v. Continental Ins. Co., 167 Misc 2d 429, 439 [Sup Ct, Westchester County 1995][full disclosure and consent does not insulate an attorney where the conflict of interest affects or appears to affect the attorney's obligations]). Finally, in light of defendant's failure to demonstrate a right to relief based upon documentary evidence, it is not necessary, at this time, to address the issues of fact raised by plaintiffs' belated claims of coercion.
Accordingly, for the reasons stated above, it is:

ORDERED, that defendant's motion, pursuant to CPLR 3211 (a)(7) is granted, and the Second, Third, Fifth, Seventh and Ninth causes of action alleged in plaintiffs' complaint are dismissed; and it is further

ORDERED, that defendant's motion relating to the Sixth cause of action, pursuant to CPLR 3211 (a)(1) is denied, and it is further

ORDERED, that plaintiffs' request for leave to amend the complaint is denied; and it is further

ORDERED, that defendant is directed to serve an answer to the balance of the complaint, consisting of the First, Fourth, Eighth, Tenth and Eleventh causes of action, within 10 days after service of a copy of this order with notice of entry.
5. Client (Non) Disclosure / Lawyer Exposure?

Chuck was sitting at his desk reviewing some draft invoices when the phone rang.

"Chuck Parsons here."

"Chuck? Bill. Listen, we got a call from DOJ this morning. They want us to come down and talk about the hydro project southeast of Jakarta. Sounds like they've been thumbing their copy of the FPCA. It could well be nothing. But it might be just a bit sticky. Can't tell for sure yet. We're Jim Carpenter in the Bringhurst firm's D.C. office."

"Well, that's really a stinker. I just circulated the finals of the schedules. We'll have to get that on 3.08 and send it around again."

"Chuck, we are out in front of you on this. We aren't going to schedule it. Pete is adamant that we close that we ink that credit facility tomorrow and close by Thursday. We just can't afford a lot of stupid questions from all over the syndicate. Pete is sure that this will prove to be nothing and he's willing to cross some other bridge if he's wrong. And it's Pete's call. Damn the torpedoes."

"Bill you guys are absolutely nuts! Unless it's much different that you are suggesting, it clearly goes on 3.08. And we can't give our opinion unless it does."

"Wait a minute Chuck. You know and I know that your opinion doesn't go anywhere near that type of issue. Existence. Corporate power. Due authorization. Due execution. Legal, valid and binding. Enforceability. No conflicts. That's it. I looked at it last night myself. Step up to the plate, Chuck. It our decision to make. And it's no problem of yours."

* * * * *


Frank T. VEGA, Plaintiff and Appellant,

v.

JONES, DAY, REAVIS & POGUE, Defendant and Respondent.

No. B170659.

Court of Appeal, Second District, Division Eight.


28*28 Manuel R. Ramos, Lo Jolla, for Plaintiff and Appellant.

Gibson, Dunn & Crutcher, James P. Fogelman, Joel M. Tantalo and Sarah R. Long, Los Angeles, for Defendant and Respondent.

27*27 BOLAND, J.

SUMMARY

A shareholder in a company acquired in a merger transaction sued the law firm which represented the acquiring company for fraud. He alleged the law firm concealed the so-called toxic terms of a third party financing transaction, and thus defrauded him into exchanging his valuable stock in the acquired company for "toxic" stock in the acquiring company. The law firm demurred. It contended it made no 29*29 affirmative misstatements and had no duty to disclose the terms of the third party investment to an adverse party in the merger transaction. We conclude the complaint stated a fraud claim based on nondisclosure. The complaint alleged the law firm, while expressly undertaking to disclose the financing transaction, provided disclosure schedules that did not include material terms of the transaction.

FACTUAL AND PROCEDURAL BACKGROUND

Frank T. Vega (Vega), a 23 percent shareholder in a company known as Monsterbook.com, sued Jones, Day, Reavis & Pogue (Jones Day), a law partnership, for fraud and negligent misrepresentation in connection with a merger transaction. In the merger transaction, Jones Day represented Transmedia Asia Pacific, Inc., which acquired Monsterbook. Monsterbook and Vega were represented by the law firm of Heller, Ehrman, White & McAuliffe (Heller Ehrman).

The terms of the acquisition included Vega's receipt of restricted stock in Transmedia in exchange for his interest in Monsterbook. Monsterbook and Vega accepted the merger offer on March 8, 2000. Closing occurred on April 13, 2000, when the two companies exchanged stock based on a $15 million valuation of Monsterbook. Vega thus exchanged stock valued at $3.45 million for the restricted Transmedia stock.

During the weeks between Vega's acceptance of the merger offer on March 8 and the closing on April 13, Transmedia, which "[e]verybody knew . . . was an iffy company," sought and secured $10 million in investment financing from a third party.\[1] The terms of Transmedia's $10 million third party financing transaction included so-called toxic stock provisions, under which the investors received convertible preferred stock that seriously diluted the shares of all other Transmedia stockholders. Both Transmedia and Jones Day knew that "toxic" stock financing is a "desperate and last resort of financing for a struggling company" and that 95 percent of companies who engage in such financing end up in bankruptcy.
Jones Day prepared a two-page disclosure schedule that clearly described and properly disclosed the "toxic" provisions of the $10 million investment, but did not send the disclosure to Vega, Monsterbook or Heller Ehrman. Jones Day knew that a full disclosure of the "toxic" terms of the financing would have "killed the acquisition," without which Transmedia would not have obtained the financing and would have gone out of business. Instead, Vega, Monsterbook and Heller Ehrman were told, on about March 16, 2000, that the $10 million financing then being negotiated was "standard" and "nothing unusual" and that Jones Day and Transmedia would supply additional documents to support these characterizations of the financing.\(^\text{20}\) No documents showing the "toxic" nature of the investment were provided; instead, Jones Day supplied Heller Ehrman with "a different sanitized version" of the disclosure schedule which did not include the "toxic" stock provisions.

Jones Day also prepared, and Transmedia sent to Monsterbook and Vega, a consent form concerning the $10 million investment, which Vega signed. The consent form stated that the $10 million investment would be convertible into an aggregate maximum of 6,815,000 shares of common stock, "thus misrepresenting that it fell within the 20% dilution 'toxic' cap mandated by NASD Rule 4350(i)(1)(D)." On March 28, 2000, two weeks before the closing of Transmedia's acquisition of Monsterbook, Jones Day filed a "Certificate of Designation" with the Delaware Secretary of State, certifying the creation of the convertible preferred stock. This document, available to the public, contained all the terms of the financing, including the "toxic" provisions.

The closing of the Monsterbook acquisition occurred on April 13, 2000. Eight months later, on December 14, 2000, Vega learned for the first time, through a press release issued by Transmedia, about the "toxic" stock provision of the $10 million financing. Several legal actions ensued.

First, on October 2, 2001, Monsterbook's former majority shareholder, William H. McKee, who had owned 70.125 percent of Monsterbook's stock, sued Heller Ehrman for legal malpractice. In a first amended complaint on November 21, 2001, McKee and a second shareholder, Paul R. Estrada, who had held a 1.486 percent interest in Monsterbook, also named Transmedia and Jones Day as defendants, alleging causes of action for fraud and negligent misrepresentation.

Second, on December 14, 2001, another shareholder, John Cuero, who had held a 2 percent interest in Monsterbook, sued Heller Ehrman, Jones Day, and Transmedia. This suit was consolidated with McKee's lawsuit. In the consolidated actions, Jones Day sought and obtained summary judgment, and judgment was entered in its favor on August 23, 2002. Estrada waived his right to appeal; McKee abandoned his appeal; and Cuero's appeal was dismissed at his request.

Third, on May 12, 2003, Vega filed this lawsuit against Jones Day and Transmedia, and Jones Day demurred.\(^\text{31}\) The demurrer to the fraud claim was sustained, without leave to amend, on multiple grounds, as follows:

- The claim did not allege an actionable, affirmative misstatement by Jones Day;
- Vega could not justifiably have relied on the statements allegedly made by Jones Day;
- Because Jones Day owed Vega no duty to disclose, Vega could not state a claim based on omission or nondisclosure;
- Vega did not allege damages proximately caused by Jones Day;
- Vega had no standing to bring the claim because it was derivative in nature;
- The claim was barred by the statute of limitations; and
- The claim was barred by res judicata.

Jones Day's demurrer to the negligent misrepresentation claim was sustained on the same grounds and, in addition, because a negligent misrepresentation claim cannot be based on an omission or nondisclosure. The court also concluded Vega failed to plead both causes of action with the requisite specificity.
The trial court's order sustaining the demurrers and dismissing Vega's complaint with prejudice was filed August 5, 2003, and this appeal followed.  

DISCUSSION

Vega's allegations may be summarized as follows. Jones Day hid the existence of the "toxic" stock provisions with the intent to induce Vega to give up his valuable stock in Monsterbook in exchange for Transmedia's "toxic" and worthless stock. Jones Day knew about the "toxic" stock provisions, and knew the acquisition would not occur if Monsterbook, Vega and their lawyers discovered them. Jones Day deliberately concealed the "toxic" stock provisions by telling Heller Ehrman the transaction was "standard" and "nothing unusual," by failing to provide the proper written disclosure it prepared, and by instead providing a different, sanitized version of the disclosure. Vega did not know, and had no reason to suspect, that the financing contained "toxic" provisions, and would not have given up his valuable stock in Monsterbook had he known. As a result of Jones Day's concealment of the "toxic" terms of the financing, Vega lost his $3.45 million interest in Monsterbook.

We agree with Vega that the complaint properly states a fraud claim.

Before we analyze the elements of the claim, we note the governing legal principles. A fraud claim against a lawyer is no different from a fraud claim against anyone else. "If an attorney commits actual fraud in his dealings with a third party, the fact he did so in the capacity of attorney for a client does not relieve him 32*32 of liability." (Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal.App.4th 54, 69, 131 Cal.Rptr.2d 777 (Shafer), quoting Jackson v. Rogers & Wells (1989) 210 Cal.App.3d 336, 345, 258 Cal.Rptr. 454.) While an attorney's professional duty of care extends only to his own client and intended beneficiaries of his legal work, the limitations on liability for negligence do not apply to liability for fraud. (Ibid.) Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient (Shafer, supra, 107 Cal.App.4th at p. 69, 131 Cal.Rptr.2d 777), and may be liable to a nonclient for fraudulent statements made during business negotiations. (Cicone v. URS Corp. (1986) 183 Cal.App.3d 194, 202, 227 Cal.Rptr. 887 ["the case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length"]).

With these principles in mind, we turn to the elements of fraud, which are: "(1) representation; (2) falsity; (3) knowledge of falsity; (4) intent to deceive; and (5) reliance and resulting damage (causation)." (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 668, p. 123.) Active concealment or suppression of facts by a nonfiduciary is the equivalent of a false representation, i.e., actual fraud. (Ibid., § 678, p. 136, italics omitted.) We treat the various elements, and the bases for the trial court's decision, in turn.

1. False representation.

We agree with Jones Day that a mere statement that the $10 million financing then being negotiated was "standard" and "nothing unusual" is not itself an actionable misrepresentation. While expressions of professional opinion are sometimes treated as representations of fact, a "casual expression of belief" is not similarly treated. (Bity v. Arthur Young & Co. (1992) 3 Cal.4th 370, 408, 11 Cal.Rptr.2d 51, 834 P.2d 745, quoting Gagne v. Bertran (1954) 43 Cal.2d 481, 489, 275 P.2d 15.) Moreover, no party to a major transaction could reasonably rely on a casual statement by counsel for another party to the transaction.

More problematic, however, is the question of active concealment or suppression of facts, which is the equivalent of a false representation. Vega alleges that Jones Day, after telling Heller Ehrman that Transmedia was about to close a $10 million private stock transaction which it wanted to include in its disclosure schedules, prepared a proper disclosure schedule containing the pertinent terms, but provided a "different sanitized version" of the schedule, without the "toxic" stock provisions. Thus, Vega alleges that Jones Day "deliberately or with a reckless disregard of the truth concealed the 'toxic' stock provisions" from Vega, Monsterbook and Heller Ehrman. These allegations state an "active concealment or suppression
of facts."\textsuperscript{23} (5 Witkin, Cal. Procedure, 33*33 supra, \S 678, p. 136, italics omitted.) So long as the remaining elements of a fraud claim are met (see discussion post), we are unable to conclude these allegations are deficient.

Jones Day contends that fraud based on concealment requires that the defendant have a duty to disclose the suppressed fact, and that as counsel for the adverse party in a merger, Jones Day owed no duty to disclose to Vega or Monsterbook the terms of the third party $10 million investment. Thus, the disclosure schedule, they contend, "is entirely irrelevant" because Jones Day had no duty to provide it to Monsterbook or Vega or Heller Ehrman. We disagree. Jones Day specifically undertook to disclose the transaction and, having done so, is not at liberty to conceal a material term. Even where no duty to disclose would otherwise exist, "where one does speak he must speak the whole truth to the end that he does not conceal any facts which materialy qualify those stated. [Citation.] One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud." (\textit{Cicone v. URS Corp., supra, 183 Cal.App.3d at p. 201, 227 Cal.Rptr. 887; Shafer, supra, 107 Cal.App.4th at p. 72, 131 Cal.Rptr.2d 777.})

Jones Day insists this case is controlled by \textit{B.L.M. v. Sabo \& Deitsch} (1997) 55 Cal.App.4th 823, 64 Cal.Rptr.2d 335 (\textit{B.L.M.}), and that \textit{B.L.M.} held that defendant attorneys owed no duty of care to the adverse party when they provided an opinion on a material aspect of the transaction at issue. Jones Day misconstrues \textit{B.L.M.}, a case with which we have no quarrel. The defendant lawyers in \textit{B.L.M.} specifically stated an opinion on a material point in the transaction on which third party B.L.M. relied. The court concluded that "it would be inappropriate to hold an attorney liable to a third party for a legal opinion which the third party could not, under the Rules of Professional Conduct, have contracted to obtain from that attorney." (\textit{B.L.M., supra, 55 Cal.App.4th at p. 839, 64 Cal.Rptr.2d 335.}) The court therefore held that B.L.M.'s reliance on the legal opinion of another party's lawyers "was not justifiable under the facts alleged . . . ." (\textit{Ibid.}) The court specifically stated: "We do not suggest that an attorney should be exempt from liability for negligent misrepresentation under circumstances in which a nonattorney could be held liable; we merely decline to extend professional liability under a negligent misrepresentation theory to individuals who are not clients of the attorney." (\textit{Ibid., fn. omitted.})

\textit{B.L.M.} is entirely inapposite. First, plaintiff B.L.M.'s claims were grounded solely in professional negligence — not fraud. On appeal, \textit{B.L.M.} argued it should be permitted to proceed against the attorneys under a theory of negligent misrepresentation — not fraud. The court reviewed that contention, and ultimately concluded B.L.M. failed to sufficiently allege that the lawyers had the intent to induce B.L.M.'s reliance on their representations, or that the reliance of B.L.M. was justifiable "under the circumstances of the case." (\textit{B.L.M., supra, 55 Cal.App.4th at p. 835, 64 Cal.Rptr.2d 335.}) Second, as the court in \textit{B.L.M.} pointed out, third parties may recover against an attorney under a negligent misrepresentation theory, in cases involving misrepresentations of fact rather than legal opinions. (\textit{I.d.} at pp. 839-840, 64 Cal.Rptr.2d 335.) The case under review involves the lawyers' alleged concealment 34*34 of a material fact in a transaction the lawyers undertook to disclose — not the expression of an inaccurate legal opinion as in \textit{B.L.M.} Consequently, Jones Day can take no comfort from \textit{B.L.M.}, which is in no way inconsistent with our conclusion here. Certainly Jones Day had no professional duty of care to Vega as an adverse party in the merger transaction. However, as in \textit{Shafer, supra}, Jones Day did have the same duty others have "not to defraud another, even if that other is an attorney negotiating at arm's length." (\textit{Shafer, supra, 107 Cal.App.4th at p. 71, 131 Cal.Rptr.2d 777, quoting Cicone v. URS Corp., supra, 183 Cal.App.3d at p. 202, 227 Cal.Rptr. 887.})

Jones Day contends that \textit{Shafer} is irrelevant, and suggests the result there was due to "the peculiar circumstances." In \textit{Shafer}, the court held that an attorney, who was retained by an insurance company to provide coverage advice in a lawsuit against its insured, could be held liable to the plaintiffs in that lawsuit for making a fraudulent statement about coverage. (\textit{Shafer, supra, 107 Cal.App.4th at p. 59, 131 Cal.Rptr.2d 777.}) This case is different, Jones Day says, because Vega has not alleged an affirmative misstatement of fact made to him by Jones Day, and because Vega cannot allege any "special circumstances that would give rise to an independent duty of disclosure owed by Jones Day to him."\textsuperscript{48} Neither of these asserted differences assists Jones Day. First, \textit{Shafer} indeed involved an affirmative false statement, while this case involves the concealment or suppression of material facts. However, we can
deduce no reason why a lawyer may be liable for one form of fraud but not the other. (See Lovejoy v. AT & T Corp. (2001) 92 Cal.App.4th 85, 97, 111 Cal.Rptr.2d 711 [it is established by statute "that intentional concealment of a material fact is an alternative form of fraud and deceit equivalent to direct affirmative misrepresentation," quoting Stevens v. Superior Court (1986) 180 Cal. App.3d 605, 608, 225 Cal.Rptr. 624]; & Witkin, Cal. Procedure, supra, § 678, p. 136 [active concealment or suppression of facts is the equivalent of a false representation].) Second, Jones Day's invocation of the principle that fraud based on nondisclosure requires an "independent duty of disclosure" is erroneous. In some but not all circumstances, an independent duty to disclose is required; active concealment may exist where a party "[w]hile under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or suppresses facts which materially qualify those stated."[10] (BAJI 35*35 No. 12.37; Ciccone v. URS Corp., supra, 183 Cal.App.3d at p. 201, 227 Cal.Rptr. 887["[o]ne who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud"]). Providing a disclosure schedule which deliberately omitted material facts seems clearly to fit this category.

2. Justifiable reliance.

Jones Day argues that publicly available information cannot form the basis for a concealment claim, and Vega, with reasonable diligence, could have known about the "toxic" stock provisions. Jones Day points out that Vega had notice, in the consent form he signed, that a "Certificate of Designation" regarding the $10 million investment and its terms would be filed with the Delaware Secretary of State at some time in the future, and that this certificate, containing all the financing terms, was in fact filed two weeks before the merger closed.[11]

Jones Day's argument fails on two counts. First, the contention that publicly available information cannot form the basis for a concealment claim is mistaken. The mere fact that information exists somewhere in the public domain is by no means conclusive. (See, e.g., Seeger v. Odell (1941) 18 Cal.2d 409, 414-415, 115 P.2d 977 [a plaintiff is not barred by constructive notice of a public record which would reveal the true facts].) Second, the question in a nondisclosure case is whether the defendant knows of material facts, and also knows that those facts are neither known nor readily accessible to the plaintiff.[12] (See BAJI, No. 12.36, ¶ 4.) In this case, Jones Day knew about the "toxic" provisions of the financing, and knew those facts were unknown to Vega unless, and only to the extent that, Jones Day and/or Transmedia disclosed those terms. Indeed, the point of disclosing material information in a transaction is that it is not otherwise available to the other side. Jones Day stated its desire to disclose the $10 million financing transaction, and then allegedly provided a sanitized disclosure, without the "toxic" terms. Questions as to whether Jones Day intentionally concealed that information in order to induce Vega to believe the transaction was "standard," and whether the consent form indicating that a certificate regarding the investment and its terms would be filed in Delaware in the future made the "toxic" terms reasonably 36*36 accessible to Vega, are questions of fact to be resolved on the evidence, not as a matter of law on a demurrer.

3. Reliance and causation.

Jones Day argues that nondisclosure of the "toxic" terms of the $10 million third party financing resulted in any damage. This is because (1) Vega agreed to exchange his Monsterbook stock for Transmedia stock on March 8, 2000, before the third party financing transaction arose and before he consented to it, and (2) Vega "concedes" in his complaint that Transmedia "would have gone out of business" without the $10 million investment. This claim is puzzling at best. First, while Vega agreed to exchange his stock on March 8, he may have had good grounds to rescind the agreement if the "toxic" terms of the financing had been disclosed. This is not a point that can be determined on a demurrer.

Second, Jones Day quotes only part of the sentence in which Vega "concedes" Transmedia would have gone out of business without the financing. The complaint alleges that disclosure of the "toxic" terms of the financing "would have killed the acquisition," and that "[w]ithout the acquisition," Transmedia would not have obtained the financing and would have gone out of business. We fail to see how these allegations show Vega was not harmed by the failure to disclose the "toxic" terms of the financing. Quite the contrary. Vega alleges that had full disclosure been made, he would not have exchanged his valuable Monsterbook
stock for the "toxic" Transmedia stock. Those allegations, if true, show the nondisclosure resulted in damage.

4. Requisite particularity.

The trial court also sustained the demurrer on the ground Vega failed to allege the cause of action "with the requisite degree of specificity." Jones Day argues Vega has not alleged ")(1) who, (2) said what, (3) to whom, (4) when, and (5) in what manner," and waived the opportunity to replead. Again we disagree. The pertinent question in a concealment case is not who said what to whom; the question, among others, is whether Jones Day, in undertaking to disclose the $10 million financing, intentionally concealed its "toxic" terms from Vega and Monsterbook so that they would proceed with the transaction. The complaint sufficiently apprises Jones Day of the facts of Vega's fraud claim to allow Jones Day to prepare its defense. (See Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 216, 197 Cal.Rptr. 783, 673 P.2d 660.)

5. Standing to sue.

Jones Day contends Vega has no standing to sue Jones Day for fraud because his claims are "derivative" claims. In a tortuous argument, Jones Day concludes that because Vega agreed to accept Transmedia stock before the third party financing transaction arose, the gravamen of his complaint "must be for the diminution in 37*37 the value of the Transmedia stock" he acquired, which was caused by Transmedia's entering into the private stock transaction. This, Jones Day asserts, is a classic example of a derivative claim because the harm to Vega is the same harm suffered by every other Transmedia or Monsterbook shareholder.

Jones Day is mistaken. A derivative suit is a suit brought on behalf of a corporation for injury to the corporation, often for breach of fiduciary duty, mismanagement or other wrongdoing by corporate officers or directors, or for wrongs against the corporation by third parties. (See Friedman, Cal. Practice Guide: Corporations (The Rutter Group 2004) ¶¶ 6:602 & 6:603, pp. 6-128.1 to 6-128.2.) An action is derivative "if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets." (Jones v. H.F. Ahmanson & Co. (1969) 1 Cal.3d 93, 106, 81 Cal.Rptr. 592, 460 P.2d 464, citing Gagnon Co., Inc. v. Nevada Desert Inn, Inc. (1955) 45 Cal.2d 448, 453, 289 P.2d 466.) This is not such a case. Vega alleges that Jones Day deceived him into exchanging his valuable stock in Monsterbook for worthless stock in Transmedia. As in Jones, Vega "does not seek to recover on behalf of the corporation for injury done to the corporation" by Jones Day. (Jones v. H.F. Ahmanson & Co., supra, 1 Cal.3d at p. 107, 81 Cal.Rptr. 592, 460 P.2d 464.) Instead, "the gravamen of [his] cause of action is injury to [himself]. . . ." (Ibid.)


Jones Day argues that Vega's fraud claim is barred by the three-year statute of limitations. Again, we disagree.

Vega alleged he first discovered the "toxic" terms of the $10 million financing transaction on December 14, 2000, when a Transmedia press release revealed that the terms of the financing had included a "toxic" stock provision. He filed suit on May 12, 2003. Jones Day argues the three-year statute expired no later than March 28, 2003, three years after the filing in Delaware of the "Certificate of Designation" containing all the terms of the transaction. Jones Day recognizes that the statute of limitations in a fraud action does not begin to run "until the discovery, by the aggrieved party, of the facts constituting the fraud. . . ." (Code Civ. Proc., § 338, subd. (d).) However, it argues Vega should have discovered the "toxic" terms of the financing on March 28, 2000, since the filing of the certificate in Delaware put him on inquiry notice.
38*38 The rule is that the statute commences to run "only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry." (Hobart v. Hobart Estate Co. (1945) 26 Cal.2d 412, 437, 159 P.2d 958.) The means of knowledge are equivalent to knowledge "only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious." (Hobart v. Hobart Estate Co., supra, 26 Cal.2d at p. 438, 159 P.2d 958.) We cannot say, as a matter of law, that Vega's knowledge that the $10 million financing transaction would occur, standing alone, should have made him "suspicious of fraud," or suspicious that the transaction might contain "toxic" terms. Whether other circumstances exist which, in conjunction with knowledge of the existence of the financing transaction, would have made a prudent person suspicious is a question that cannot be resolved on demurrer.


Finally, Jones Day contends that Vega's claims are barred by the doctrine of res judicata, because Jones Day obtained summary judgment in its favor on fraud claims in earlier lawsuits brought by three other shareholders, who subsequently waived, abandoned and dismissed their respective appeals. Jones Day argues Vega was in privity with each of those three shareholders, because he is also a former shareholder in Monsterbook, his fraud claim is the same as their claims, he knew about their lawsuits, and he is using the same attorney. This relationship, Jones Day contends, is sufficiently close to justify application of the principle of preclusion. Again, we cannot agree.

The doctrine of res judicata precludes parties or their privies from relitigating issues decided in a prior action in which a final judgment on the merits was entered. While Jones Day obtained summary judgment on fraud claims by three other shareholders, Vega was not a party to those lawsuits. The concept of privity has been expanded to include "a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel." (Clemmer v. Hartford Ins. Co. (1978) 22 Cal.3d 865, 875, 151 Cal.Rptr. 285, 587 P.2d 1098.) However, "[n]otwithstanding expanded notions of privity," due process requirements must be satisfied. (Ibid.) The cases uniformly state that, in addition to an identity or community of interest between the party to be estopped and the losing party in the first action, and adequate representation by the latter, "the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication." (Clemmer v. Hartford Ins. Co., supra, 22 Cal.3d at p. 875, 151 Cal. Rptr. 285, 587 P.2d 1098.)

We discern no basis for concluding Vega "should reasonably have expected to be bound by" the adjudication of lawsuits in which he did not participate in any way, in which he had no proprietary or financial interest, and over which he had no control 39*39 of any sort. (See Lynch v. Glass (1975) 44 Cal.App.3d 943, 949, 119 Cal.Rptr. 139 ["it cannot be said that appellants should reasonably have expected to be bound by the prior adjudication"]; although appellants "were fully aware of the prior litigation, the appearance of one of them as a witness gave them no power to control any aspect of the case"]; Aronow v. LaCroix (1990) 219 Cal.App.3d 1039, 1052, 268 Cal.Rptr. 866 [where plaintiff was litigant, attorney and witness at various stages of prior case, but did not participate throughout, her connection with prior case "though falling short of the power to control, was so close that she should reasonably expect to be bound by the result"]). The only relationship between Vega and the prior lawsuit is that he and the plaintiffs in those suits were shareholders in the same company. We are aware of no precedent for finding this to be a "sufficiently close" relationship to justify application of the principle of preclusion, and we decline to create one.

DISPOSITION

The order dismissing the complaint, construed as a judgment of dismissal, is reversed and the cause is remanded for further proceedings. Appellant is entitled to recover his costs on appeal.

We concur: COOPER, P.J., and RUBIN, J.
[1] Transmedia's Form 10-K annual report for fiscal year 1998, filed with the Securities and Exchange Commission, indicated Transmedia's working capital deficit raised "substantial doubt about its ability to continue as a going concern," and that its ability to do so was dependent on its ability to continue to effect sales of equity securities and issue of debt. Its annual report for fiscal year 1999, filed January 13, 2000, showed a slightly larger working capital deficit, decreased revenues and an increased net loss.

[2] On March 16, 2000, Heller Ehrman sent an e-mail informing Monsterbook and Vega as follows:

"On another note, I received a call from the lawyers for Transmedia. . . . There are a couple of disclosure issues relating to Transmedia that came up. Specifically, they are revising their most recent 10K (annual report) and are also about to close a private stock financing. Neither of these were included in the disclosure schedules that they sent to us, and they want them included—which means that they have to wait until they sort out their books. I have not spoken directly with their attorneys, we've just traded phone messages. Tom Stromberg who has been working on this deal also gave them a call. Neither we nor Transmedia's attorneys think that this is a big deal as it relates to the MonsterBook acquisition, but it will delay closing."

[3] The complaint in McKee's lawsuit, unlike Vega's complaint, did not allege that Jones Day prepared a complete disclosure of the $10 million financing, but provided Heller Ehrman with a sanitized version of the disclosure schedule without the toxic stock provisions. The trial court in the McKee case (Judge James C. Chalfant) concluded that: (1) Jones Day's statements that the preferred stock offering was "no big deal" and "standard" were nonactionable expressions of opinion. Because Jones Day's loyalty was owed only to Transmedia, not to Monsterbook's shareholders, Jones Day had no duty to disclose the details of the transaction. The statement was also nonactionable because of its casual nature, so that it could not be relied on by anyone. (2) The consent form prepared by Jones Day and signed by Transmedia and McKee was not a representation by Jones Day; and there was no evidence that the consent form—concerning the aggregate maximum of 6,815,000 shares—was a misrepresentation or a misleading half-truth. Therefore, Jones Day had no duty to disclose other terms of the preferred stock transaction. (3) McKee and the other shareholders could not have justifiably relied on Jones Day's opinions; any reliance on Jones Day's opinion that the transaction was "standard" or "no big deal" would have been unreasonable as a matter of law.


[5] The trial court's order dismissed Vega's complaint with prejudice, but no judgment was entered for Jones Day in accordance with the order. Since the case is fully briefed, in the interests of judicial economy we will construe the order as a judgment of dismissal. (See Smith v. Hopland Band of Pomo Indians (2002) 95 Cal.App.4th 1, 3, fn. 1, 115 Cal. Rptr.2d 455 [premature appeal from order sustaining demurrer and granting motion to dismiss; "although we fail to understand why the clearly established law on this point continues to be disregarded, in the interest of judicial economy, we shall deem the order to incorporate a judgment of dismissal"]) .

[6] The demurrer to Vega's cause of action for negligent misrepresentation was properly sustained by the trial court, since such a claim requires a positive assertion. (Wilson v. Century 21 Great Western Realty (1993) 15 Cal. App.4th 298, 306, 18 Cal.Rptr.2d 779 [negligent misrepresentation is a species of fraud requiring a positive assertion; an implied assertion or representation is not enough].) Since no positive assertions are alleged, other than the comments that the financing was "standard" and "nothing unusual," no claim for negligent misrepresentation is stated.

[7] See Civil Code sections 1710, subdivision 3 (defining deceit as including "[t]he suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact"), and 1572, subdivision 3 (defining actual fraud in a contract setting to include the "suppression of that which is true, by one having knowledge or belief of the fact").
[8] In Shafer, supra, 107 Cal.App.4th 54, 131 Cal.Rptr.2d 777, the Shafters recovered a judgment against an insured, and asked the insurer to satisfy the judgment. The insurer's lawyer told the Shafters that the insurer had not agreed to provide indemnity for willful acts, while in fact, as the lawyer well knew, the insurer had agreed to such indemnification; the lawyer made the false statement to induce the Shafters to forgo full payment on the judgment. (Shafer, supra, 107 Cal. App.4th at p. 66, 131 Cal.Rptr.2d 777.) The court observed that the lawyer "owed the Shafters a duty not to make fraudulent statements about the insurance coverage provided by [the insurer]." (Id. at p. 67, 131 Cal. Rptr.2d 777.) Jones Day says that in Shafer, the applicable provisions of the insurance code gave rise to a "special relationship" and "independent duties" to the plaintiffs since they were third party beneficiaries of the insurance contract. However, Shafer nowhere requires, or suggests the need for, a "special relationship" as a predicate to a fraud claim against a lawyer. Indeed, while the facts in Shafer are different, the principle it applied was not new. Shafer refers to sources citing cases from 28 states holding that an attorney can be liable to a nonclient, even an adversary in litigation, for fraud or deceit. (Shafer, supra, 107 Cal.App.4th at p. 75, 131 Cal. Rptr.2d 777.)

[9] See also Pavieich v. Santucci (2000) 85 Cal. App.4th 382, 398, 102 Cal.Rptr.2d 125 ("[t]his is not a situation where we are required to apply the rule that a ‘duty to disclose a material fact normally arises only where there exists a confidential relationship between the parties or other special circumstances require disclosure. . . .’ [Citation.] This is because of the principle that ‘where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated’") quoting Ciccone v. URS Corp., supra, 183 Cal.App.3d at p. 201, 227 Cal.Rptr. 887.

[10] While both parties refer to the consent form, it is not a part of the record in this case.

[11] Jones Day cites several cases in connection with its statement that Vega could have discovered, with reasonable diligence, the "toxic" provisions of the financing. These cases reject fraudulent concealment claims where the information in question was readily accessible, or plaintiff was on inquiry notice of the allegedly concealed information. (E.g., Stevenson v. Baum (1998) 65 Cal.App.4th 159, 75 Cal.Rptr.2d 904 [affirming summary judgment; the plaintiffs could not state cause of action for fraudulent nondisclosure of a pipeline easement as a matter of law, because the purchase contract put the plaintiffs on notice that they took title subject to easements of record]; Clayton v. Landsing Pacific Fund, Inc. (N.D.Cal. May 16, 2002) 2002 U.S. Dist. Lexis 9446 [no claim for fraudulent concealment of the decline in value of plaintiff's investment, where value of shares was publicly available, and in addition letter from the defendants actually disclosed the decrease in the value of the plaintiff's investment].)

[12] The trial court stated it was "willing to sustain [the demurrer] without leave to amend and just get this on the short track up to the court of appeal," although its general practice was to "give the other side a chance to amend if they think they can amend to cure the defect in the complaint. [5] So it is up to you [Vega]." Vega's counsel responded, "Well, if the reason for the demurrer sustaining it without leave to amend is that the court feels that there is somehow a different duty vis-à-vis Jones, Day as there is with Transmedia." The court replied, "Well, that is one of the reasons." Counsel then said, "All right. Then I think it is better to take it up now. I don't want to fight Gibson, Dunn for a year and then be back here."

[13] Jones Day relies on Nelson v. Anderson (1999) 72 Cal.App.4th 111, 117, 124, 84 Cal. Rptr.2d 753, which held that the plaintiff — the minority shareholder in a two-shareholder corporation — had no standing as an individual to bring an action for breach of fiduciary duty against the majority shareholder. The plaintiff had no standing as an individual because the obligations allegedly violated — which amounted to negligence and misfeasance in managing the corporation's business — were "duties owed directly and immediately to the corporation." (Id. at p. 125, 84 Cal.Rptr.2d 753.) In this case, by contrast, the "duty" — not to defraud another person — is not a duty owed only to the corporation. Indeed, Nelson expressly states that "the same facts regarding injury to the corporation may underlie a personal cause of action, such as . . . fraud . . . [but] Nelson has not alleged or proved the elements of a fraud cause of action. (Id. at pp. 124-125 & fn. 6, 84 Cal. Rptr.2d 753.)

[14] Since Vega's negligent misrepresentation claim has been disposed of on other grounds (see fn. 6, ante), we need not consider whether it is governed by and barred by a shorter statute of limitations.
"Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances a prudent man would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission." (Hobart v. Hobart Estate Co., supra, 26 Cal.2d at p. 438, 159 P.2d 958, quoting Tarke v. Bingham (1898) 123 Cal. 163, 166, 55 P. 759, italics omitted.)
MEGA GROUP, INC., Appellant,  
v.  
PECHENIK & CURRO, P.C., et al., Respondents. (Action No. 1.)  
MEGA PERSONAL LINES, INC., Appellant,  
v.  
MEGA GROUP, INC., Appellant, and  
PECHENIK & CURRO, P.C., et al., Respondents. (Action No. 2.)

Appellate Division of the Supreme Court of the State of New York, Third Department.

August 3, 2006.

585*585 Cardona, P.J., Mercure, Peters and Carpinello, JJ., concur.

Spain, J.

These appeals represent the next chapter in a series of related actions which have made their way to this Court (Matter of Mega Personal Lines, Inc. v Halton, 9 AD3d 553 [2004]; Matter of Mega Personal Lines v Halton, 297 AD2d 428 [2002]; Mega Group v Halton, 290 AD2d 673 [2002]). The two precipitating events of this array of litigation are the firing of Robert Halton by plaintiff/defendant Mega Group, Inc. (hereinafter Mega) and Mega's subsequent sale of virtually all of its assets to plaintiff Mega Personal Lines, Inc. (hereinafter MPL).

Halton's termination was followed by litigation between Mega and Halton (hereinafter the Halton action). Halton successfully moved for summary judgment after Mega, then represented by defendants Stephen A. Pechenik and Pechenik & Curro, P.C. (hereinafter collectively referred to as the attorneys), failed to oppose the motion, resulting in a default judgment in favor of Halton against Mega. Prior to entry of that judgment but while the litigation was pending, Mega entered into a purchase/sale agreement with MPL for the sale of virtually all of Mega's assets (hereinafter the sale). By the terms of the purchase/sale agreement, Mega's principal, Steven Gregory, obtained a 40% equity stake in MPL. In conjunction with the sale, the attorneys were required to provide, on behalf of Mega, an opinion letter discussing the legality of the proposed sale. Following the sale and by virtue of its default judgment against Mega in the Halton action, Halton levied restraints upon business accounts titled in Mega's name, but which legally belonged to MPL. Halton claimed, among other things, that the transfer of Mega's assets to MPL violated Debtor and Creditor Law § 273-a.

In the first appeal before us, Mega commenced a legal malpractice action against the attorneys (hereinafter action No. 1), asserting that they had been negligent in defending Mega's interests in the Halton action and in rendering advice in connection with the sale. The attorneys moved for summary judgment dismissing the complaint. Mega opposed the motion and cross-moved for summary judgment. Finding that Mega failed to demonstrate that it had suffered any actual or ascertainable damages due to the attorneys' alleged malpractice, Supreme Court granted the attorneys' motion and dismissed Mega's complaint. Mega appeals, and we affirm.

The second action was commenced by MPL against Mega and 586*586 the attorneys (hereinafter action No. 2), asserting various causes of action based on the alleged nondisclosure by Mega and the attorneys of the pending claims by Halton against Mega at the time of the sale and upon the attorneys' alleged negligence in rendering the opinion letter. Mega asserted cross claims for contribution and indemnification against the attorneys. The attorneys moved for summary judgment and, finding that their assertions in the opinion letter were not negligent, Supreme Court granted the motion and dismissed the complaint and Mega's cross claims against the attorneys. Both MPL and Mega appeal, and we affirm.
In action No. 1, Mega's legal malpractice complaint was properly dismissed. To establish legal malpractice, a plaintiff must show that "the attorney was negligent, that the negligence was a proximate cause of the loss sustained and that plaintiff suffered actual and ascertainable damages" (Ehlinger v Ruberti, Girvin & Ferlazzo, 304 AD2d 925, 926 [2003], quoting Busino v Mechem, 270 AD2d 606, 609 [2000]; see Brodeur v Hayes, 18 AD3d 979, 980 [2005], lv dismissed and denied 5 NY3d 871 [2005]; Tabner v Drake, 9 AD3d 606, 609 [2004]). Here, an attorney-client relationship existed between Mega and the attorneys, and Mega's pleadings contain sufficient facts to support the conclusion that the attorneys were negligent in defending Mega in the Halton action. As Supreme Court properly found, however, Mega has failed to state facts sufficient to find that it has suffered any actual and ascertainable damages.

First, Mega cannot claim any disadvantage in negotiating the sale by virtue of the attorneys' alleged negligence in connection with the Halton action because neither Mega nor MPL claims any knowledge that Halton had in fact made cross claims against Mega when the sale took place (see Busino v Mechem, supra at 608). Further, although a default judgment was entered against Mega in the Halton action, it is clear from the record that Mega did not pay that judgment and the judgment has now been satisfied; Mega, MPL and Halton entered into a stipulation of settlement resolving the Halton action whereby a portion of the escrowed funds already due to MPL by virtue of its purchase of Mega's assets were transferred to Halton. Mega did not pay anything to Halton, or any other party, in connection with the settlement. All parties to the settlement signed general releases to one another, but the details of the settlement and those releases are not in the record; thus, it is unclear to what extent, if any, Mega may be held liable to MPL in action No. 2 for alleged damages flowing from the Halton action. Mega's 587*587 claim that it has suffered damage in the form of potential liability to MPL, should MPL succeed in action No. 2, is too speculative to support the malpractice cause of action (see Peak v Bartlet, Pontiff, Stewart & Rhodes, P.C., 28 AD3d 1028, 1031 [2006]; Brodeur v Hayes, supra at 981). Finally, Mega's assertion that it has been damaged by legal fees incurred in the course of this litigation also is speculative. It is undisputed that Gregory—not Mega—paid the legal fees and, although he states that he made such payments on behalf of Mega, no documentary evidence exists that Mega is indebted to him or that he would be successful in seeking reimbursement from Mega, which is now a corporate shell. Finding that all damages alleged by Mega are "speculative and unsubstantiated," we conclude that Mega's legal malpractice claim was properly dismissed (Brodeur v Hayes, supra at 981; see Antokol & Coffin v Myers, 30 AD3d 843 [2006]; Misako v Leeds & Morelli, 3 AD3d 726, 726-727 [2004]).

The appeal in action No. 2 is premised on the opinion letter issued by the attorneys on behalf of Mega and in connection with the sale. An opinion letter containing a negligent misrepresentation may give rise to liability to a third party even where no privity of contract exists between the maker and the third party if there is "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance" (Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood, 80 NY2d 377, 384 [1992]).

Ample record evidence exists which, if credited, satisfies all three prongs; the attorneys prepared the opinion letter in support of the sale with the understanding that MPL, as purchaser, would rely upon it (see id. at 385; see also Fleet Bank v Pine Knoll Corp., 290 AD2d 792, 796 [2002]; cf. Rayco of Schenectady v City of Schenectady, 267 AD2d 664, 665 [1999]). On this record, MPL sufficiently pleaded facts which could establish a duty flowing to MPL from the attorneys.

To state a prima facie case of negligent misrepresentation, however, it was also incumbent upon MPL to state facts demonstrating that the duty was breached, resulting in damage to MPL (see Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood, supra at 385-386). MPL argues that, in the opinion letter, the attorneys had a duty to disclose Halton's then pending claims against Mega, as well as the potential that the sale could violate the Debtor and Creditor Law. The attorneys met their prima facie burden establishing 588*588 entitlement to summary judgment by averring that the opinion letter contained precisely the information called for in the parties' purchase/sale agreement and contained no misrepresentations. Indeed, although Mega, in the purchase/sale agreement, professes that no claims against it are pending, the opinion letter makes no such representations. The attorneys' opinion letter does affirmatively state: "I do not believe based upon what I have examined and know from being corporate
counsel, that the execution, delivery and performance of the agreement will contravene or violate any statute ...." However, even assuming that the sale violated the Debtor and Creditor Law, MPL has proffered no competent evidence demonstrating that the attorneys' statement was negligently made. By all accounts Mega transferred its assets to MPL for full and fair consideration, thus the attorneys make a persuasive argument that their opinion letter was accurate because no violation occurred under Debtor and Creditor Law § 273-a.

In opposition to the motion, MPL submitted an expert affidavit broadly opining that "a reasonable and competent attorney should recognize that, where a corporation is conveying substantially all of its assets, any opinion letter generated in connection therewith should disclose any known claims for damages as against the transferring corporation and, where appropriate, should indicate any potential violations of the Debtor and Creditor Law." We agree with Supreme Court that this submission is insufficient to create a triable issue of fact on the issue of whether the attorneys made negligent misrepresentation. As a term of the purchase/sale agreement, the parties to the sale carefully circumscribed the details to be contained within the opinion letter; no evidence exists that the attorneys were called upon to venture opinions beyond those agreed upon. Indeed, any further disclosures would potentially have been restricted by the attorneys' confidentiality obligations to their client (see Code of Professional Responsibility DR 4-101 [22 NYCRR 1200.19]; cf. Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood, supra at 382 [holding that preservation of client confidentiality will not insulate attorneys from liability for negligent misrepresentation where the attorneys make an affirmative misrepresentation at the bequest of the client to the detriment of the third party]).

589 In addition, MPL has not alleged facts sufficient to establish that the attorneys were negligent in opining that the sale would not violate any statute. As previously discussed, the sale was supported by fair consideration, suggesting no violation of Debtor and Creditor Law § 273-a. Indeed, the affidavit of MPL's expert does not contain any facts or details which would support the conclusion that, under the particular circumstances surrounding the sale, the attorneys should have anticipated that the sale was in any way unlawful. Accordingly, the negligent misrepresentation claim was properly dismissed (see Finova Capital Corp. v Berger, 18 AD3d 256, 258 [2005]; Marcellus Constr. Co. v Village of Broadalbin, 302 AD2d 640, 642 [2003]; Houlihan/Lawrence, Inc. v Duval, 228 AD2d 560, 562 [1996]).

Finally, Mega's cross claims against the attorneys for indemnification and contribution in action No. 2 also were properly dismissed. As discussed, Mega has failed to prove any ascertainable damages as a result of any alleged acts of negligence on the part of the attorneys and—given the general releases signed in settling the Halton action and the fact that, as a result of the sale, Mega apparently has been reduced to a corporate shell—we find the possibility of Mega sustaining any actual damage in the future too speculative to support a cause of action for indemnification or contribution (see Pennsylvania Gen. Ins. Co. v Austin Powder Co., 68 NY2d 465, 470 n 2 [1986]; Peak v Bartlett, Pontiff, Stewart & Rhodes, P.C., 28 AD3d 1028, 1031 [2006], supra; Bogdan & Faist v CAI Wireless Sys., 295 AD2d 849, 854 [2002]; Henegan v Merchants Mut. Ins. Co., 31 AD2d 12, 14-15 [1968]).

Ordered that the orders are affirmed, with costs.

[1] In the prior litigations, no definitive conclusion was reached with regard to whether the sale violated any provision of the Debtor and Creditor Law (see Matter of Mega Personal Lines, Inc. v Halton, 9 AD3d 553, 555-556 [2004], supra; Matter of Mega Personal Lines v Halton, 297 AD2d 428, 430 [2002], supra).

[2] Section 273-a applies to conveyances made "without fair consideration" (Debtor and Creditor Law § 273-a).

[3] By definition, "[f]air consideration" contemplates not only a conveyance of property of a fair equivalent, but that the exchange is made "in good faith" (Debtor and Creditor Law § 272 [a]; see Matter of Mega Personal Lines, Inc. v Halton, 9 AD3d 553, 555 [2004], supra). In the prior litigations, however, MPL took the position that the sale was made in good faith and, although the issue has never been litigated.
to conclusion, MPL has failed to raise a triable issue of fact as to whether the attorneys knew of any bad faith in connection with the sale.
SELECTED MODEL RULES

Model Rule Preamble- Scope, Paragraph [20]

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. [Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.]

(emphasis supplied)

Model Rule 1.0

...........

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

.....

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

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances.

1 All Rules set forth above are from the Delaware Rules of Professional Conduct. Those Rules are substantially identical in all relevant respects to the Model Rules.

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

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

...............  

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

Model Rule 1.1

COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
Model Rule 1.2(d)
SCOPE OF REPRESENTATION

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

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

Model Rule 1.4
COMMUNICATION

(a) A lawyer shall:

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

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

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

Model Rule 1.6
CONFIDENTIALITY OF INFORMATION

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

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

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

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

(6) to comply with other law or a court order.

Model Rule 1.7

CONFLICT OF INTEREST: CURRENT CLIENTS

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

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

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

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

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;

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

(4) each affected client gives informed consent, confirmed in writing.

**Identifying Conflicts of Interest: Directly Adverse**

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

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

**Identifying Conflicts of Interest: Material Limitation**

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.
[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

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

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

Model Rule 1.16

DECLINING OR TERMINATING REPRESENTATION

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

(1) the representation will result in violation of the rules of professional conduct or other law;

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(7) other good cause for withdrawal exists.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Model Rule 2.3

EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

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

Model Rule 4.1

TRUTHFULNESS IN STATEMENTS TO OTHERS

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

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

Model Rule 5.1

RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

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

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

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

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

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

Model Rule 8.4

MISCONDUCT

It is professional misconduct for a lawyer to:

....

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

....
SELECTED REFERENCE POINTS


4. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 335.


7. ABA Committee on Legal Opinions, Guidelines for the Preparation of Closing Opinions, 57 BUS. LAW. 875 (2002) [“Revised ABA Guidelines”]


3 Also contains, (A) an excellent bibliography, and (B) as exhibits, in hard copy and/or accompanying disk, a substantial body of primary opinion literature.
Cognitive Twists

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Gordon Silver Professor of Law
William S. Boyd School of Law
University of Nevada, Las Vegas

http://www.law.unlv.edu/faculty_nancyRapoport.html
http://nancyrapoport.blogspot.com/

* I was going to call this PPT “Stupid Lawyer Tricks,” but my husband talked me out of it.

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Humans are hard-wired to make certain types of processing errors.

- Mix of personal and group errors.
- Cognitive dissonance error.
- Diffusion of authority ("bystander effect") error.
- Social pressure error.
- Anchoring error.
Cognitive dissonance and corporate scandals.

“I am a good person.”

“I am doing a bad thing.”

“There’s a good reason I’m doing this.”
Cognitive dissonance and corporate scandals.

- Stanley Milgram’s experiments in the 1960s, based on Leon Festinger’s work on cognitive dissonance.
For more about the Milgram experiments:

- [http://www.youtube.com/watch?v=XpIzju84v24](http://www.youtube.com/watch?v=XpIzju84v24).
- And Milgram’s experiment repeated two years ago on ABC Primetime: [http://www.youtube.com/watch?v=HwqNP9HRy7Y](http://www.youtube.com/watch?v=HwqNP9HRy7Y).
When it comes to cognitive dissonance, there are no lobsters, only frogs.
Other personal and group cognitive errors:

- Diffusion of authority and the bystander effect.
- “Someone else will do it” — the Kitty Genovese story.

For more about diffusion of authority and the bystander effect:

- [http://www.youtube.com/watch?v=IJqhWkTGu5o](http://www.youtube.com/watch?v=IJqhWkTGu5o).
Other personal and group cognitive errors:

- Social pressure.
- Solomon Asch’s “lines” experiment.
For more about the Asch social conformity experiment:

- [http://www.youtube.com/watch?v=iRh5qy09nNw](http://www.youtube.com/watch?v=iRh5qy09nNw).
Anchoring error.

• “Anchoring” involves “the common human tendency to rely too heavily, or ‘anchor,’ on one trait or piece of information when making decisions.”*


How anchoring affects ethics.

- Once you settle on a framework, it’s very difficult to look at things from any other perspective.
- For all cognitive errors, the hardest part is recognizing that all humans experience them.
ETHICAL AND RISK MANAGEMENT ISSUES IN COMMERCIAL TRANSACTIONS

Uniform Commercial Code Committee
ABA Business Law Section
Spring Meeting
Las Vegas
March 22, 2012
1. A Piece of *What*?

You stop and look up at the morning winter sun streaming through the high windows of the main concourse. You furrow your brow: “What the *deuce* are these guys doing?”
2. The Gift?

“Chuck, I know our guys at Roofing Materials pretty well. They obviously don’t want the termination provision. If we tell him what happened, they may well just sign it up anyway. They’ll say they changed their mind or something.”

“Well … I think we need to tell the client. But … maybe not. What do you think?”
3. On Creating Unintended Post-Closing Obligations

“Well, that not so good. But it sure isn’t our fault. Our opinion would have clearly stated the window for filing continuation statements and that it would be the trustee’s obligation to do so.”

“Actually, I looked for that in the opinion, but I didn’t see it. I spoke with John. He said that we only started using that language in 2005.”
4. Underlying Work

“Hmmm. That’s odd. Well, I’ll get someone to send you the names of the firms that we would have used. No harm, no foul.”

“I’m not quite sure about that. One of our associates here in Chicago took a look at the mortgage and concluded that the remedies that we planned to rely on may not work just perfectly in Utah and New Mexico.”

“Really? Well David, you’re an old hand at this stuff. I’m sure you can come up with a work around.”
“Bill you guys are absolutely nuts! Unless it’s much different that you are suggesting, it clearly goes on 3.08. And we can’t give our opinion unless it does.”

“Wait a minute Chuck. You know and I know that your opinion doesn’t go anywhere near that type of issue. Existence. Corporate power. Due authorization. Due execution. Legal, valid and binding. Enforceability. No conflicts. That’s it. I looked at it last night myself. Step up to the plate, Chuck. It our decision to make. And it’s no problem of yours.”
Of Smell Tests and Gut Checks: Ethics Issues for Transactional Lawyers in Negotiating and Drafting Business Contracts

Presented by:

Business Law Education Committee

ABA Business Law Section  
2012 Spring Meeting  
March 22, 2012
Of Smell Tests and Gut Checks: Ethics Issues for Transactional Lawyers in Negotiating and Drafting Business Contracts

Panelists:
• Riccarda N. Heising, Bryan Cave LLP, Atlanta, Georgia
• Thomas E. Rutledge, Stoll Keenon Ogden PLLC, Louisville, Kentucky
• William J. Woodward, Jr., Temple University Beasley School of Law, Philadelphia, Pennsylvania

Program Chairs and Moderators:
• Dennis R. Honabach, Northern Kentucky University Chase College of Law, Highland Heights, Kentucky
• Carol D. Newman, Emory University School of Law, Atlanta, Georgia

Additional Materials:
• Tina L. Stark, Professor of the Practice of Law, Boston University School of Law, Boston, Massachusetts
Of Smell Tests and Gut Checks: Ethics Issues for Transactional Lawyers in Negotiating and Drafting Business Contracts

• Introduction to General Transactional Issues:
  – After the Original Engagement – Potential Conflicts during New or Developing Transactions:
    • Changes in Roles of Client Parties
    • Introduction of Additional Parties
    • Changes in Law

Spring Meeting 2012
Of Smell Tests and Gut Checks: Ethics Issues for Transactional Lawyers in Negotiating and Drafting Business Contracts

• Negotiating and Drafting Business Contracts:
  – Invalid or Iffy Clauses: “But They Signed It…”

HYPO NO. 1
Of Smell Tests and Gut Checks: Ethics Issues for Transactional Lawyers in Negotiating and Drafting Business Contracts

• Negotiating and Drafting Business Contracts (cont’d):
  – Confidentiality: “Whoops, I Didn’t Mean for You to See That…”

HYPO NO. 2
Of Smell Tests and Gut Checks: Ethics Issues for Transactional Lawyers in Negotiating and Drafting Business Contracts

- **Negotiating and Drafting Business Contracts (cont’d):**
  - **Confidentiality:** “Can You Keep a Secret?”

HYPO NO. 3
Of Smell Tests and Gut Checks: Ethics Issues for Transactional Lawyers in Negotiating and Drafting Business Contracts

• Negotiating and Drafting Business Contracts (cont’d):
  – Forthright Negotiator Principle: “But They Had Their Own Counsel….”
Of Smell Tests and Gut Checks: Ethics Issues for Transactional Lawyers in Negotiating and Drafting Business Contracts

• Summary and Conclusions
Of Smell Tests and Gut Checks: 
Ethics Issues for Transactional Lawyers in Negotiating and Drafting Business Contracts
Presented by Business Law Education Committee

ABA Business Law Section
2012 Spring Meeting
March 22, 2012

Introduction to General Transactional Issues:

- After the Original Engagement – **Potential Conflicts during New or Developing Transactions**:
  - Changes in Roles of Client Parties
  - Introduction of Additional Parties
  - Changes in Law

Negotiating and Drafting Business Contracts:

- **Invalid or Iffy Clauses**: “*But They Signed It…*”
  - Hypo No. 1

- **Confidentiality**: “*Whoops, I Didn’t Mean for You to See That…*”
  - Hypo No. 2

- **Confidentiality**: “*Can You Keep a Secret?*”
  - Hypo No. 3

- **Forthright Negotiator Principle**: “*But They Had Their Own Counsel….*”
  - Hypo No. 4

Panelists:

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- **Thomas E. Rutledge**, Stoll Keenon Ogden PLLC, Louisville, Kentucky
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- **Tina L. Stark**, Professor of the Practice of Law, Boston University School of Law, Boston, Massachusetts
HYPO NO. 1  
By William J. Woodward, Jr.

Beth is representing Jones Technology, an international company with headquarters in the State of Nirvana, but with branch offices in many other states. While its employees are "at will," Jones uses a standard employment agreement that Beth prepared for Jones. The standard agreement requires employees to sign a noncompete provision when they come on board. The provision provides:

In consideration of employment and other valuable consideration, Employee agrees s/he will not compete with Jones Technology for a period of one year. “Compete” as used in this agreement means 1) accepting employment within one year of Employee’s termination / resignation from Jones with a company that competes directly with Jones in the current areas of Jones’ business; 2) working directly within one year of Employee’s termination / resignation from Jones with any person or entity that has been a customer of Jones.

The document that employees are required to sign also provides:

The parties agree that the law of Nirvana governs all aspects of this agreement.

Assume that this agreement is enforceable, as within the limits of reasonableness, in Nirvana but void by statute in Paranoia, a state located somewhere to the left of Nirvana. Assume also that Beth knows that Jones uses the employment agreement when hiring employees for its Help, Paranoia office.

Charlie, an employee of Jones in its Help, Paranoia office, has been offered a much better job with a company that is a direct competitor of Jones in Paranoia. Assume that if he takes the job, he will get in on the ground floor with stock options and other benefits that, if the business is successful, will make Charlie a rich man.

- What are the ethical dimensions of the following?
  o Putting such a clause into agreements where the employee works in Paranoia?
  o Using invalid or iffy clauses to influence employment decisions of employees who have signed the agreements?

- How should one respond to a client who insists on including such a provision, despite your advice that the provision will be
  o Unenforceable?
  o Illegal?

Assume that HR reminds Charlie about the noncompete provision, and, as a result, he does not take the job. Assume further that Charlie finds out two years after rejecting the job offer (and when the then-start-up has gone public and made many of its employees rich) that noncompete provisions were not enforceable in Paranoia when HR reminded him of the noncompete provision.

- What might Charlie's legal options be?

- Would Charlie or Jones have a claim against Beth, the lawyer who included the provision in the standard employment contract that Jones uses?
HYPO NO. 2
By Carol D. Newman and Catherine P. Powell

Lauren represents ABC Supplies ("ABC"), a small retail office supply company. While negotiating a retail lease for a new store location, Frank (counsel for the lessor) emails the most recent draft of the lease for Lauren’s review. Within seconds after Lauren opened the attached draft, Lauren realized that the lease draft did not relate to the ABC deal, but instead related to a large lease to an office-supply mega-store, to be located two blocks away from the proposed ABC site. Lauren promptly calls Frank to let him know about receiving the wrong lease draft.

While Lauren knows that ABC has determined, based upon market research and demographic studies, that the location covered by the new lease is the best location for their new store, Lauren also knows that ABC would re-think this decision if they knew a mega-store in the same business were to be located nearby. On the other hand, the deal with the mega-store might not happen, for you have heard rumors that the mega-store company is over-leveraged and in shaky financial condition.

- Are you permitted to tell your client, ABC, about the content of the lease to the mega-store that you briefly viewed in Frank’s erroneous email?
- Are you required to tell your client about what you have learned?
- What should Frank do?
- What do you think a client would expect the lawyer to do?

Assume that, instead of receiving the wrong lease, Lauren had received a document with the correct ABC draft, but had discovered earlier versions showing that the ABC draft had been adapted from the mega-store lease (thus revealing the possibility of a mega-store lease at the nearby location)?

- Would your answer(s) change in this situation?
- What should Frank do?
- What do you think a client would expect the lawyer to do?
Mr. Clean is a successful CEO of a for-profit company. Mr. Clean is looking to move on to the next stage in his career by taking on the CEO position with a nationally known nonprofit organization. This position is high profile and will be a feather in Mr. Clean’s cap, even though his salary will not be as high as it was in his prior job. In his new position, Mr. Clean’s primary role will be to raise funds for and awareness of the organization’s cause, which is to provide role models for and mentor young boys to grow up to be good fathers, husbands and citizens.

Mr. Clean has come to you to help him negotiate his new employment agreement. The nonprofit is interested in Mr. Clean, not just because of his managerial skills but because he is the image of the role models that they are seeking, and he will be a spokesman for their new fundraising campaign. One of the main sticking points in the negotiations is the termination provision proposed by the nonprofit, which defines “Cause” for termination to include “any criminal act or any activity that would bring the Organization into disrepute or scandal.” Mr. Clean will insist on limiting this language to include only “conviction of a felony.” Last year your firm represented Mr. Clean against a charge of sexual harassment made by a young woman subordinate. The young woman settled her claim for a six-figure sum and signed a confidentiality agreement; the settlement payment must be repaid if there is a breach of the confidentiality agreement and Mr. Clean is confident that this episode will never see the light of day.

Would you tell Mr. Clean that he must disclose this while negotiating the termination provision in this new contract?

Would your answer change if the other side said during negotiations, “Of course, we assume that Mr. Clean does not have any skeletons in his closet.”

Would your answer change if the other side said during negotiations, "Has Mr. Clean been involved in any controversial situations?"

Would your answer change if the contract to be signed contained the following provision?

"Mr. Clean acknowledges that the policies and code of conduct of the Organization are of the upmost importance and agrees that his failure to comply with the same at any time shall constitute ‘Cause’ for termination."

What if this provision also said that the failure to comply “constitutes a breach of this Agreement”?

How would you advise the client to anticipate handling the potential issues raised by this situation?
HYPO NO. 4
By Tina L. Stark

Exercise - You’re Too Kind

To: Exhausted, But Still Going, Associate

From: Compassionate, but Demanding, Corporate Partner

As you know, I am representing HiTech Inc. in the sale of substantially all of its assets. Unfortunately, in connection with that deal, I now have an ethical dilemma: Buyer’s lawyers have crafted a provision that is too generous to our client. Specifically, they have drafted the representation and warranty with respect to defaults under existing contracts as follows:

“No material defaults exist under any material agreements.”

According to my recollection of the negotiation (and also the recollection of our client), the representation was supposed to provide that no defaults exist under any material agreement. (No double dip on materiality.)

Our client insists that we say nothing. I am thinking that maybe we should say something. What are our ethical obligations? Do you have any suggestions as to how we should deal with our client on this matter?

I have no idea whether it will be helpful to you, but attached is ABA Informal Op. 86-1518. Do not do any other research on this matter; our client does not want to pay.

* * * * *

ABA Informal Opinion 86-1518
Notice to Opposing Counsel of Inadvertent Omission of Contract Provision
February 9, 1986

Where the lawyer for [A] has received for signature from the lawyer for [B] the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for [B], the lawyer for [A], unintentionally advantaged, should contact the lawyer for [B] to correct the error and need not consult a about the error.

A and B, with the assistance of their lawyers, have negotiated a commercial contract. After deliberation with counsel, A ultimately acquiesced in the final provision insisted upon by B, previously in dispute between the parties and without which B would have refused to come to overall agreement. However, A’s lawyer discovered that the final draft of the contract typed in the office of B’s lawyer did not contain the provision which had been in dispute. The Committee has been asked to give its opinion as to the ethical duty of A’s lawyer in that circumstance.

The Committee considers this situation to involve merely a scrivener’s error, not an intentional change in position by the other party. A meeting of the minds has already occurred. The Committee concludes that the error is appropriate for correction between the lawyers without client consultation. [FN1]
A's lawyer does not have a duty to advise A of the error pursuant to any obligation of communication under Rule 1.4 of the ABA Model Rules of Professional Conduct (1983). 'The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation.' Comment to Rule 1.4. In this circumstance there is no 'informed decision,' in the language of Rule 1.4 that A needs to make; the decision on the contract has already been made by the client. Furthermore, the Comment to Rule 1.2 points out that the lawyer may decide the 'technical' means to be employed to carry out the objective of the representation, without consultation with the client.

The client does not have a right to take unfair advantage of the error. The client's right pursuant to Rule 1.2 to expect committed and dedicated representation is not unlimited. Indeed, for A's lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by B and B's lawyer, might raise a serious question of the violation of the duty of A's lawyer under Rule 1.2(d) not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, Rule 4.1(b) admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client, and Rule 8.4(c) prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The result would be the same under the predecessor ABA Model Code of Professional Responsibility (1969, revised 1980). While EC 7-8 teaches that a lawyer should use best efforts to ensure that the client's decisions are made after the client has been informed of relevant considerations, and EC 9-2 charges the lawyer with fully and promptly informing the client of material developments, the scrivener's error is neither a relevant consideration nor a material development and therefore does not establish an opportunity for a client's decision.

[FN2] The duty of zealous representation in DR 7-101 is limited to lawful objectives. See DR 7-102. Rule 1.2 evolved from DR 7-102(A)(7), which prohibits a lawyer from counseling or assisting the client in conduct known to be fraudulent. See also DR 1-102(A)(4), the precursor of Rule 8.4(c), prohibiting the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

FN1. Assuming for purposes of discussion that the error is 'information relating to [the] representation,' under Rule 1.6 disclosure would be 'impliedly authorized in order to carry out the representation.' The Comment to Rule 1.6 points out that a lawyer has implied authority to make 'a disclosure that facilitates a satisfactory conclusion'—in this case completing the commercial contract already agreed upon and left to the lawyers to memorialize. We do not here reach the issue of the lawyer's duty if the client wishes to exploit the error.

FN2. The delivery of the erroneous document is not a 'material development' of which the client should be informed under EC 9-2 of the Model Code of Professional Responsibility, but the omission of the provision from the document is a 'material fact' which under Rule 4.1(b) of the Model Rules of Professional Conduct must be disclosed to B's lawyer.
Selected Bibliography for Further Reading

Cases:

United Rentals, Inc. v. Ram Holdings, Inc., 937 A.2d 810 (Del. Ch. 2007)


Books


Tina L. Stark, Drafting Contracts (2007)

Scott L. Burnham, Drafting and Analyzing Contracts (1993)

Articles:


David Hricik, I Can Tell When You’re Telling Lies: Ethics and Embedded Confidential Information, 30 J. Legal Prof. 79 (2006)


