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CHAIRMAN’S INTRODUCTION

The Commission on Evaluation of Professional Standards was appointed in the summer of 1977 by then ABA President William B. Spann, Jr., and charged with undertaking a comprehensive rethinking of the ethical premises and problems of the profession of law. That assignment led naturally and quickly to an evaluation of the current Model Code of Professional Responsibility and to the conclusion that patchwork amendment of the Code would not achieve the goal of a consistent, comprehensive and constitutional legislative statement of the requirements of ethical lawyering. Accordingly, the Commission on Evaluation of Professional Standards presents its recommendations to the bar in the form of these proposed Model Rules of Professional Conduct.

A word on the process that led to these Model Rules is in order. From the outset, our sessions were drafting sessions, not forums for free-floating debates. Ideas and their consequences had to be tested on paper. In the nature of things, many proposals and their approaches to the issues failed this test. Many more, after being subjected to repeated reworking, survived—often substantially altered form the original form in which they were proposed. The process of revision was continuous. Though my colleagues on the Commission wearied of my saying it, the motion to reconsider was always in order.

In this drafting process, an overriding concern was that every concept be rooted in law, not in professional lore and certainly not in self-interest. This concern is reflected in the extensive research Notes accompanying the Model Rules. And yet, the Model Rules are not simply a restatement of the law of professional conduct. Our drafting goal, in keeping with our mission, was to produce standards bottomed on the law as it is but facing the future of a rapidly expanding and changing profession. Moreover, while intended to be comprehensive, these Model Rules are not encyclopedic and cannot be. They invite and require the exercise of legal judgment and the application of legal reasoning—the same judgment and reasoning lawyers bring to bear upon the affairs of their clients.

No one has a monopoly on the judgment and insight that such a comprehensive evaluation of professional standards demands. Our sessions were open both intellectually and in the physical sense of an open town meeting. In addition to the Commission and its regular advisors and consultants, anyone who wanted to participate needed only to ask. Many others, representing specific areas of expertise or particularly crucial and controversial points of view, were invited to attend and generously shared their time and skills with us. The process of open deliberation included the publication 18 months ago, in January 1980, of a Discussion Draft of the proposed Model Rules.

The Discussion Draft produced an enormous response to its invitation for further directions from the bar and the public. This response was constructive and immensely helpful. While the volume and detail of the comments on the Discussion Draft frequently precluded individual response to the ideas expressed, their effect appears on every page of this completely revised Final Draft.

Some specific differences between the Final Draft and the earlier Discussion Draft should be noted. Many provisions of the earlier Draft have been consolidated and reorganized. For example, separate provisions describing distinct lawyer roles and functions have been consolidated into provisions detailing only those aspects specific to such functions. We have clarified language that had led to interpretations of our proposals that we did not intend. We have adopted standardized terms and provided definitions for each. We have included approximately 200 pages of research Notes that provide both a comparison of relevant Code provisions and a discussion of the legal authority underlying each Rule. The Rules themselves...
have changed in number (from 57 to 50), in scope and in content. So, too, the Comment accompanying the Rules. This is a new document.

On a number of controversial points the Discussion Draft prompted comment which the Commission addressed in developing this Final Draft. Several of these points merit particular mention here.

The Discussion Draft, for example, called for mandatory pro bono legal service. This Final Draft does not, though two Commission members, Thomas Ehrlich and Jane Frank-Harman, would be recorded as favoring our initial position.

The confidential nature of the client-lawyer relationship is central to our concept of the profession and its role in our society. The Commission’s attempt to clarify the ambiguities of the current Code on this subject provoked extended comment. Although some lawyers believe otherwise, the rule of confidentiality has never been absolute—as the relevant research Notes in this Final Draft indicate. The rule of confidentiality is certainly not absolute in the current Code nor was it in the predecessor Canons of Professional Ethics. Moreover, the current Code’s treatment of confidentiality has raised certain problems of its own. The current Code protects “secrets,” a term of limited and ambiguous scope; the proposed Rules cover all information relating to representation of a client. The current Code prescribes exceptions to confidentiality for crimes and frauds; the proposed Rules limit those exceptions in terms of materiality, on the one hand, and the lawyer’s own involvement on the other. The formulation settled upon by the Commission both broadens the general rule of confidentiality and narrows its exceptions.

The peculiar problems confronting the lawyer representing an organization such as a corporation or a trade union have sometimes been viewed as simply aspects of the confidentiality problem. Our analysis, reached after repeated consultation with concerned and expert practitioners, turns on a different axis. It recognizes that the difficult problem arises where the client—the organization—is being harmed by one of its employees or other agents on whom the lawyer could normally rely as an authoritative voice of the client. The concern, in other words, is not with what the client is doing to others, but with what others are attempting to do to the client. The Commission’s proposal is not, in today’s parlance, an “audit” provision nor is it a “whistle blowing” rule. It is a provision guiding the lawyer in loyal representation of the organization.

Another major area of concern was the lawyer’s role as advocate in an adversary system. Some of the more heated comments on the proposed Rules centered on this subject, saying the Model Rules would substantially alter that system. Part of the criticism resulted from ambiguous language in the Discussion Draft which has been eliminated. Some of the criticism, however, stemmed from differing concepts of the nature of the adversary system and the lawyer’s role as advocate.

Our system of individual rights and liberties assumes that the adjudicatory process is reasonable, reliable and just. The integrity of that process is at the very heart of all that ennobles our society and sustains it without resort to force or fear—in short, respect for the law and the rights of others. As daily ministers of the judicial process, lawyers bear a special responsibility for its integrity. This responsibility is recognized in the shorthand phrase that a lawyer is a representative of the client but also an officer of the court. However, to say that a lawyer owes a duty of candor to the court and one of loyalty to the client leaves unresolved the problem of conflict between those duties. The questions remain: How should this conflict be resolved? What are the lawyer’s duties to the court? What are the limits of duty to a client? Does a client have a right to use illegal or wrongful means to gain his objectives? Does a client have a right to the assistance of a lawyer in the process?
It is universally recognized that a lawyer may not make false statements to a court about the law. The Model Rules continue this standard, as well as the current Code’s requirement that a lawyer disclose to a court controlling legal authority known to be directly adverse and which has not been disclosed by opposing counsel.

As to disclosure of facts, the Model Rules prohibit the introduction of evidence known or discovered by the lawyer to be false. The disclosure of the fact of a client’s surprise perjury is more troublesome. The Rules adopt the majority view compelling such disclosure. Given the considerable uncertainty surrounding the proper constitutional standard with respect to perjury by the accused in a criminal matter, however, the Rules do not require disclosure of perjury if constitutional law may require silence.

After a thorough reevaluation and careful reconsideration of the law, we conclude that the Final Draft, far from jeopardizing the adversary system, is in fact more consistent with its premises and purposes than other more single-sided approaches that have been advanced.

Other proposals in this Draft focus on elements of legal representation not adequately addressed in the current Code. These include the lawyer’s obligations of competence, promptness, diligence and communication in providing legal services. Studies indicate that these aspects of the client-lawyer relationship, along with the cost of legal services, are of great concern to clients and are among the most prolific sources of discontent with the legal profession. The Commission has proposed disciplinary standards for these basic obligations of lawyering. Critics suggest that such matters be left as aspirational objectives. That approach, however, might imply that as a profession we are only marginally concerned with the quality of legal services and would, in effect, constitute an abdication of professional self-regulation.

Other less controversial aspects of the earlier Discussion Draft have been made more precise. This Final Draft addresses the issues of conflicts of interest, imputed disqualification of a law firm, the “revolving door” in governmental and private practice, professional competition and many other important concerns to our profession.

A final subject of much comment—both favorable and otherwise—was the decision to forgo the current Code’s organizational structure of Canons, Ethical Considerations and Disciplinary Rules, in favor of the Final Draft’s organization along the lines of an American Law Institute Restatement. That choice was carefully considered in the first instance and, in the light of comment on the Discussion Draft, has been reaffirmed.

Our recommendation on this point derived from a number of considerations. As a matter of practicality, we concluded that a different format would provide a framework more convenient to the average practitioner. The current Code’s format may be familiar to experts who are in daily contact with it, but we felt compelled to look to a larger audience.

The change in format was prompted by substantive considerations as well. The Code’s structure of Canons, Ethical Considerations and Disciplinary Rules was an attempt to resolve the uncertain legal status of the 1908 Canons of Professional Ethics by separating enforceable duties from general exhortations. The Code’s Ethical Considerations are described as aspirational, its Canons as general maxims; together these are contrasted with its enforceable Disciplinary Rules. Yet careful inspection of the Ethical Considerations reveals that they are not wholly aspirational. Many of the Ethical Considerations present substantive comment on Disciplinary Rules. For example, EC 2-9 provides instances of prohibited deceptive advertising; EC 4-6 states the rule that “the obligation…to preserve…confidences and secrets…continues after…termination of
employment”; and EC 7-24 discusses application of the Disciplinary Rule governing irrelevant and prejudicial statements by a lawyer during trial.

Many other Ethical Considerations state the rationale of particular Disciplinary Rules. For example, EC 7-21 explains the prohibition of threats of criminal prosecution contained in DR 7-104; EC 7-33 explains the purpose of restrictions on pretrial publicity; and EC 4-1 provides the underlying foundation for the rules of confidentiality presented in DR 4-101. Ethical Considerations such as these have substantive effects on the rules they refer to.

Of greater concern are the many Ethical Considerations that may be viewed as incorporating obligations under law beyond the Code. One illustration is the lawyer’s duty of communication with a client. No Disciplinary Rule in the current Code requires that a lawyer explain a matter’s legal and practical aspects to the client, advise the client of the status and progress of the matter, or comply with reasonable requests for information. EC 7-8 states that “a lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations.” EC 9-2 states that “a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client.” These purport to be merely aspirational objectives, goals lawyers may strive to attain but need not achieve. However, agency law treats communication as a component of fiduciary obligation. The current Code thus may suggest that a lawyer’s professional obligations are somehow below the obligations of an ordinary agent. Yet, a number of cases, some of them relying on EC 9-2, hold that timely client communication is a professional duty enforceable in disciplinary proceedings.

Because the Code’s Ethical Considerations often confuse duty with aspiration and because some of its Disciplinary Rules are vague, courts often find legal duties in either the Code’s aspirational provisions or the Canons’ general maxims. Canon 9’s admonition against the “appearance of impropriety” has been the most prolific source. However, lawyers have been disciplined for violating an ethical Consideration alone, including the generality stated in EC 1-5 that a lawyer’s conduct should be “temperate and dignified.” Lawyers may rightly share the Commission’s objection to retaining three sets of rules in a single Code. Further, once commentary, rationale and independently stated obligations are removed from the Ethical Considerations, there is little left that would fall into our understanding of the term “aspirational.”

Additionally, it should be noted that the national uniformity hoped for in the Code format has not materialized. In eight states the Code has been adopted without Ethical Considerations. In others, the Ethical Considerations are considered obligatory along with the Disciplinary Rules. In others still, the Code has been amended to place selected Ethical Considerations within the Disciplinary Rules. The law of professional responsibility is as balkanized now as it was under the 1908 Canons.

Some concern has been expressed that altering the format of the Code will invalidate much of the case law and many of the ethics opinions that have developed since the Code was adopted in 1969. Most of that law and many of those ethics opinions are, in fact, preserved. Where appropriate, such authority is cited in the research Notes that accompany each of the Model Rules. Those cases and opinions not cited in the Notes are, of course, not vitiated. The problems confronted in the cases are recurrent; and the principles of law that are applied to resolve them are, in many cases, either plainly inherent or explicitly restated in a particular Model Rule. The point should be made, however, that certain ambiguities in the current Code have given rise to inevitable inconsistencies in the cases. To the extent the Model Rules have clarified those ambiguities, they will render some case law and ethics opinions obsolete.
Given all this, and given the Commission’s view that extensive amendment could not adequately remedy the current Code, we concluded that nothing would be lost in the change of format, and that much would be gained.

Nevertheless, at the urging of colleagues involved in the administration of professional discipline, the Commission is publishing concurrently with this Final Draft a companion document couched as nearly as possible in the format of the current Code.

None of this, it must be said, is to cast a shadow on the work of the justifiably well-regarded Wright Committee. The Wright Committee broke new ground in the law of legal ethics in producing the Model Code of Professional Responsibility. The bar’s accumulated experience of ten years with the Code is not jeopardized by the Model Rules, for, as will be clear from a review of the Code Comparisons in this Final Draft, much has been retained from that foundation. The current Code opened a decade of unprecedented attention to questions of legal ethics. It formulated the essential terms of the debate on those questions—a debate for which this Final Draft may provide a logical end as surely as it will provide a new beginning.

The goal of this effort has been to produce standards of professional conduct that are consistent, comprehensive and constitutional: consistent, in integrating the competing responsibilities that arise in the conduct of our profession; comprehensive, in addressing the multiple roles and settings in which the modern lawyer practices; constitutional, in that they be bottomed on law, constitutional, corporate, criminal, agency, tort, fiduciary—the seamless web—to the end that the law by which lawyers are disciplined is congruent with the lawyers practice.

This document is offered as the collective best effort of literally hundreds of participants at addressing questions of professional conduct that are engrossing to us all. In commenting on the January, 1980, Discussion Draft, uncounted numbers of lawyers, both individually and through their various bar organizations, spent many hours of thoughtful review and study. It may have seemed to them a thankless task at the time. We thank them sincerely now.

Sadly, I must note that the service of two Commission members was cut short by death. Alan Barth, the distinguished author and journalist and one of the Commission’s public members, died in 1979. Most recently, on the very eve of the publication of this document, William B. Spann, Jr. died. Mr. Spann launched this project as a key objective of his year as President of the American Bar Association. His commitment to this Final Draft continued after his term as President, first as liaison with the Board of Governors, then as a member of the Commission itself. In a project where enthusiasm and dedication were characteristic, Bill Spann’s contribution was exemplary.

I exercise a Chairman’s prerogative in expressing thanks for the extraordinary efforts of but a particular few in this project: colleagues in my own law firm, Daniel S. Reynolds and Thomas J. McCormick; the Commission’s consultants, Judge Betty B. Fletcher, Deans L. Ray Patterson and John F. Sutton; our liaisons with the ABA’s Committees on Ethics and Discipline, L. Clair Nelson (now a Commission member), Thomas Z. Hayward and Michael Franck; and liaisons with the Board of Governors, S. Shepard Tate and John C. Deacon. A special word must be reserved for our Reporter, Dean Geoffrey C. Hazard, Jr. With remarkable skill and a truly extraordinary fidelity to his role, Geoff Hazard invested the Commission’s deliberations and drafting with great scholarship, patience and grace, steering us clear of hidden shoals and keeping us on course.

Most particularly, I express gratitude and praise to each of my fellow members of the Commission. This proposed Final Draft is a legislative document in many senses, not the least in
that it is a document of consensus, reflecting the views of the Commission as a whole and not necessarily the particular views of any of its individual members. The goodwill and sheer hard work entailed in it will be readily appreciated by all who have undertaken any collective endeavor. Had this document been written by any single one of our members, it may have been a different work, but, I believe, a work of vastly diminished attainment.

Robert J. Kutak
May 30, 1981
A lawyer is an officer of the legal system, a representative of clients and a public citizen having special responsibility for the quality of justice.

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

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

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

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

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

A lawyer’s responsibilities as an officer of the legal system, a representative of clients and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a vigorous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know they can do so in private. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct are legal rules that prescribe terms for resolving these conflicts.
Within the framework of these rules many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

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

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

The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct; a lawyer must also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.
The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These prescribe or limit the lawyer's professional conduct. Others, generally cast in the term "may," define areas under the Rules in which the lawyer has professional discretion. Other Rules define the nature of relationships between the lawyer and others. Taken together, the Rules provide elements of the lawyer's professional role. The Rules are thus partly obligatory or disciplinary and partly constitutive in that they define a lawyer's professional role.

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

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of the Rules should not necessarily result in civil liability, which is a matter governed by general law. The Rules of Professional Conduct may have relevance in determining civil liability, but they should not be uncritically incorporated into that context. The purposes of compensatory redress imposed through civil liability are different from the purposes of disciplinary process. Generally speaking, compensatory damages may be predicated on violation of a regulatory standard only if the standard is intended to protect against the specific harm that has ensued. Many of the Rules of Professional Conduct seek to protect a general public interest in the integrity of the legal process, and as regulatory devices are broader than required for determination of 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.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble concerning a lawyer's responsibilities provides general orientation. The Preamble and Comments are, like legislative history, intended to aid in construction of the Rules, but the text of each Rule is authoritative. The research Notes compare counterparts in the ABA Model Code of Professional Responsibility (adopted 1969, as amended) and provide references to other authorities.
“Believes” or "Belief" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

“Disclose" or "Disclosure" denotes communication of information reasonably sufficient to permit the person to whom the disclosure is made to appreciate the significance of the matter in question.

"Fraud" or "Fraudulent act" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knows" or “Knowingly” denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Law firm" denotes a lawyer practicing with the assistance of other persons, whether in private practice, in the legal department of an organization or a government agency or in a legal services organization. See also Rule 7.1

“Material” when used in reference to degree or extent denotes a matter of practical importance as distinct from one that is formal or nominal.

"Partner" includes an individual partner of a law firm, an individual practicing as a professional corporation, an individual owner of director of a professional corporation engaged in the practice of law and a person having substantially comparable status in a law firm.

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

"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.

"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.

"Substantial" when used in reference to degree or extent denotes a matter of clear and weighty practical importance.
MODEL RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 COMPETENCE

A LAWYER SHALL PROVIDE COMPETENT REPRESENTATION TO A CLIENT. COMPETENCE CONSISTS OF THE LEGAL KNOWLEDGE, SKILL, THOROUGHNESS, PREPARATION AND EFFICIENCY REASONABLY NECESSARY FOR THE REPRESENTATION.

COMMENT:

Knowledge and Skill

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 special 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.

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 intensive study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if 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 illconsidered action under emergency conditions can jeopardize the client's interest.

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, Preparation and Efficiency

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence. Efficiency
includes use of office procedures enabling the lawyer to carry out the representation promptly, effectively and at reasonable cost to the client.

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.
RULE 1.2  SCOPE OF REPRESENTATION

(a) A LAWYER SHALL ABIDE BY A CLIENT'S DECISIONS CONCERNING THE OBJECTIVES OF REPRESENTATION, SUBJECT TO PARAGRAPHS (c), (d) AND (e), AND SHALL CONSULT WITH THE CLIENT AS TO THE MEANS BY WHICH THEY ARE TO BE PURSUED. A LAWYER SHALL ABIDE BY A CLIENT'S DECISION WHETHER TO ACCEPT AN OFFER OF SETTLEMENT OF A MATTER. IN A CRIMINAL CASE, THE LAWYER FOR THE DEFENDANT 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 OBJECTIVES OF THE REPRESENTATION IF THE CLIENT CONSENTS AFTER DISCLOSURE. IF A CLIENT INSISTS UPON PURSUING AN OBJECTIVE THAT THE LAWYER CONSIDERS REPUGNANT OR IMPRUDENT, THE LAWYER MAY WITHDRAW IF DOING SO CAN BE ACCOMPLISHED WITHOUT MATERIAL ADVERSE EFFECT ON THE INTERESTS OF THE CLIENT OR AS OTHERWISE PERMITTED BY RULE 1.16(b).

(d) 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.

(e) WHEN A LAWYER KNOWS OR REASONABLY SHOULD KNOW THAT A CLIENT EXPECTS ASSISTANCE NOT PERMITTED BY THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW, THE LAWYER SHALL INFORM THE CLIENT OF THE RELEVANT LIMITATIONS TO WHICH THE LAWYER IS SUBJECT.

COMMENT:

Scope of Representation

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.
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.

Services Limited to Particular Purposes

The objectives or scope of services 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. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or to settle litigation that the lawyer might wish to press forward.

Repugnant or Impudent Course of Action

If during the course of representation a client insists that the lawyer pursue a course of action that the lawyer considers repugnant or imprudent, the lawyer may withdraw if withdrawal will not result in an adverse effect upon the client. The lawyer's right to terminate the representation is governed by Rule 1.16.

Criminal, Fraudulent and Prohibited Transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. However, a lawyer may not assist a client in criminal or fraudulent conduct. 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. The distinction can be subtle. A client may seek to act legally although at the borderline of what is permissible; on the other hand, a client may seek a lawyer’s knowledge to contrive a criminal or fraudulent scheme. The lawyer’s professional responsibility includes making an assessment of the client’s purposes and regulating the lawyer’s own conduct accordingly.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not required or permitted to reveal the client's wrongdoing, except where necessary to avoid additional serious consequences. See Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required. If the lawyer knows that despite the withdrawal the client is continuing in conduct that is criminal or fraudulent, and is making use of the fact that the lawyer had been involved in the matter, the lawyer may have to take positive steps to avoid being held to have assisted the conduct. In other situations not involving such assistance, the lawyer has discretion to make disclosure of otherwise confidential information in accordance with Rule 1.6(b).
Where the client is a fiduciary, and, therefore, charged with special obligations of honesty in dealings with a beneficiary, the lawyer’s obligation to avoid assisting in fraudulent conduct is correlative.

Law in many jurisdictions prohibits various provisions in contracts and other written instruments. Such proscriptions include usury laws, statutes prohibiting provisions that purport to waive certain legally conferred rights and contract provisions that have been held unconscionable as a matter of law in the controlling jurisdiction. A lawyer may not employ these terms. On the other hand, there are legal rules that simply make certain contractual provisions unenforceable, allowing one or both parties to avoid the obligation. Inclusion of the latter kind of provision in a contract may be unwise but it is not ethically improper, nor is it improper to include a provision whose legality is subject to reasonable argument.

A lawyer ordinarily is not obliged to make an independent investigation of the circumstances of a transaction. However, in certain situations law may require the lawyer to make an investigation or determination of the regularity of a transaction; if so, the lawyer is bound by the prescribed standard of conduct. Moreover, a lawyer is not absolved of responsibility for a legally offensive transaction simply because the client takes the final step in carrying it out. For example, a lawyer who prepares a form contract containing legally proscribed terms is involved in a transaction in which the form is used, even though the lawyer does not directly participate in its consummation.

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.
RULE 1.3  DILIGENCE

A LAWYER SHALL ACT WITH REASONABLE PROMPTNESS AND DILIGENCE IN REPRESENTING A CLIENT.

COMMENT:

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 should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.
RULE 1.4 COMMUNICATION

(a) A LAWYER SHALL KEEP A CLIENT REASONABLY INFORMED ABOUT A MATTER BY PERIODICALLY ADVISING THE CLIENT OF ITS STATUS AND PROGRESS AND BY PROMPTLY COMPLYING WITH REASONABLE REQUESTS FOR INFORMATION.

(b) A LAWYER SHALL EXPLAIN THE LEGAL AND PRACTICAL ASPECTS OF A MATTER AND ALTERNATIVE COURSES OF ACTION TO THE EXTENT REASONABLY NECESSARY TO PERMIT THE CLIENT TO MAKE INFORMED DECISIONS REGARDING THE REPRESENTATION.

COMMENT:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation, where appropriate, and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status and progress of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should 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 might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. If a client is inexperienced in employing legal services, the lawyer should provide initial orientation and periodic reports notwithstanding the client’s failure to request such information. Doing so protects against the client’s timidity or ignorance and safeguards the lawyer against belated accusations of nondisclosure. 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.

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

Withholding Information

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. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.
RULE 1.5  FEES

(a) A LAWYER'S FEE SHALL BE REASONABLE.

(b) THE BASIS OR RATE OF A LAWYER’S FEE SHALL BE COMMUNICATED TO THE CLIENT IN WRITING BEFORE THE LAWYER RENDERS SUBSTANTIAL SERVICES IN A MATTER, EXCEPT WHEN:

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

(2) THE SERVICES ARE RENDERED IN AN EMERGENCY OR WHERE A WRITING IS OTHERWISE IMPRACTICAL.

(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 LAW. A CONTINGENT FEE AGREEMENT SHALL BE IN WRITING AND SHALL STATE THE METHOD BY WHICH THE FEE IS TO BE DETERMINED, INCLUDING THE PERCENTAGE OR PERCENTAGES THAT SHALL ACCRUE TO THE LAWYER IN THE EVENT OF SETTLEMENT, TRIAL OR APPEAL, EXPENSES TO BE DEDUCTED FROM THE RECOVERY, AND WHETHER EXPENSES ARE TO BE DEDUCTED BEFORE OR AFTER THE CONTINGENT FEE IS CALCULATED. UPON CONCLUSION OF A CONTINGENT FEE MATTER, THE LAWYER SHALL PROVIDE THE CLIENT WITH A WRITTEN STATEMENT STATING THE OUTCOME OF THE MATTER AND, IF THERE IS A RECOVERY, SHOWING THE REMITTANCE TO THE CLIENT AND THE METHOD OF ITS DETERMINATION.

(d) A DIVISION OF FEE BETWEEN LAWYERS WHO ARE NOT IN THE SAME FIRM MAY BE MADE ONLY IF:

(1) THE DIVISION IS IN PROPORTION TO THE SERVICES PERFORMED BY EACH LAWYER, OR BY WRITTEN AGREEMENT WITH THE CLIENT ALL LAWYERS ASSUME RESPONSIBILITY FOR THE REPRESENTATION;

(2) THE CLIENT CONSENTS TO THE PARTICIPATION OF ALL THE LAWYERS INVOLVED; AND

(3) THE TOTAL FEE IS REASONABLE.

COMMENT:

Reasonableness of Fee

Relevant factors in determining the reasonableness of a fee include the novelty and difficulty of the matter; the skill, standing and expertise of the lawyer; the time involved; the urgency of the matter; the degree of contingency; the effect in preempting the lawyer’s opportunity to represent other clients; the fact that the relationship is a continuing one; the amount involved and the results obtained; the client’s ability to pay; and the normal range of rates for legal services of similar kind.
A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer’s customary fee schedule is sufficient if the basis or rate of the fee is set forth. It is not necessary to recite the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, and to identify any other factors that may be taken into account in finally fixing the fee. Where a continuing relationship is contemplated, a single writing covering the relationship as a whole is sufficient. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised written estimate should be provided to the client. However, where the lawyer has recently served the client in a similar matter in which payment has been completed, paragraph (b)(1) permits the lawyer to proceed upon an implied understanding that the ensuing services will be similarly compensated.

Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise. However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

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

When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

The common law rule prevailing in many jurisdictions is that a contingent fee is not permitted in criminal cases or in domestic relations matters.

Division of Fee

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 (d)(1) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Disputes over Fees
If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.
RULE 1.6  CONFIDENTIALITY OF INFORMATION

(A) A LAWYER SHALL NOT REVEAL INFORMATION RELATING TO REPRESENTATION OF A CLIENT EXCEPT AS STATED IN PARAGRAPH (b), UNLESS THE CLIENT CONSENTS AFTER DISCLOSURE.

(B) A LAWYER MAY REVEAL SUCH INFORMATION TO THE EXTENT THE LAWYER BELIEVES NECESSARY:

1. TO SERVE THE CLIENT’S INTERESTS, UNLESS IT IS INFORMATION THE CLIENT HAS SPECIFICALLY REQUESTED NOT BE DISCLOSED;

2. TO PREVENT THE CLIENT FROM COMMITTING A CRIMINAL OR FRAUDULENT ACT THAT THE LAWYER REASONABLY BELIEVES IS LIKELY TO RESULT IN DEATH OR SUBSTANTIAL BODILY HARM, OR SUBSTANTIAL INJURY TO THE FINANCIAL INTEREST OR PROPERTY OF ANOTHER;

3. TO RECTIFY THE CONSEQUENCES OF A CLIENT’S CRIMINAL OR FRAUDULENT ACT IN THE COMMISSION OF WHICH THE LAWYER’S SERVICES HAD BEEN USED;

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

5. TO COMPLY WITH THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW.

COMMENT:

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

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Authorized Disclosure

A lawyer may disclose information about a client when necessary in the proper representation of the client. In litigation, for example, a lawyer may disclose information by
admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

**Disclosure Adverse to Client**

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm to another person. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client’s confidences even though the client’s purpose is wrongful. To the extent a lawyer is required or permitted to disclose a client's purposes, the client may be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened harm thus involves balancing the interests of one group of potential victims against those of another. On the assumption that lawyers generally fulfill their duty to advise against the commission of deliberately wrongful acts, the public is better protected if full disclosure by the client is encouraged than if it is inhibited.

Generally speaking, information relating to the representation must be kept confidential, as stated in paragraph (a). However, where the client is or has been engaged in criminal or fraudulent conduct or the integrity of the lawyer’s own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer’s knowledge about and relationship to the conduct in question, and the seriousness of that conduct. Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). As noted in the Comment to that Rule, there can be situations where the lawyer may have to reveal information relating to the representation in order to avoid assisting a client’s criminal or fraudulent conduct. Paragraph 1.6(b)(5) permits doing so. Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false or fabricated evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct. Rule 1.6(b)(5) permits revealing information to the extent necessary to comply with Rule 3.3(a). The same is true of compliance with Rule 4.1 concerning truthfulness of a lawyer’s own representations.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Even if the involvement was innocent, however, the fact remains that the lawyer’s professional services were made the instrument of the client’s crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right although not a professional duty to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (b)(3) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

Third, the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. Inaction by the lawyer is not a violation of Rule 1.2(d), except in the limited circumstances where failure to act constitutes assisting the client. See Comment to Rule 1.2(d). However, the lawyer’s knowledge of the client’s purpose may enable the lawyer to prevent
commission of the prospective crime or fraud. If the prospective crime or fraud is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When the threatened injury is grave, such as homicide or serious bodily injury, the lawyer may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer’s concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client. As stated in paragraph (b)(2), the lawyer has professional discretion to reveal information in order to prevent substantial harm likely to result from a client’s criminal or fraudulent act.

It is arguable that the lawyer should have a professional obligation to make a disclosure in order to prevent homicide or serious bodily injury which the lawyer knows is intended by a client. However, it is very difficult for a lawyer to “know” when such a heinous purpose will actually be carried out, for the client may have a change of mind. To require disclosure when the client intends such an act, at risk of disciplinary liability if the assessment of the client’s purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer’s resolution of an inherently difficult moral dilemma.

The lawyer’s exercise of discretion requires consideration of such factors as the magnitude, proximity and likelihood of the contemplated wrong, the nature of the lawyer’s relationship with the client and with those who might be injured by the client, the lawyer’s own involvement in the transaction and factors that may extenuate the conduct in question. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer believes necessary to the purpose. A lawyer’s decision not to take preventive action permitted by paragraph (b)(2) does not violate this Rule.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out and whether higher authority in the organization approves. Where necessary to guide his conduct in connection with this Rule, the lawyer should make inquiry within the organization as indicated in Rule 1.13(b).

The term “another” in paragraph (b)(2) includes a person, organization and government.

Paragraph (b)(3) does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom.

**Dispute Concerning Lawyer's Conduct**

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending himself. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is not prevented by the rule of confidentiality from proving the services rendered in an action to collect it.

**Disclosures Otherwise Required or Authorized**

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable.
The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 1.13, 2.2, 2.3, 3.3 & 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

**Use of Information**

A lawyer may not make use of information relating to the representation in a manner disadvantageous to the client. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.
RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A LAWYER SHALL NOT REPRESENT A CLIENT IF THE LAWYER’S ABILITY TO CONSIDER, RECOMMEND OR CARRY OUT A COURSE OF ACTION ON BEHALF OF THE CLIENT WILL BE ADOVERSELY AFFECTED BY THE LAWYER’S RESPONSIBILITIES TO ANOTHER CLIENT OR TO A THIRD PERSON, OR BY THE LAWYER’S OWN INTERESTS.

(b) WHEN A LAWYER’S OWN INTERESTS OR OTHER RESPONSIBILITIES MIGHT ADVERSELY AFFECT THE REPRESENTATION OF A CLIENT, THE LAWYER SHALL NOT REPRESENT THE CLIENT UNLESS:

(1) THE LAWYER REASONABLY BELIEVES THE OTHER RESPONSIBILITIES OR INTERESTS INVOLVED WILL NOT ADVERSELY AFFECT THE BEST INTEREST OF THE CLIENT; AND

(2) THE CLIENT CONSENTS AFTER DISCLOSURE. WHEN REPRESENTATION OF MULTIPLE CLIENTS IN A SINGLE MATTER IS UNDERTAKEN, THE DISCLOSURE SHALL INCLUDE EXPLANATION OF THE IMPLICATIONS OF THE COMMON REPRESENTATION AND THE ADVANTAGE AND RISKS INVOLVED.

COMMENT:

Loyalty to a Client

Loyalty is an essential element in the lawyer's relationship to a client. An improper conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken and cannot be remedied by disclosure to and consent by the client, the lawyer must withdraw from representation. See Rule 1.16. Where more than one client is involved and a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.

Disclosure and Consent

Loyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation. The critical questions are whether the conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.

Lawyer's Interests

The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and
1.5. A lawyer should not undertake a matter if the lawyer is so busy that adequate communication with the client will be impossible, or if the lawyer’s personal scruples prevent the use of measures that the client’s situation may require. See Rules 1.2 and 1.4. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

A lawyer may not represent two or more parties in contentious litigation whose rights and obligations are materially adverse. An impermissible conflict may also exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

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

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it would be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service

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

Other Conflict Situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration
and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise.

The question is often one of proximity and degree. A lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

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 removing himself 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.

A lawyer may act as intermediary between clients as provided in Rule 2.2

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.
RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

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

(b) A LAWYER SHALL NOT USE INFORMATION RELATING TO REPRESENTATION OF A CLIENT TO THE DISADVANTAGE OF THE CLIENT UNLESS THE CLIENT CONSENTS AFTER DISCLOSURE.

(c) A LAWYER SHALL NOT PREPARE AN INSTRUMENT GIVING THE LAWYER OR A MEMBER OF THE LAWYER’S FAMILY ANY GIFT FROM A CLIENT, INCLUDING A TESTAMENTARY GIFT, EXCEPT WHERE THE CLIENT IS A RELATIVE OF THE DONEE.

(d) PRIOR TO THE CONCLUSION OF REPRESENTATION OF A CLIENT, A LAWYER SHALL NOT MAKE OR NEGOTIATE AN AGREEMENT GIVING THE LAWYER LITERARY OR MEDIA RIGHTS TO A PORTRAYAL OR ACCOUNT BASED IN SUBSTANTIAL PART ON INFORMATION RELATING TO THE REPRESENTATION.

(e) A LAWYER SHALL NOT PROVIDE FINANCIAL ASSISTANCE TO A CLIENT IN CONNECTION WITH PENDING OR CONTEMPLATED LITIGATION, EXCEPT THAT:

   (1) A LAWYER MAY ADVANCE COURT COSTS, EXPENSES OF LITIGATION, AND REASONABLE AND NECESSARY MEDICAL AND LIVING EXPENSES, THE REPAYMENT OF WHICH MAY BE CONTINGENT ON THE OUTCOME OF THE MATTER; AND

   (2) A LAWYER REPRESENTING AN INDIGENT CLIENT MAY PAY COURT COSTS AND EXPENSES OF LITIGATION ON BEHALF OF THE CLIENT.

(f) A LAWYER SHALL NOT ACCEPT COMPENSATION FOR REPRESENTING A CLIENT FROM ONE OTHER THAN THE CLIENT UNLESS THE CLIENT CONSENTS AFTER DISCLOSURE.

(g) A LAWYER WHO REPRESENTS TWO OR MORE CLIENTS SHALL NOT PARTICIPATE IN MAKING AN AGGREGATE SETTLEMENT OF THE CLAIMS OF OR AGAINST THE CLIENTS, OR IN A CRIMINAL CASE AN AGGREGATED AGREEMENT AS TO GUILTY PLEAS, UNLESS EACH CLIENT CONSENTS AFTER DISCLOSURE, INCLUDING DISCLOSURE OF THE EXISTENCE AND NATURE OF ALL THE CLAIMS OR PLEAS INVOLVED AND OF THE PARTICIPATION OF EACH PERSON IN THE SETTLEMENT.

(h) A LAWYER SHALL NOT PARTICIPATE IN OFFERING OR MAKING:

   (1) A PARTNERSHIP OR EMPLOYMENT AGREEMENT THAT RESTRICTS THE RIGHT OF A LAWYER TO PRACTICE LAW AFTER TERMINATION OF THE RELATIONSHIP, EXCEPT AN AGREEMENT CONCERNING BENEFITS UPON RETIREMENT; OR
(2) AN AGREEMENT IN WHICH A RESTRICTION ON THE LAWYER’S RIGHT TO PRACTICE IS PART OF THE SETTLEMENT OF A CONTROVERSY BETWEEN PRIVATE PARTIES.

(i) A LAWYER SHALL NOT MAKE AN AGREEMENT PROSPECTIVELY LIMITING THE LAWYER’S LIABILITY TO A CLIENT FOR MALPRACTICE UNLESS PERMITTED BY LAW AND THE CLIENT IS INDEPENDENTLY REPRESENTED IN MAKING THE AGREEMENT, OR SETTLE A CLAIM FOR SUCH LIABILITY UNLESS THE CLIENT IS FIRST ADVISED THAT INDEPENDENT REPRESENTATION MAY BE APPROPRIATE IN CONNECTION THEREWITH.

(j) A LAWYER RELATED TO ANOTHER LAWYER AS PARENT, CHILD, SIBLING OR SPOUSE MAY REPRESENT A CLIENT HAVING AN INTEREST ADVERSE TO A PERSON REPRESENTED BY THE OTHER LAWYER ONLY UPON CONSENT BY THE CLIENT AFTER DISCLOSURE OF THE RELATIONSHIP.

COMMENT:

Business Transactions and Gifts

As a general principle, all transactions between client and lawyer should be fair to the client. Under the law of agency, an agent may not realize profit at the expense of the principal, a proposition expressed in paragraph (b). A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of the gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee.

Literary Rights

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation involves incompatible standards for the lawyer’s performance, one being effectiveness in representing the client and the other being performance that has publication value. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5.

Person Paying for Lawyer’s Services

Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.
RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

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

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

(b) USE INFORMATION RELATING TO THE REPRESENTATION TO THE DISADVANTAGE OF THE FORMER CLIENT UNLESS THE FORMER CLIENT CONSENTS AFTER DISCLOSURE OR THE INFORMATION HAS BECOME GENERALLY KNOWN.

COMMENT:

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, 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.

The scope of a "matter" for purposes of Rule 1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests 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 wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

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.

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

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is associated, see Rule 1.10.
RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

(a) WHEN LAWYERS ARE ASSOCIATED IN A FIRM, NONE OF THEM SHALL
UNDERTAKE OR CONTINUE REPRESENTATION WHEN A LAWYER PRACTICING
ALONE WOULD BE PROHIBITED FROM DOING SO UNDER THE PROVISIONS
REGARDING CONFLICT OF INTEREST STATED IN RULES 1.7, 1.9 AND 2.2.

(b) WHEN LAWYERS TERMINATE AN ASSOCIATION IN A FIRM, NONE OF
THEM, NOR ANY OTHER LAWYER WITH WHOM ANY OF THEM SUBSEQUENTLY
BECOME ASSOCIATED, SHALL UNDERTAKE OR CONTINUE REPRESENTATION
THAT INVOLVES A MATERIAL RISK OF REVEALING INFORMATION RELATING TO
REPRESENTATION OF A CLIENT IN VIOLATION OF RULE 1.6, OR OF MAKING USE
OF INFORMATION TO THE DISADVANTAGE OF A FORMER CLIENT IN VIOLATION
OF RULE 1.9.

(c) SUBJECT TO THE LIMITATIONS OF RULE 1.7, A DISQUALIFICATION
PRESCRIBED BY THIS RULE MAY BE WAIVED BY THE CONSENT OF THE
AFFECTED CLIENT AFTER DISCLOSURE.

COMMENT:

Definition of “Law Firm”

For purposes of the Rules of Professional Conduct, the term "law firm" includes lawyers in
a private firm, lawyers employed in the legal department of a corporation or other organization
and lawyers employed in the legal department of a government agency, or in a legal services
organization. Whether two or more lawyers constitute a law firm within this definition can
depend on the specific facts. For example, two practitioners who share office space and
occasionally consult or assist each other ordinarily would not be regarded as constituting a law
firm. However, if they present themselves to the public in a way suggesting that they are a law
firm, or if they share professional work and fees regularly, they should be regarded as a law firm
for purposes of the Rules. The terms of any formal agreement between associated lawyers are
relevant in determining whether they are a law firm, as is the fact that they have mutual access to
confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful
cases to consider the underlying purpose of the rule that is involved. A group of lawyers could
be regarded as a law firm for purposes of the rule that the same lawyer should not represent
opposing parties in litigation, while it might not be so regarded for purposes of the rule that
information acquired by one lawyer is attributed to another.

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

In the case of government lawyers, there can be ambiguity as to the boundaries of the
department of which they are members. For example, it is usually clear that lawyers in an
attorney general’s office are in one department. However, in some states all lawyers employed
by state agencies are at least nominally members of the attorney general’s staff. The basic
criterion for defining the department is whether the lawyers involved regularly collaborate with
each other in performing their professional responsibilities. Similar questions can arise with
respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service
organization constitute a law firm, but not necessarily those employed in separate units. As in
the case of independent practitioners, whether the lawyers should be treated as associated with
each other can depend on the particular rule that is involved, and on the specific facts of the
situation.

Principles of Imputed Disqualification

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.

When lawyers have been associated in a firm but then end their association, however, the
problem is more complicated. The fiction that the law firm is the same as a single lawyer is no
longer wholly realistic. There are several competing considerations. First, the client previously
represented must be reasonably assured that the principle of loyalty to the client is not
compromised. Second, the rule of disqualification should not be so broadly cast as to preclude
other persons from having reasonable choice of legal counsel. Third, the rule of disqualification
should not unreasonably hamper lawyers from forming new associations and taking on new
clients after having left a previous association. In this connection, it should be recognized that
today many lawyers practice in firms, that many 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 imputed disqualification were defined with unqualified rigor, the result would be
radical curtailment of the opportunity of lawyers to move from one practice setting to another
and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two
rubrics. One approach has been to seek per se rules of disqualification. For example, it has been
held that a partner in a law firm is conclusively presumed to have access to all confidences
concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law
firm and then becomes a partner in another law firm, there is a presumption that all confidences
known by a partner in the first firm are known to all partners in the second firm. This
presumption might properly be applied in some circumstances, especially where the client has
been extensively represented, but may be unrealistic where the client was represented only for
limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner
and an associate in modern law firms, and does not address associations other than law firms; for
example, lawyers associated in the law department of a government agency.

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

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

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a 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 discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Relevant factors in determining the likelihood of actual access to information relating to representation of a client include the professional experience of the lawyer in question, the division of actual responsibility for the matters involved, the organizational structure of the law firm or other association involved, the sensitivity of the information and its relevance to the affairs of the affected clients, and the nature and probable effectiveness of screening measures. Application of this Rule can, therefore, depend on a situation’s particular facts. In any such inquiry, the burden of proof should rest upon the lawyer whose disqualification is sought.

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

Adverse Positions

The second aspect of loyalty to client is the lawyer’s obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a).
RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) EXCEPT AS LAW MAY OTHERWISE EXPRESSLY PERMIT, A LAWYER SHALL NOT REPRESENT A PRIVATE CLIENT IN CONNECTION WITH A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY AS A PUBLIC OFFICER OR EMPLOYEE, UNLESS THE APPROPRIATE GOVERNMENT AGENCY CONSENTS AFTER DISCLOSURE.

(b) A LAWYER SERVING AS A PUBLIC OFFICER OR EMPLOYEE SHALL NOT:

(1) PARTICIPATE IN A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY WHILE IN PRIVATE PRACTICE OR NONGOVERNMENTAL EMPLOYMENT, UNLESS UNDER APPLICABLE LAW NO ONE IS, OR BY LAWFUL DELEGATION MAY BE, AUTHORIZED TO ACT IN THE LAWYER'S STEAD IN THE MATTER; OR

(2) NEGOTIATE FOR PRIVATE EMPLOYMENT WITH ANY PERSON WHO IS INVOLVED AS A PARTY OR AS ATTORNEY FOR A PARTY IN A MATTER IN WHICH THE LAWYER IS PARTICIPATING PERSONALLY AND SUBSTANTIALLY.

(c) IF A LAWYER IS DISQUALIFIED BY PARAGRAPH (a), NO LAWYER IN A FIRM WITH WHICH THAT LAWYER IS ASSOCIATED MAY UNDERTAKE OR CONTINUE REPRESENTATION IN THE MATTER UNLESS:

(1) THE DISQUALIFIED LAWYER IS SCREENED FROM ANY PARTICIPATION IN THE MATTER AND IS APPORTIONED NO PART OF THE FEE THEREFROM; AND

(2) WRITTEN NOTICE IS PROMPTLY GIVEN TO THE APPROPRIATE GOVERNMENT AGENCY TO ENABLE THE AGENCY TO ASCERTAIN COMPLIANCE WITH THE PROVISIONS OF THIS RULE.

COMMENT:

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.9 and also the imputed disqualification provisions of Rule 1.10. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening in paragraph (c) and waiver in paragraph (a) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.
Defining “matter” for purposes of this Rule can require consideration of the nature of the lawyer’s activity while in government service. If the lawyer was an advocate in litigation or a negotiator in a contract transaction on behalf of the government, the scope of the “matter” should be determined essentially as it would be in the case of a private practitioner under Rule 1.9. On the other hand, if the government lawyer was engaged in drafting general regulations or supervising a program of enforcement or compliance, the “matter” includes the drafting or enforcement process at the time, but not the subsequent administration of the regulations or program for the indefinite future. The essential question is whether substantial unfair advantage could accrue to the private client by reason of access to information about the client’s adversary obtainable only by use of public resources available during the lawyer’s government service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency. With regard to the boundaries of a government agency for purposes of this Rule, see comment to Rule 1.10.

Paragraph (b) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Paragraph (c)(1) does not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. It prohibits directly relating the attorney’s compensation to the fee in the matter in which the lawyer is disqualified.
RULE 1.12 FORMER JUDGE OR ARBITRATOR

(a) EXCEPT AS STATED IN PARAGRAPH (d), A LAWYER SHALL NOT REPRESENT ANYONE IN CONNECTION WITH A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY AS A JUDGE OR OTHER ADJUDICATIVE OFFICER, ARBITRATOR OR LAW CLERK TO SUCH A PERSON, UNLESS ALL PARTIES TO THE PROCEEDING CONSENT AFTER DISCLOSURE.

(b) A LAWYER SHALL NOT NEGOTIATE FOR EMPLOYMENT WITH ANY PERSON WHO IS INVOLVED AS A PARTY OR AS ATTORNEY FOR A PARTY IN A MATTER IN WHICH THE LAWYER IS PARTICIPATING PERSONALLY AND SUBSTANTIALLY AS A JUDGE OR OTHER ADJUDICATIVE OFFICER, ARBITRATOR OR LAW CLERK TO SUCH A PERSON.

(c) IF A LAWYER IS DISQUALIFIED BY PARAGRAPH (a), NO LAWYER IN A FIRM WITH WHICH THAT LAWYER IS ASSOCIATED MAY UNDERTAKE OR CONTINUE REPRESENTATION IN THE MATTER UNLESS:

1. THE DISQUALIFIED LAWYER IS 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 TRIBUNAL TO ENABLE IT TO ASCERTAIN COMPLIANCE WITH THE PROVISIONS OF THIS RULE.

(d) AN ARBITRATOR SELECTED AS A PARTISAN OF A PARTY IN A MULTI-MEMBER ARBITRATION PANEL IS NOT PROHIBITED FROM SUBSEQUENTLY REPRESENTING THAT PARTY.

COMMENT:

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. Compliance Rules A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those rules correspond in meaning.
RULE 1.13 ORGANIZATION AS THE CLIENT

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

(b) IF A LAWYER FOR AN ORGANIZATION KNOWS THAT AN OFFICER, EMPLOYEE OR OTHER PERSON ASSOCIATED WITH THE ORGANIZATION IS ENGAGED IN ACTION, INTENDS TO ACT OR REFUSES TO ACT IN A MATTER RELATED TO THE REPRESENTATION THAT IS A VIOLATION OF A LEGAL OBLIGATION TO THE ORGANIZATION, OR A VIOLATION OF LAW WHICH REASONABLY MIGHT BE IMPUTED TO THE ORGANIZATION, AND IS LIKELY TO RESULT IN MATERIAL INJURY TO THE ORGANIZATION, THE LAWYER SHALL PROCEED AS IS REASONABLY NECESSARY IN THE BEST INTEREST OF THE ORGANIZATION. IN DETERMINING HOW TO PROCEED, THE LAWYER SHALL GIVE DUE CONSIDERATION TO THE SERIOUSNESS OF THE VIOLATION AND ITS CONSEQUENCES, THE SCOPE AND NATURE OF THE LAWYER'S REPRESENTATION, THE RESPONSIBILITY IN THE ORGANIZATION AND THE APPARENT MOTIVATION OF THE PERSON INVOLVED, THE POLICIES OF THE ORGANIZATION CONCERNING SUCH MATTERS AND ANY OTHER RELEVANT CONSIDERATIONS. THE MEASURES TAKEN SHALL BE DESIGNED TO MINIMIZE DISRUPTION OF THE ORGANIZATION AND THE RISK OF REVEALING INFORMATION RELATING TO THE REPRESENTATION TO PERSONS OUTSIDE THE ORGANIZATION. SUCH MEASURES MAY INCLUDE:

(1) ASKING RECONSIDERATION OF THE MATTER;

(2) ADVISING THAT A SEPARATE LEGAL OPINION ON THE MATTER BE SOUGHT FOR PRESENTATION TO APPROPRIATE AUTHORITY IN THE ORGANIZATION; AND

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

(c) WHEN A MATTER HAS BEEN REFERRED TO THE ORGANIZATION'S HIGHEST AUTHORITY IN ACCORDANCE WITH PARAGRAPH (b), AND THAT AUTHORITY INSISTS UPON ACTION, OR REFUSES TO TAKE ACTION, THAT IS CLEARLY A VIOLATION OF A LEGAL OBLIGATION TO THE ORGANIZATION, OR A VIOLATION OF LAW WHICH REASONABLY MIGHT BE IMPUTED TO THE ORGANIZATION, AND IS LIKELY TO RESULT IN SUBSTANTIAL INJURY TO THE ORGANIZATION, THE LAWYER MAY TAKE FURTHER REMEDIAL ACTION THAT THE LAWYER REASONABLY BELIEVES TO BE IN THE BEST INTEREST OF THE ORGANIZATION. SUCH ACTION MAY INCLUDE REVEALING INFORMATION RELATING TO THE REPRESENTATION OF THE ORGANIZATION ONLY IF THE LAWYER REASONABLY BELIEVES THAT:

(1) THE HIGHEST AUTHORITY IN THE ORGANIZATION HAS ACTED TO FURTHER THE PERSONAL OR FINANCIAL INTERESTS OF MEMBERS OF THAT AUTHORITY WHICH ARE IN CONFLICT WITH THE INTERESTS OF THE ORGANIZATION; AND
(2) REVEALING THE INFORMATION IS NECESSARY IN THE BEST INTEREST OF THE ORGANIZATION.

(d) IN DEALING WITH AN ORGANIZATION'S DIRECTORS, OFFICERS, EMPLOYEES, MEMBERS, SHAREHOLDERS OR OTHER CONSTITUENTS, A LAWYER SHALL EXPLAIN THE IDENTITY OF THE CLIENT WHEN NECESSARY TO AVOID MISUNDERSTANDINGS ON THEIR PART.

(e) A LAWYER REPRESENTING AN ORGANIZATION MAY ALSO REPRESENT ANY OF ITS DIRECTORS, OFFICERS, EMPLOYEES, MEMBERS, SHAREHOLDERS OR OTHER CONSTITUENTS, SUBJECT TO THE PROVISIONS REGARDING CONFLICT OF INTEREST STATED IN 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.

COMMENT:

The Entity as the Client

In transactions with their lawyers, clients who are individuals can speak and decide for themselves, finally and authoritatively. In transactions between an organization and its lawyer, however, the organization can speak and decide only through agents, such as its officers or employees. In effect, the client-lawyer relationship is maintained through an intermediary between the client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the client.

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

In an extreme case, the lawyer must refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation. The ultimately difficult question is whether the lawyer should be required to circumvent the organization’s highest authority when it persists in a course of action that is clearly violative of law or a legal obligation to the organization and is likely to result in substantial injury to the organization.
In such a situation, if the lawyer can take remedial action without a disclosure of information that might adversely affect the organization, the lawyer as a matter of professional discretion should take such action as the lawyer reasonably believes to be in the best interest of the organization. For example, a lawyer for a close corporation may be obliged to disclose misconduct by the board to the shareholders. However, taking such action could entail disclosure of information relating to the representation with consequent risk of injury to the client. When such is the case, the organization is threatened by alternative injuries: the injury that may result from the governing board’s action or refusal to act, and the injury that may result if the lawyer’s remedial efforts entail disclosure of confidential information. The lawyer may pursue remedial efforts even at the risk of disclosure in the circumstances stated in subparagraphs (c)(1) and (c)(2).

Relation to Other Rules

The authority and responsibility provided in Rules 1.13(b) and (c) is concurrent with the authority and responsibility provided in other Rules. In particular, the responsibility to act for the best interest of the organization under this Rule exists independently of the authority to prevent legally wrongful conduct under Rule 1.6 or 3.3, the responsibilities to the client under Rules 1.8 and 1.16 and the responsibilities of the lawyer under Rule 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable. In connection with complying with Rule 1.2(d), 3.3 or 4.1 or exercising the discretion conferred by Rule 1.6(b), a lawyer for an organization may be in doubt whether the conduct will actually be carried out and whether higher authority in the organization approves. To guide his conduct under Rule 1.2(d), 3.3 or 4.1 or Rule 1.6(b), the lawyer ordinarily should make inquiry within the organization as indicated in Rule 1.13(b).

When the lawyer involved is a member of a firm, the firm’s procedures may require referral of difficult ethical questions to a superior in the firm. In that event, Rule 5.2 may be applicable.

Unincorporated Associations

The duty defined in this Rule applies to unincorporated associations.

Government Agency

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, defining precisely the identity of the client may be more difficult in the government context. In some circumstances it may be a specific agency but in others it may be the government as a whole. For example, if the action or failure to act involves the head of a bureau, the department of which the bureau is a part may be the client for purposes of this Rule. With these qualifications, the lawyer’s substantive duty to the client and reasonable courses of action are essentially the same as when the client is a private organization.

Clarifying the Lawyer's Role

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

**Dual Representation**

Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder. Such common representation, although often undertaken in practice, can entail serious potential conflicts of interest.

**Derivative Actions**

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

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client 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 whether independent counsel should represent the directors.
RULE 1.14 CLIENT UNDER A DISABILITY

(a) WHEN A CLIENT'S ABILITY TO MAKE ADEQUATELY CONSIDERED DECISIONS IN CONNECTION WITH THE REPRESENTATION IS IMPAIRED, WHETHER BECAUSE OF MINORITY, MENTAL DISABILITY OR FOR SOME OTHER REASON, THE LAWYER SHALL, AS FAR AS REASONABLY POSSIBLE, MAINTAIN A NORMAL CLIENT-LAWYER RELATIONSHIP WITH THE CLIENT.

(b) A LAWYER SHALL SECURE THE APPOINTMENT OF A GUARDIAN OR OTHER LEGAL REPRESENTATIVE, OR SEEK A PROTECTIVE ORDER WITH RESPECT TO A CLIENT, ONLY WHEN THE LAWYER REASONABLY BELIEVES THAT THE CLIENT CANNOT ADEQUATELY COMMUNICATE OR EXERCISE JUDGMENT IN THE CLIENT-LAWYER RELATIONSHIP.

COMMENT:

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

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

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

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

Disclosure of the Client's Condition

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. A lawyer representing a party who is within the terms of such a rule has an obligation both to the
court and to the client to see that the rule is complied with. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. If possible, the lawyer should consult an appropriate diagnostician for guidance.
RULE 1.15  SAFEKEEPING PROPERTY

(a) A LAWYER SHALL HOLD IN TRUST, SEPARATE FROM THE LAWYER’S OWN PROPERTY, PROPERTY OF CLIENTS OR THIRD PERSONS THAT IS IN A LAWYER’S POSSESSION IN CONNECTION WITH A REPRESENTATION. FUNDS SHALL BE KEPT IN A TRUST ACCOUNT MAINTAINED IN THE STATE WHERE THE LAWYER’S OFFICE IS SITUATED, OR ELSEWHERE WITH THE CONSENT OF THE CLIENT. OTHER PROPERTY SHALL BE IDENTIFIED AS SUCH AND APPROPRIATELY SAFEGUARDED. COMPLETE RECORDS OF TRUST ACCOUNT FUNDS AND OTHER PROPERTY SHALL BE KEPT BY THE LAWYER AND SHALL BE PRESERVED FOR A PERIOD OF FIVE YEARS AFTER TERMINATION OF THE REPRESENTATION.

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

(c) WHEN IN THE COURSE OF REPRESENTATION A LAWYER IS IN POSSESSION OF PROPERTY IN WHICH BOTH THE LAWYER AND ANOTHER PERSON CLAIM INTERESTS, THE PROPERTY SHALL BE TREATED BY THE LAWYER AS TRUST PROPERTY UNTIL THERE IS AN ACCOUNTING AND SEVERANCE OF THEIR INTERESTS. IF A DISPUTE ARISES CONCERNING THEIR RESPECTIVE INTERESTS, THE PORTION IN DISPUTE SHALL BE TREATED AS TRUST PROPERTY UNTIL THE DISPUTE IS RESOLVED.

COMMENT:

A lawyer should hold property of others with the care required of a professional fiduciary such as a trust company. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances.

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

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

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.
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 IS LIKELY TO RESULT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW;

2. THE LAWYER’S PHYSICAL OR MENTAL CONDITION MATERIALLY IMPAIRS THE LAWYER’S ABILITY TO REPRESENT THE CLIENT; OR

3. THE LAWYER IS DISCHARGED.

(b) EXCEPT AS STATED IN PARAGRAPH (c), A LAWYER MAY WITHDRAW FROM REPRESENTING A CLIENT IF WITHDRAWAL CAN BE ACCOMPLISHED WITHOUT MATERIAL ADVERSE EFFECT ON THE INTERESTS OF THE CLIENT, OR IF:

1. THE CLIENT PERSISTS IN A COURSE OF ACTION INVOLVING THE LAWYER’S SERVICES THAT THE LAWYER REASONABLY BELIEVES IS CRIMINAL OR FRAUDULENT;

2. THE CLIENT FAILS SUBSTANTIALLY TO FULFILL AN OBLIGATION TO THE LAWYER REGARDING THE LAWYER’S SERVICES AND HAS BEEN GIVEN REASONABLE WARNING THAT THE LAWYER WILL WITHDRAW UNLESS THE OBLIGATION IS FULFILLED;

3. THE REPRESENTATION WILL RESULT IN AN UNREASONABLE FINANCIAL BURDEN ON THE LAWYER OR HAS BEEN RENDERED UNREASONABLY DIFFICULT BY THE CLIENT; OR

4. OTHER GOOD CAUSE FOR WITHDRAWAL EXISTS.

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

(d) UPON TERMINATION OF REPRESENTATION, A LAWYER SHALL TAKE REASONABLE STEPS FOR THE CONTINUED PROTECTION OF 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 THAT HAS NOT BEEN EARNED. THE LAWYER MAY RETAIN PAPERS RELATING TO THE CLIENT TO THE EXTENT PERMITTED BY APPLICABLE LAW.

COMMENT:

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

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

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

Discharge

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

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

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

Optional Withdrawal

A lawyer may withdraw from representation in a limited range of circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is illegal, for a lawyer is not required to be associated with such conduct. In such circumstances, withdrawal is permitted even if the client may be prejudiced, because that consequence can be prevented by the client’s desisting from the conduct in question.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by applicable law.
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 AS WELL, SUCH AS MORAL, ECONOMIC, SOCIAL AND POLITICAL FACTORS, THAT MAY BE RELEVANT TO THE CLIENT'S SITUATION.

COMMENT:

Scope of Advice

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.

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

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.

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

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 probably will result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted.
RULE 2.2 INTERMEDIARY

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

(1) THE LAWYER DISCLOSES TO EACH CLIENT THE IMPLICATIONS OF THE COMMON REPRESENTATION, INCLUDING THE ADVANTAGES AND RISKS INVOLVED, AND OBTAINS EACH CLIENT'S CONSENT TO THE COMMON REPRESENTATION;

(2) THE LAWYER REASONABLY BELIEVES THAT THE MATTER CAN BE RESOLVED ON TERMS COMPATIBLE WITH THE CLIENTS' BEST INTERESTS, THAT EACH CLIENT WILL BE ABLE TO MAKE ADEQUATELY INFORMED DECISIONS IN THE MATTER AND THAT THERE IS LITTLE RISK OF MATERIAL PREJUDICE TO THE INTERESTS OF ANY OF THE CLIENTS IF THE CONTEMPLATED RESOLUTION IS UNSUCCESSFUL; AND

(3) THE LAWYER REASONABLY BELIEVES THAT THE COMMON REPRESENTATION CAN BE UNDERTAKEN IMPARTIALLY AND WITHOUT IMPROPER EFFECT ON OTHER RESPONSIBILITIES THE LAWYER HAS TO ANY OF THE CLIENTS.

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

(c) A LAWYER SHALL WITHDRAW AS INTERMEDIARY IF ANY OF THE CLIENTS SO REQUESTS, IF THE CONDITIONS STATED IN PARAGRAPH (a) CANNOT BE MET OR IF IN THE LIGHT OF SUBSEQUENT EVENTS THE LAWYER REASONABLY SHOULD KNOW THAT A MUTUALLY ADVANTAGEOUS RESOLUTION CANNOT BE ACHIEVED. UPON WITHDRAWAL, THE LAWYER SHALL NOT CONTINUE TO REPRESENT ANY OF THE CLIENTS UNLESS DOING SO IS CLEARLY COMPATIBLE WITH THE LAWYER’S RESPONSIBILITIES TO THE OTHER CLIENT OR CLIENTS.

COMMENT:

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping 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, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

A lawyer acts as intermediary under this Rule when the lawyer represents all parties. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because
confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

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

The appropriateness of intermediation can depend on its form. Forms of intermediation range from arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

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

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

Disclosure

In acting as intermediary between clients, the lawyer is required to make adequate disclosure to the clients of the implications of doing so, and proceed only upon consent based on such a disclosure. The disclosure should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

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

Withdrawal

Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the
lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to former clients.
RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A LAWYER MAY UNDERTAKE AN EVALUATION OF A MATTER AFFECTING A CLIENT FOR THE USE OF SOMEONE OTHER THAN THE CLIENT IF:

(1) THE LAWYER REASONABLY BELIEVES THAT MAKING THE EVALUATION IS COMPATIBLE WITH OTHER ASPECTS OF THE LAWYER'S RELATIONSHIP WITH THE CLIENT;

(2) THE TERMS UPON WHICH THE EVALUATION IS TO BE MADE ARE STATED CLIENT IN WRITING, PARTICULARLY THE TERMS RELATING TO THE LAWYER'S ACCESS TO INFORMATION, THE CONTEMPLATED DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION AND THE PERSONS TO WHOM REPORT OF THE EVALUATION IS TO BE MADE; AND

(3) THE IMPLICATIONS TO THE CLIENT ARE DISCLOSED AND THE CLIENT CONSENTS.

(b) IN REPORTING THE EVALUATION, THE LAWYER SHALL INDICATE ANY MATERIAL LIMITATIONS THAT WERE IMPOSED ON THE SCOPE OF THE INQUIRY OR ON THE DISCLOSURE OF INFORMATION.

(c) EXCEPT AS DISCLOSURE IS REQUIRED IN CONNECTION WITH A REPORT OF THE EVALUATION, INFORMATION RELATING TO AN INDEPENDENT EVALUATION IS CONFIDENTIAL UNDER RULE 1.6.

COMMENT:

Definition

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

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

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 point is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation
of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

**Duty to Third Person**

When the evaluation is for the benefit of third persons, they have an interest in its integrity. Depending on the terms of reference under which the evaluation is conducted, that interest may be merely the right to know that an evaluation has been made, or it may include the right to be supplied with a full report of the evaluation. The duty to the third person may be one of reasonable care, perhaps a duty to use high care, perhaps some other standard, depending on the law governing the particular relationships involved. For example, the duty to a purchaser of property arising from a title evaluation may be different from the duty to prospective shareholders arising from a legal evaluation of the authority of a company to issue shares. Even if the duty is legally minimal, however, it goes beyond the obligations a lawyer normally has to third persons.

Since a legal evaluation intended for a third person involves a departure from the normal client-lawyer relationship, careful analysis of the situation and a written arrangement with the client are 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 independent evaluation concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should fully advise the client of the implications, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

**Access to and Disclosure of Information**

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

**Financial Auditors' Requests for Information**

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 unless some other procedure is established after consent by the client upon adequate disclosure. Such a procedure is prescribed in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.
ADVOCATE

RULE 3.1  MERITORIOUS CLAIMS AND CONTENTIONS

A LAWYER SHALL NOT BRING OR DEFEND A PROCEEDING, OR ASSERT OR CONTROVERT AN ISSUE THEREIN, UNLESS THERE IS A REASONABLE BASIS FOR DOING SO, WHICH INCLUDES A GOOD FAITH ARGUMENT FOR AN EXTENSION, MODIFICATION OR REVERSAL OF EXISTING LAW. A LAWYER FOR THE DEFENDANT IN A CRIMINAL PROCEEDING, OR THE RESPONDENT IN A PROCEEDING THAT COULD RESULT IN INCARCERATION, MAY NEVERTHELESS SO DEFEND THE PROCEEDING AS TO REQUIRE THAT EVERY ELEMENT OF THE CASE BE ESTABLISHED.

COMMENT:

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change. The test applicable under Rule 3.1 is, therefore, whether a lawyer acting in good faith would conclude that there is a reasonable basis for the action or position in question, including a good faith argument for an extension, modification or reversal of existing law.
RULE 3.2 EXPEDITING LITIGATION

A LAWYER SHALL MAKE REASONABLE EFFORT CONSISTENT WITH THE LEGITIMATE INTERESTS OF THE CLIENT TO EXPEDITE LITIGATION.

COMMENT:

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.
RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A LAWYER SHALL NOT KNOWINGLY:

(1) MAKE A FALSE STATEMENT OF FACT OR LAW TO A TRIBUNAL, OR FAIL TO DISCLOSE A FACT IN CIRCUMSTANCES WHERE THE FAILURE TO MAKE THE DISCLOSURE IS THE EQUIVALENT OF THE LAWYER’S MAKING A MATERIAL MISREPRESENTATION;

(2) FAIL TO MAKE A DISCLOSURE OF FACT NECESSARY TO PREVENT A FRAUD ON THE TRIBUNAL;

(3) FAIL TO DISCLOSE TO THE TRIBUNAL LEGAL AUTHORITY IN THE CONTROLLING JURISDICTION KNOWN TO THE LAWYER TO BE DIRECTLY ADVERSE TO THE POSITION OF THE CLIENT AND NOT DISCLOSED BY OPPOSING COUNSEL; OR

(4) OFFER EVIDENCE THAT THE LAWYER KNOWS TO BE FALSE. IF A LAWYER HAS OFFERED MATERIAL EVIDENCE AND COMES TO KNOW OF ITS FALSITY, THE LAWYER SHALL TAKE REASONABLE REMEDIAL MEASURES.

(b) THE DUTIES IN PARAGRAPH (a) CONTINUE TO THE CONCLUSION OF THE PROCEEDING, AND APPLY EVEN IF COMPLIANCE REQUIRES DISCLOSURE OF INFORMATION OTHERWISE CONFIDENTIAL UNDER RULE 1.6.

(c) A LAWYER MAY REFUSE TO OFFER EVIDENCE THAT THE LAWYER REASONABLY BELIEVES IS FALSE.

(d) IN AN EX PARTE PROCEEDING, A LAWYER SHALL INFORM THE TRIBUNAL OF ALL RELEVANT FACTS KNOWN TO THE LAWYER THAT SHOULD BE DISCLOSED TO PERMIT THE TRIBUNAL TO MAKE AN INFORMED DECISION, WHETHER OR NOT THE FACTS ARE ADVERSE.

CAVEAT: CONSTITUTIONAL LAW DEFINING THE RIGHT TO ASSISTANCE OF COUNSEL IN CRIMINAL CASES MAY SUPERSEDE THE OBLIGATIONS STATED IN THIS RULE.

COMMENT:

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

Representations by a Lawyer

Although an advocate is responsible for pleadings and other documents prepared for litigation, he or she usually is not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a
statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.

Misleading Legal Argument

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

Furthermore, as stated in paragraph (b), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Fraud on the Tribunal

Fraud on the tribunal is defined by applicable law. In some jurisdictions it includes not only submission of evidence known to be false, but also deliberately misleading the tribunal by omission.

False or Fabricated Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client himself, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take responsibility for rectifying the situation. Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, see Rule 1.2(d), thereby subverting the truth-finding process which the adversary system is designed to implement. Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.
The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify on his own behalf and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d). The advocate accordingly must disclose a client's perjury if efforts to prevent commission of perjury have failed.

**Remedial Measures**

If perjured testimony or fabricated evidence has been offered, the advocate's proper course ordinarily is to make prompt disclosure to the court. It is for the court then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

**Constitutional Requirements**

The general rule—that an advocate must disclose perjury, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

**Duration of Obligation**

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. After that point, however, the lawyer may rectify the consequences as provided in Rule 1.6(b)(3).
Refusing to Offer Proof Believed to Be False

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make relevant disclosures.
RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A LAWYER SHALL NOT:

(a) UNLAWFULLY OBSTRUCT ANOTHER PARTY'S ACCESS TO EVIDENCE OR ALTER, DESTROY OR CONCEAL A DOCUMENT OR OTHER MATERIAL THAT THE LAWYER KNOWS OR REASONABLY SHOULD KNOW IS RELEVANT TO A PENDING PROCEEDING OR ONE THAT IS REASONABLY FORESEEABLE. A LAWYER SHALL NOT COUNSEL OR ASSIST ANOTHER PERSON TO DO ANY SUCH ACT;

(b) FABRICATE EVIDENCE, COUNSEL OR ASSIST A WITNESS TO TESTIFY FALSELY, OR OFFER AN INDUCEMENT TO A WITNESS THAT IS PROHIBITED BY LAW;

(c) KNOWINGLY DISOBEY AN OBLIGATION UNDER THE RULES OF A TRIBUNAL EXCEPT FOR AN OPEN REFUSAL BASED ON AN ASSERTION THAT NO VALID OBLIGATION EXISTS;

(d) IN PRETRIAL PROCEDURE, MAKE A DISCOVERY REQUEST THAT HAS NO REASONABLE BASIS, OR FAIL TO MAKE REASONABLY DILIGENT EFFORT TO COMPLY WITH A LEGALLY PROPER DISCOVERY REQUEST BY AN OPPOSING PARTY;

(e) IN TRIAL, ALLUDE TO ANY MATTER THAT THE LAWYER DOES NOT REASONABLY BELIEVE IS RELEVANT OR THAT WILL NOT BE SUPPORTED BY ADMISSIBLE EVIDENCE, ASSERT PERSONAL KNOWLEDGE OF FACTS IN ISSUE EXCEPT WHEN TESTIFYING AS A WITNESS, OR STATE A PERSONAL OPINION AS TO THE JUSTNESS OF A CAUSE, THE CREDIBILITY OF A WITNESS, THE CULPABILITY OF A CIVIL LITIGANT OR THE GUILT OR INNOCENCE OF AN ACCUSED; OR

(f) REQUEST A PERSON OTHER THAN A CLIENT TO REFRAIN FROM VOLUNTARILY GIVING RELEVANT INFORMATION TO ANOTHER PARTY UNLESS:

(1) THE PERSON IS A RELATIVE OR AN EMPLOYEE OR OTHER AGENT OF A CLIENT; AND

(2) IT IS REASONABLE TO BELIEVE THAT THE PERSON'S INTERESTS WILL NOT BE ADVERSELY AFFECTED BY REFRAINING FROM GIVING SUCH INFORMATION.

COMMENT:

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

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

Paragraph (a) applies to evidentiary material generally, including computerized information. The Rule does not require a lawyer to foresee all possible uses of material and does not preclude advice about a general policy concerning retention of records.

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

Paragraph (f) permits a lawyer to advise an employee of a client to refrain from giving information to another party, for the employee may identify his interests with those of the client. See also Rule 4.3.
RULE 3.5  IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A LAWYER SHALL NOT:

(a) SEEK TO INFLUENCE A JUDGE, JUROR, PROSPECTIVE JUROR OR OTHER DECISION-MAKER BY MEANS PROHIBITED BY LAW;

(b) COMMUNICATE EX PARTE WITH SUCH A PERSON EXCEPT AS PERMITTED BY LAW; OR

(c) ENGAGE IN CONDUCT INTENDED TO DISRUPT A TRIBUNAL.

COMMENT:

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. In addition to specific requirements, that Code requires generally that a judge avoid impropriety or the appearance of impropriety. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.
RULE 3.6  TRIAL PUBLICITY

(a) A LAWYER SHALL NOT MAKE AN EXTRAJUDICIAL STATEMENT THAT THE LAWYER KNOWS OR REASONABLY SHOULD KNOW WILL HAVE A SUBSTANTIAL LIKELIHOOD OF MATERIALLY PREJUDICING AN ADJUDICATIVE PROCEEDING. AN EXTRAJUDICIAL STATEMENT, OTHER THAN ONE PERMITTED BY PARAGRAPH (b), ORDINARILY IS LIKELY TO HAVE SUCH AN EFFECT WHEN IT REFERS TO A CIVIL MATTER TRIABLE TO A JURY, OR A CRIMINAL MATTER OR PROCEEDING THAT COULD RESULT IN INCARCERATION, AND THE STATEMENT RELATES TO:

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

(2) IN A CRIMINAL CASE OR PROCEEDING THAT COULD RESULT IN INCARCERATION, THE POSSIBILITY OF A PLEA OF GUILTY TO THE OFFENSE OR THE EXISTENCE OR CONTENTS OF ANY CONFESSION, ADMISSION, OR STATEMENT GIVEN BY A DEFENDANT OR SUSPECT OR THAT PERSON’S REFUSAL OR FAILURE TO MAKE A STATEMENT;

(3) THE PERFORMANCE OR RESULTS OF ANY EXAMINATION OR TEST OR THE REFUSAL OR FAILURE OF A PERSON TO SUBMIT TO AN EXAMINATION OR TEST, OR THE IDENTITY OR NATURE OF PHYSICAL EVIDENCE EXPECTED TO BE PRESENTED;

(4) ANY OPINION AS TO THE GUILT OR INNOCENCE OF A DEFENDANT OR SUSPECT IN A CRIMINAL CASE OR PROCEEDING THAT COULD RESULT IN INCARCERATION; OR

(5) INFORMATION THE LAWYER KNOWS OR REASONABLY SHOULD KNOW IS LIKELY TO BE INADMISSIBLE AS EVIDENCE IN A TRIAL AND WOULD IF DISCLOSED CREATE A SUBSTANTIAL RISK OF PREJUDICING AN IMPARTIAL TRIAL.

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

(1) THE GENERAL NATURE OF THE CLAIM OR DEFENSE;

(2) INFORMATION CONTAINED IN A PUBLIC RECORD;

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

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

(5) A REQUEST FOR ASSISTANCE IN OBTAINING EVIDENCE AND INFORMATION NECESSARY THERETO;
(6) A WARNING OF DANGER CONCERNING THE BEHAVIOR OF A PERSON INVOLVED, WHEN THERE IS REASON TO BELIEVE THAT SUCH DANGER EXISTS; AND

(7) IN A CRIMINAL CASE:

(i) THE IDENTITY, RESIDENCE, OCCUPATION AND FAMILY STATUS OF THE DEFENDANT OR SUSPECT;

(ii) IF THE DEFENDANT OR SUSPECT HAS NOT BEEN APPREHENDED, INFORMATION NECESSARY TO AID IN APPREHENSION OF THAT PERSON;

(iii) THE FACT, TIME AND PLACE OF ARREST, RESISTANCE, PURSUIT AND USE OF WEAPONS; AND

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

COMMENT:

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

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.
RULE 3.7 LAWYER AS WITNESS

(a) A LAWYER SHALL NOT ACT AS ADVOCATE AT A TRIAL IN WHICH THE LAWYER IS LIKELY TO BE A NECESSARY WITNESS EXCEPT WHERE:

(1) THE TESTIMONY RELATES TO AN UNCONTESTED ISSUE;

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

(3) DISQUALIFICATION OF THE LAWYER WOULD WORK SUBSTANTIAL HARDSHIP ON THE CLIENT.

(b) RULE 1.7 RELATING TO CONFLICT OF INTEREST DETERMINES WHETHER A LAWYER MAY ACT AS ADVOCATE IN A PROCEEDING IN WHICH A MEMBER OF THE LAWYER'S FIRM IS LIKELY TO BE CALLED AS A WITNESS.

COMMENT:

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

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

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

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

Apart from these two exceptions, subparagraph (3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would
probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.
RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

THE PROSECUTOR IN A CRIMINAL CASE SHALL:

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

(b) MAKE REASONABLE EFFORT TO ASSURE THAT THE DEFENDANT HAS BEEN ADVISED OF THE RIGHT TO COUNSEL AND HAS BEEN GIVEN REASONABLE OPPORTUNITY TO OBTAIN COUNSEL;

(c) NOT SEEK TO OBTAIN FROM AN UNREPRESENTED DEFENDANT A WAIVER OF IMPORTANT PRETRIAL RIGHTS, SUCH AS THE RIGHT TO A PRELIMINARY HEARING; AND

(d) MAKE REASONABLE EFFORT TO SEEK ALL EVIDENCE, WHETHER OR NOT FAVORITE TO THE DEFENDANT, MAKE TIMELY DISCLOSURE TO THE DEFENSE OF ALL EVIDENCE KNOWN TO THE PROSECUTOR THAT SUPPORTS INNOCENCE OR MITIGATES THE OFFENSE, AND, IN CONNECTION WITH SENTENCING, DISCLOSE TO THE DEFENSE AND TO THE TRIBUNAL ALL UNPRIVILEGED MITIGATING INFORMATION KNOWN TO THE PROSECUTOR.

COMMENT:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate. The provisions of this Rule seek to specify those prosecutorial obligations that should be a matter of professional discipline. They are based upon the ABA Standards of Criminal Justice, Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to a defendant representing himself with the approval of the tribunal.
RULE 3.9  ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A LAWYER REPRESENTING A CLIENT BEFORE A LEGISLATIVE OR ADMINISTRATIVE TRIBUNAL IN A NONADJUDICATIVE PROCEEDING SHALL DISCLOSE THAT THE APPEARANCE IS IN A REPRESENTATIVE CAPACITY AND SHALL CONFORM TO THE PROVISIONS OF RULES 3.3(a) THROUGH (c), 3.4(a) THROUGH (c), AND 3.5.

COMMENT:

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

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.

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

(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 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.

COMMENT:

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by act as well as deed. Making a false statement includes the failure to make a statement in circumstances in which nondisclosure is equivalent to making such a statement. Thus, where a lawyer has made a statement that he or she believed to be true when made but later discovers that the statement was not true, in some circumstances failure to correct the statement is equivalent to making a statement that is false.

Statements of Fact

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

This Rule governs representations by a lawyer. A related but distinct duty exists under Rule 1.2(d), which forbids a lawyer to assist a client in conduct that is criminal or fraudulent. The critical elements under Rule 1.2(d) are the nature of the client’s purpose, whether the lawyer knew of the purpose and whether the lawyer assisted in carrying it out. In contrast, the critical elements under this Rule are the making of a statement by the lawyer and the lawyer’s knowledge that the statement is false.

Disclosure
As noted in the Comment to Rule 1.6, the duty imposed by Rule 4.1 may require a lawyer to disclose information that otherwise is confidential. However, in criminal cases the constitutional right to effective counsel may limit the extent to which counsel for a defendant may correct a misrepresentation that is based on information provided by the client. See Comment to Rule 3.3.
RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

A LAWYER SHALL NOT COMMUNICATE ON THE SUBJECT OF THE REPRESENTATION WITH A PARTY THE LAWYER KNOWS TO BE REPRESENTED BY ANOTHER LAWYER IN THE MATTER, UNLESS THE LAWYER HAS THE CONSENT OF THE OTHER LAWYER OR IS AUTHORIZED BY LAW TO DO SO.

COMMENT:

This Rule does not prohibit communication with a represented person, or an employee or agent of a party, 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. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter. This Rule prohibits communication concerning the matter in representation by a lawyer for one party with managing agents of a party that is a corporation or organization, for such persons speak for the organization. It does not prohibit communication with lower echelon employees who are not representatives of the organization. Whether a specific employee is a representative of a client can depend on the circumstances, particularly whether the employee has significant managerial responsibility in the matter in question. Compare Rule 3.4(f).
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 DOES NOT UNDERSTAND THE LAWYER'S ROLE IN THE MATTER, THE LAWYER SHALL MAKE REASONABLE EFFORT TO EXPLAIN THAT ROLE.

COMMENT:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In explaining the lawyer’s role, it may be sufficient to suggest that the unrepresented person obtain counsel.
RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

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.

COMMENT:

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.
RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A PARTNER IN A LAW FIRM SHALL MAKE REASONABLE EFFORT TO ENSURE THAT ALL LAWYERS IN THE FIRM, INCLUDING OTHER PARTNERS, CONFORM TO THE RULES OF PROFESSIONAL CONDUCT.

(b) A LAWYER HAVING SUPERVISORY AUTHORITY OVER ANOTHER LAWYER SHALL MAKE REASONABLE EFFORT 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 RATIFIES THE CONDUCT INVOLVED; OR

   (2) THE LAWYER IS A PARTNER IN THE LAW FIRM IN WHICH THE OTHER LAWYER IS A PARTNER OR ASSOCIATE, OR HAS SUPERVISORY AUTHORITY OVER THE OTHER LAWYER, AND KNOWS OF THE CONDUCT AT A TIME WHEN ITS CONSEQUENCES CAN BE AVOIDED OR MITIGATED BUT FAILS TO TAKE REASONABLE REMEDIAL ACTION.

COMMENT:

Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm. This includes members of a partnership and the directors or principals in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

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

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

Paragraph (c)(2) defines the duty of a lawyer having direct authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Thus, partners of a private firm do not as such necessarily have direct authority over all work being done by the firm, but a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a
subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (a) or (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.
RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

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

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

COMMENT:

A lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted under the direction of a supervisor. However, the fact that an act was done at the direction of a supervisor may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless he knew or should have known of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.
RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

WITH RESPECT TO A NONLAWYER EMPLOYED OR RETAINED BY OR ASSOCIATED WITH A LAWYER, THE LAWYER:

(a) SHALL MAKE REASONABLE EFFORT TO ENSURE THAT THE PERSON'S CONDUCT IS COMPATIBLE WITH THE PROFESSIONAL OBLIGATIONS OF THE LAWYER; AND

(b) IS 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 RATIFIES THE CONDUCT INVOLVED; OR

(2) THE LAWYER IS A PARTNER IN THE LAW FIRM IN WHICH THE PERSON IS EMPLOYED, OR HAS 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:

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 should 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.
RULE 5.4  PROFESSIONAL INDEPENDENCE OF A FIRM

A LAWYER MAY BE EMPLOYED BY AN ORGANIZATION IN WHICH A FINANCIAL INTEREST IS HELD OR MANAGERIAL AUTHORITY IS EXERCISED BY A NONLAWYER, OR BY A LAWYER ACTING IN A CAPACITY OTHER THAN THAT OF REPRESENTING CLIENTS, SUCH AS A BUSINESS CORPORATION, INSURANCE COMPANY, LEGAL SERVICES ORGANIZATION OR GOVERNMENT AGENCY, BUT ONLY IF THE TERMS OF THE RELATIONSHIP PROVIDE IN WRITING THAT:

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

(b) INFORMATION RELATING TO REPRESENTATION OF A CLIENT IS PROTECTED AS REQUIRED BY RULE 1.6;

(c) THE ARRANGEMENT DOES NOT INVOLVE ADVERTISING OR PERSONAL CONTACT WITH PROSPECTIVE CLIENTS PROHIBITED BY RULES 7.2 AND 7.3; AND

(d) THE ARRANGEMENT DOES NOT RESULT IN CHARGING A FEE THAT VIOLATES RULE 1.5.

COMMENT:

In its classical form the law firm consisted solely of lawyers, assisted by apprentices and scriveners. Over the course of time the law firm has evolved into a variety of organizations. These include multimember partnerships, firms employing paraprofessionals and professionals of other disciplines, professional corporations, insurance companies that employ counsel who represent insureds, law departments of private organizations and government agencies, legal service agencies and defender organizations, and group legal service organizations in which nonlawyers, or lawyers acting in a managerial capacity, may be directors or have managerial responsibility. Many modern law firms employ nonlawyers to exercise broad managerial authority in the operation of the firm.

All such arrangements raise problems concerning the client-lawyer relationship. Given the complex variety of modern legal services, it is impractical to define organizational forms that uniquely can guarantee compliance with the Rules of Professional Conduct.

Whatever the form of organization, where nonlawyers exercise managerial authority or have a financial interest in an organization rendering legal services, the requirements of this Rule must be met. Many corporations now have written specifications concerning the authority of general counsel, and legal service organizations have similar definitions of the authority of staff attorneys.
RULE 6.1  PRO BONO PUBLICO SERVICE

A LAWYER SHOULD RENDER PUBLIC INTEREST LEGAL SERVICE. A LAWYER MAY DISCHARGE THIS RESPONSIBILITY BY PROVIDING PROFESSIONAL SERVICES AT NO FEE OR A REDUCED FEE TO PERSONS OF LIMITED MEANS OR TO PUBLIC SERVICE OR CHARITABLE GROUPS OR ORGANIZATIONS, OR BY SERVICE IN ACTIVITIES FOR IMPROVING THE LAW, THE LEGAL SYSTEM OR THE LEGAL PROFESSION.

COMMENT:

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

The American Bar Association House of Delegates has formally acknowledged “the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services” without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice.
RULE 6.2 ACCEPTING APPOINTMENTS

A LAWYER SHALL NOT DECLINE APPOINTMENT TO REPRESENT A PERSON EXCEPT FOR GOOD CAUSE, SUCH AS THE FOLLOWING:

(a) REPRESENTING THE CLIENT WOULD BE LIKELY TO RESULT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW; OR

(b) REPRESENTING THE CLIENT WOULD BE LIKELY TO RESULT IN AN UNREASONABLE FINANCIAL BURDEN ON THE LAWYER; OR

(c) THE CLIENT OR THE CAUSE IS SO REPUGNANT TO THE LAWYER AS TO BE LIKELY TO IMPAIR THE CLIENT-LAWYER RELATIONSHIP OR THE LAWYER'S ABILITY TO REPRESENT THE CLIENT.

COMMENT:

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

Appointed Counsel

For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome; for example, when it would impose a financial sacrifice so great as to be unjust, or if personal distaste for the cause makes adequate representation of the client impossible.

An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.
RULE 6.3  MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A LAWYER MAY SERVE AS A DIRECTOR, OFFICER OR MEMBER OF A LEGAL SERVICES ORGANIZATION, OTHER THAN THE LAW FIRM WITH WHICH THE LAWYER PRACTICES, NOTWITHSTANDING THAT THE ORGANIZATION SERVES PERSONS HAVING INTERESTS ADVERSE TO A CLIENT OF THE LAWYER IF:

(a) THE ORGANIZATION COMPLIES WITH RULE 5.4 CONCERNING THE PROFESSIONAL INDEPENDENCE OF ITS LEGAL STAFF; AND

(b) WHEN THE INTERESTS OF A CLIENT OF THE LAWYER COULD BE AFFECTED, THE LAWYER TAKES NO PART IN ANY DECISION BY THE ORGANIZATION THAT COULD HAVE A MATERIAL ADVERSE EFFECT ON THE INTEREST OF A CLIENT OF THE ORGANIZATION OR UPON THE INDEPENDENCE OF PROFESSIONAL JUDGMENT OF A LAWYER REPRESENTING SUCH A CLIENT.

COMMENT:

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

The provisions of this Rule apply where the lawyer who is director, officer or member of the legal services organization is in a firm having a client whose interests are in conflict with those of the legal services organization client. See Rules 1.7 and 1.10. Furthermore, under Rule 1.7 the lawyer’s affiliation with the legal services organization must be disclosed to the lawyer’s client, and the latter’s consent obtained, where that client’s interests are directly adverse to those of the client of the legal services organization. Similar action is required of the staff attorney of the legal services organization with respect to the client of the organization.

It may also be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established written policies in this respect can enhance the credibility of such assurances.
RULE 6.4  LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A LAWYER MAY SERVE AS A DIRECTOR, OFFICER OR MEMBER OF AN ORGANIZATION INVOLVED IN REFORM OF THE LAW OR ITS ADMINISTRATION NOTWITHSTANDING THE FACT THAT THE REFORM MAY AFFECT THE INTERESTS OF A CLIENT OF THE LAWYER IF THE LAWYER TAKES NO PART IN ANY DECISION THAT COULD HAVE A DIRECT MATERIAL EFFECT ON THE CLIENT.

COMMENT:

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject.

However, a lawyer has a professional obligation to the integrity of the program with which the lawyer is associated and to limit the possibility of benefiting a private client. Compare Rule 8.4(a). Isolation from matters directly affecting the lawyer’s client is an appropriate means to this end.
INFORMATION ABOUT LEGAL SERVICES

RULE 7.1  COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A LAWYER SHALL NOT MAKE ANY FALSE OR MISLEADING COMMUNICATION ABOUT THE LAWYER OR THE LAWYER'S SERVICES. A COMMUNICATION IS FALSE OR MISLEADING IF IT:

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

(b) IS LIKELY TO CREATE AN UNJUSTIFIED EXPECTATION ABOUT RESULTS THE LAWYER CAN ACHIEVE, OR STATES OR IMPLIES THAT THE LAWYER CAN ACHIEVE RESULTS BY MEANS THAT VIOLATE THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW; OR

(c) COMPARES THE LAWYER'S SERVICES WITH OTHER LAWYERS' SERVICES, UNLESS THE COMPARISON CAN BE FACTUALLY SUBSTANTIATED.

COMMENT:

This Rule governs all communications about a lawyer's services, including advertising and direct personal contact with potential clients permitted by Rule 7.2 and 7.3. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.
RULE 7.2 ADVERTISING

(a) SUBJECT TO THE REQUIREMENTS OF RULES 7.1 AND 7.3(b), A LAWYER MAY ADVERTISE SERVICES THROUGH PUBLIC MEDIA, SUCH AS A TELEPHONE DIRECTORY, LEGAL DIRECTORY, NEWSPAPER OR OTHER PERIODICAL, RADIO OR TELEVISION, OR THROUGH WRITTEN COMMUNICATION NOT INVOLVING PERSONAL CONTACT.

(b) A COPY OR RECORDING OF AN ADVERTISEMENT OR WRITTEN COMMUNICATION SHALL BE KEPT FOR ONE YEAR AFTER ITS DISSEMINATION.

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

COMMENT:

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

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

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

Paragraph (a) permits communication by mail to a specific individual as well as general mailings, but does not permit contact by telephone or in-person delivery of written material except through the postal service or similar delivery service.

This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.
Record of Advertising

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

Paying Others to Recommend a Lawyer

A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.
RULE 7.3 PERSONAL CONTACT WITH PROSPECTIVE CLIENTS

(a) SUBJECT TO THE REQUIREMENTS OF PARAGRAPH (b), A LAWYER MAY INITIATE PERSONAL CONTACT WITH A PROSPECTIVE CLIENT FOR THE PURPOSE OF OBTAINING PROFESSIONAL EMPLOYMENT ONLY IN THE FOLLOWING CIRCUMSTANCES:

(1) IF THE PROSPECTIVE CLIENT IS A CLOSE FRIEND, RELATIVE, FORMER CLIENT OR ONE WHOM THE LAWYER REASONABLY BELIEVES TO BE A CLIENT;

(2) UNDER THE AUSPICES OF A PUBLIC OR CHARITABLE LEGAL SERVICES ORGANIZATION; OR

(3) UNDER THE AUSPICES OF A BONA FIDE POLITICAL, SOCIAL, CIVIC, FRATERNAL, EMPLOYEE OR TRADE ORGANIZATION WHOSE PURPOSES INCLUDE BUT ARE NOT LIMITED TO PROVIDING OR RECOMMENDING LEGAL SERVICES, IF THE LEGAL SERVICES ARE RELATED TO THE PRINCIPAL PURPOSES OF THE ORGANIZATION.

(b) A LAWYER SHALL NOT CONTACT, OR SEND A WRITTEN COMMUNICATION TO, A PROSPECTIVE CLIENT FOR THE PURPOSE OF OBTAINING PROFESSIONAL EMPLOYMENT IF:

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

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

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

COMMENT:

Unrestricted solicitation involves definite social harms. Among these are harassment, overreaching, provocation of nuisance litigation and schemes for systematic fabrication of claims, all of which were experienced prior to adoption of restrictions on solicitation. Measures reasonably designed to suppress these harms are constitutionally legitimate. At the same time, measures going beyond realization of such objectives would appear to be invalid under relevant decisions of the United States Supreme Court.

In determining whether a contact is permissible under Rule 7.3(b), it is relevant to consider the time and circumstances under which the contact is initiated. For example, a person undergoing active medical treatment for traumatic injury is unlikely to be in an emotional state in which reasonable judgment about employing a lawyer can be exercised.
RULE 7.4  COMMUNICATION OF FIELDS OF PRACTICE

A LAWYER MAY COMMUNICATE THE FACT THAT THE LAWYER DOES OR DOES NOT PRACTICE IN PARTICULAR FIELDS OF LAW. A LAWYER SHALL NOT STATE OR IMPLY THAT THE LAWYER IS A SPECIALIST EXCEPT AS FOLLOWS:

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

(b) A LAWYER ENGAGED IN ADMIRALTY PRACTICE MAY USE THE DESIGNATION "ADMIRALTY," "PROCTOR IN ADMIRALTY" OR A SUBSTANTIALLY SIMILAR DESIGNATION; AND

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

COMMENT:

This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services; for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist" or that the lawyer’s practice “is limited to” or “concentrated in” particular fields is not permitted. These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of these terms may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice. It is also misleading for a law firm to suggest that the firm specializes unless all members of the firm are recognized as specialists or unless it is clearly indicated which firm members are so recognized.

Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.
RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A LAWYER SHALL NOT USE A FIRM NAME, LETTERHEAD OR OTHER PROFESSIONAL DESIGNATION THAT VIOLATES RULE 7.1. A TRADE NAME MAY BE USED BY A LAWYER IN PRIVATE PRACTICE IF IT DOES NOT IMPLY A CONNECTION WITH A GOVERNMENT AGENCY OR WITH A PUBLIC OR CHARITABLE LEGAL SERVICES ORGANIZATION AND IS NOT OTHERWISE FALSE OR MISLEADING.

(b) A LAW FIRM PRACTICING IN MORE THAN ONE JURISDICTION MAY USE THE SAME NAME IN EACH JURISDICTION, BUT IDENTIFICATION OF THE MEMBERS AND ASSOCIATES IN AN OFFICE OF THE FIRM SHALL INDICATE THE JURISDICTIONAL LIMITATIONS ON THOSE NOT LICENSED TO PRACTICE IN THE JURISDICTION WHERE THE OFFICE IS LOCATED.

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

(d) LAWYERS SHALL NOT HOLD THEMSELVES OUT AS PRACTICING IN A LAW FIRM UNLESS THE ASSOCIATION IS IN FACT A FIRM.

COMMENT:

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

With regard to paragraph (d), lawyers sharing office facilities, but who are not, in fact, partners may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.
RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

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

(a) KNOWINGLY MAKE A FALSE STATEMENT OF MATERIAL FACT;

OR

(b) SUBJECT TO THE PROVISIONS OF RULE 1.6 REGARDING CONFIDENTIAL INFORMATION, FAIL TO DISCLOSE A FACT NECESSARY TO CORRECT A MISAPPREHENSION KNOWN BY THE PERSON TO HAVE ARISEN IN THE MATTER, OR KNOWINGLY FAIL TO RESPOND TO A LAWFUL DEMAND FOR INFORMATION FROM AN ADMISSIONS OR DISCIPLINARY AUTHORITY.

COMMENT:

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

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

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.
RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

(a) A LAWYER SHALL NOT MAKE A STATEMENT CONCERNING THE QUALIFICATIONS OF A JUDGE, ADJUDICATORY OFFICER OR PUBLIC LEGAL OFFICER, OR OF A CANDIDATE FOR ELECTION OR APPOINTMENT TO JUDICIAL OR LEGAL OFFICE, THAT THE LAWYER KNOWS TO BE FALSE OR WITH RECKLESS DISREGARD AS TO ITS TRUTH OR FALSITY.

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

COMMENT:

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.
RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

A LAWYER HAVING INFORMATION INDICATING THAT ANOTHER LAWYER HAS COMMITTED A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT THAT RAISES A SUBSTANTIAL QUESTION AS TO THAT LAWYER'S HONESTY, TRUSTWORTHINESS OR FITNESS AS A LAWYER IN OTHER RESPECTS, SHALL REPORT SUCH INFORMATION TO THE APPROPRIATE PROFESSIONAL AUTHORITY, EXCEPT AS PROVIDED IN RULE 1.6.

COMMENT:

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they encounter evidence indicating violation of the Rules of Professional Conduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

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

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.
RULE 8.4 MISCONDUCT

IT IS PROFESSIONAL MISCONDUCT FOR A LAWYER TO:

(a) VIOLATE OR ATTEMPT TO VIOLATE THE RULES OF PROFESSIONAL CONDUCT, KNOWINGLY ASSIST ANOTHER TO DO SO, OR DO SO THROUGH THE ACTS OF ANOTHER;

(b) COMMIT A CRIMINAL OR FRAUDULENT ACT THAT REFLECTS ADVERSELY ON THE LAWYER'S HONESTY, TRUSTWORTHINESS OR FITNESS AS A LAWYER IN OTHER RESPECTS;

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

(d) PRACTICE LAW IN A JURISDICTION WHERE DOING SO VIOLATES THE REGULATION OF THE LEGAL PROFESSION IN THAT JURISDICTION;

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

(f) KNOWINGLY ASSIST A JUDGE OR JUDICIAL OFFICER IN CONDUCT THAT IS A VIOLATION OF APPLICABLE RULES OF JUDICIAL CONDUCT OR OTHER LAW.

COMMENT:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty or breach of trust are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

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.

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

Practice of Law

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. Paragraph (e) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer retains responsibility for their work. See Rule 5.3. Nor does paragraph (e) make it improper for a lawyer to be employed by an organization meeting the requirements of Rule 5.4. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies.
RULE 8.5  JURISDICTION

A LAWYER ADMITTED TO PRACTICE IN THIS JURISDICTION IS SUBJECT TO THE RULES OF PROFESSIONAL CONDUCT ALTHOUGH ENGAGED IN PRACTICE ELSEWHERE.

COMMENT:

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 8.4(d).

If the rules of professional ethics in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.