THE REVISED ABA MODEL RULES OF PROFESSIONAL CONDUCT:
SUMMARY OF THE WORK OF ETHICS 2000

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Introduction

The American Bar Association Commission on Evaluation of the Rules of Professional Conduct (the “Ethics 2000” Commission) was established in the spring of 1997 to undertake a comprehensive study and evaluation of the ABA Model Rules of Professional Conduct in light of developments in the law and in the legal profession since the Rules' adoption in 1983. [FN1] Experience had revealed substantive shortcomings in some rules and lack of clarity in others, and the need to reconcile text and commentary in a number of cases. Moreover, while thirty-nine states and the District of Columbia had by then adopted some version of the Model Rules, there were significant variations in particular rules from jurisdiction to jurisdiction. [FN2] The desirability of a complete review of the rules to promote national uniformity and consistency was underscored by the extensive and innovative interpretive work of The American Law Institute's Restatement of the Law Governing Lawyers (the “Restatement”), then nearing completion.

In approaching its work, the Commission was mindful of the legal profession's rapidly changing internal and external environment, particularly the expanded scope and complexity of client activities, heightened public scrutiny of lawyers' involvement in those activities, the impact of technology and globalization, and new competitive pressures on law firms including specialization, multidisciplinary practice, and increased use of in-house counsel. These developments have in turn drawn into question traditional jurisdictional limits on the practice of law, the allocation of authority between lawyer and client, ethical restrictions on lawyer mobility and on fee-sharing (with other lawyers and with nonlawyers), the special status of government lawyers under the rules, and the parameters of such time-honored concepts as confidentiality, civility, and conflict of interest. They have raised new issues of law firm responsibility for the conduct of its
constituent lawyers and revived the discussion of whether a lawyer's obligation to perform pro bono service should be enforced through the disciplinary process.

The Commission considered it important to address these emerging trends, as well as situations in which state versions of particular rules vary widely, in light of the ABA's historical role in developing consensus on ethical standards for the profession. It was greatly assisted by, and often incorporated, the results of state experimentation in its effort to produce rules that would commend themselves to uniform adoption.

I. Premises and Progress of the Commission's Work

The Commission decided early on that the basic concepts and architecture of the Model Rules should be retained, as well as its function as a disciplinary code, and that it would therefore be able to take a relatively “minimalist” approach to its task. [FN3] Its presumptive operating principle was to make no change unless substantively necessary. As time went along, however, it seemed that more and more fell into this category, and that almost every rule required some improvement, if not a complete overhaul.

In the end, the Commission proposed a number of significant substantive changes to the existing rules, as well as several entirely new rules. It also proposed numerous editorial and stylistic changes in the interest of clarification, and amplification to commentary to provide additional guidance in interpreting and applying the rules. It decided against including aspirational “good practice” notes following each rule, concluding that these would be out of place in a disciplinary code.

In the nearly five years it took for the Commission to see its work through to approval by the ABA House of Delegates, it held fifty-one full days of meetings and more than a dozen public hearings. It opened its meetings to the public, engaged in regular communication with its 250-member advisory council, reached out to special interest groups, and posted its discussion drafts and meeting minutes on the Internet. It received and considered literally hundreds of comments on its work. After publishing a preliminary report with a complete set of recommended rules changes in November 2000, the Commission received additional comments and met with numerous interested entities over the next eighteen months. Its final report, submitted to the House in August 2001, reflected a number of changes made in response to comments received. The Commission subsequently agreed to a number of additional changes suggested to it while the report was under consideration by the House.

The House began its consideration of the Commission's work product at its Annual Meeting in August 2001 and completed it in February 2002. With a handful of important exceptions, the House adopted all of the Commission's recommendations. [FN4] The Commission's recommended changes in Rules 5.5 and 5.8 were not included in the debate because those rules were still under review by the Commission on Multijurisdictional Practice.
With the adoption of the Commission's recommendations by the ABA House on February 5, 2002, the amendments to the Model Rules became effective as ABA policy. Of course, these rules are not binding on lawyers unless and until they are adopted by the particular jurisdiction in which the lawyer is admitted to practice or, in some cases, is in fact practicing.

Summarized below are the more significant rule revisions proposed by the Commission. Changes that the Commission decided not to recommend are mentioned, where the author considered them noteworthy. Recommendations rejected by the House are included, as well as any significant conforming amendments made necessary as a result. The author made every effort to avoid inserting her personal views about or interpretation of particular changes recommended by the Commission, intending to make this a record rather than a review of its work. While this summary is intended to serve as a ready reference for practitioners and students, it is not an official legislative history, and should not be cited as such.

II. Significant Revisions to the Model Rules

a. preamble and scope

1. Preamble

Language has been added to the Preamble to emphasize a lawyer's duty to ensure access to the legal system for those who cannot afford or secure adequate legal counsel, and to further the public's understanding of and confidence in the rule of law and the justice system. A new paragraph notes that certain rules may apply to lawyers serving in a nonrepresentational capacity, such as a third party neutral, or to practicing lawyers even when they are acting in a nonprofessional capacity.

2. Scope

The provisions of the Scope section that discuss the effect of a rule violation on a lawyer's substantive legal duty (renumbered paragraph [20]), have been modified in recognition of the weight of judicial opinion in malpractice litigation that a violation of the rules may be admissible as evidence of a breach of the duty of care. The paragraph now explains that violation of a rule should not “itself” give rise to a cause of action against the lawyer or “necessarily” warrant disqualification or any other non-disciplinary remedy. However, violation of a rule “may be evidence of a breach of the applicable standard of conduct.” [FN5]

b. terminology
The terminology section that was previously part of the Preamble/Scope section of the Rules has been elevated to rule status as Rule 1.0 (“Terminology”). The section includes several new definitions: “informed consent,” “screened,” “tribunal,” “writing” and “confirmed in writing,” and several definitions in the current terminology section have been revised.

1. “Informed Consent”

The Commission clarified a lawyer's obligations in connection with obtaining client consent (e.g., to conflicts of interest, to limitations on scope of representation, to business transactions with clients), by replacing the concept of “consent after consultation” with the somewhat more familiar concept of “informed consent.” As defined, “informed consent” denotes agreement “after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” The definition also makes clear that the client's informed consent must be “confirmed in writing” in many cases, notably in connection with conflict waivers. Except in a few specific situations, the written confirmation need not be signed by the client. [FN6]

New commentary explains how one determines the adequacy of communication about risks and alternatives necessary to make consent properly “informed.” In this regard, it may be relevant that the person from whom consent must be obtained is already aware of the relevant facts and their implications, though by not communicating with the client personally the lawyer assumes the risk that the client is inadequately informed and that the consent will therefore be invalid. Whether the client is “experienced in legal matters and in making decisions of the type involved” is relevant in assessing whether the lawyer has complied with her obligations under the rule. Moreover, informed consent may generally be inferred where a client or other person has been independently represented by other counsel in giving the consent. [FN6]

2. “Firm”

The revised definition now specifies several different forms of private association. The commentary (imported from Rule 1.10 on “Imputation of Conflicts” and revised) explains that a “firm” may include lawyers sharing office space, depending on such facts as how the lawyers present themselves to the public, the terms of any formal agreement between them, and whether they have mutual access to information concerning the clients they serve. It also notes that “there is ordinarily no question” that members of the law department of an organization, including government agencies, constitute a firm—although there may sometimes be uncertainty as to the identity of the client or clients. Whether the lawyers should be treated as associated with each other can depend on the facts of the situation, and on the particular rule involved.

3. “Fraud”
The definition has been revised to make clear that the term fraud denotes conduct that is fraudulent under applicable substantive or procedural law, as long as it has a “purpose to deceive.” New commentary explains that under the proposed new definition of fraud, “it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.” The Commission considered and ultimately rejected a broader definition of fraud that would potentially have included negligent misrepresentation or failure to inform. The effect of this broader definition of fraud would have been to expand the category of situations in which a lawyer was obliged to take action to deal with client wrongdoing.

4. “Screened”

This new definition explains the general elements of an adequate screen, for purposes of Rules 1.11, 1.12, and 1.18. They include the “timely” imposition of procedures designed to “isolate” the personally disqualified lawyer from any participation in a matter, so as to protect confidential information in the lawyer's possession. New commentary states that all lawyers in a firm should be aware of the fact that screening is in place, and of their obligation not to communicate with the screened lawyer about the matter. Additional screening measures may be advisable, such as a written undertaking by the screened lawyer and denial of access to firm files relating to the matter, depending on the circumstances.

5. “Tribunal”

The new definition of a “tribunal” includes “a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.” An entity acts in “an adjudicative capacity” if it “will render a binding legal judgment directly affecting a party's interests in a particular matter.” Ordinarily, an administrative agency in a rule-making proceeding is not a “tribunal.”

6. “Writing” and “Confirmed in Writing”

The new definition of “writing” includes both tangible and electronic records. When a person's informed consent is required to be “confirmed in writing,” it is sufficient if “the lawyer promptly transmits to the person [a writing] confirming an oral informed consent.” In other words, the requirement of confirmation can in most situations be satisfied by a letter from the lawyer to the client that need not be signed by the client. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. There are only three rules that require a client actually to sign a consent: Rule 1.5(c) on contingent fees, Rule 1.8(a) on business transactions with clients, and Rule 1.8(g) on aggregate settlements. [FN7]

c. obligations to clients
1. Scope of Representation

The Commission discussed at length the allocation of decision-making authority between lawyer and client under paragraph (a) of Rule 1.2 (formerly “Scope of Representation,” retitled “Scope of Representation and Allocation of Authority Between Lawyer and Client”). The Commission was concerned that the current formulation sends conflicting signals: on the one hand it might be read to require consultation with the client before the lawyer takes any action; and on the other it suggests that the lawyer is not obliged to abide by the client's decisions with respect to the “means,” as opposed to the “objectives,” of the representation. After considering and rejecting a number of alternative formulations, the Commission decided to add a new sentence to clarify that “[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation,” and to leave the resolution of disagreements with clients about means to be worked out within a framework defined by the law of agency, the right of the client to discharge the lawyer, and the right of the lawyer to withdraw from the representation if the lawyer has a fundamental disagreement with the client. To emphasize the lawyer's obligation to consult, a cross reference to Rule 1.4 (“Communication”) was added to the text.

Limitations on the scope of representation under paragraph (c) were made subject to a reasonableness requirement, in addition to the current requirement of client consent.

2. Assisting Client Crime or Fraud

Paragraph (d) of Rule 1.2, as adopted in 1983, prohibits a lawyer from “assisting” the client in conduct she knows is criminal or fraudulent. This provision raises important unsettled questions about the relationship between a lawyer's obligation to third parties when she learns that her services have been or are being used to further client crime or fraud, and her obligation of confidentiality to her client under Rule 1.6 (“Confidentiality of Information”). The commentary has been amplified to explain a lawyer's obligations where she discovers that she has inadvertently been assisting an ongoing client fraud or crime: if withdrawal alone is insufficient to disassociate the lawyer from the client wrongdoing, it may be necessary for the lawyer to “give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like.”

In light of the House decision not to adopt the Commission's proposals to permit disclosure of client financial crime or fraud, [FN8] the following final proposed new sentence of this comment was omitted: “In extreme cases, substantive law may require a lawyer to disclose information relating to the representation that would otherwise be protected by Rule 1.6.” [FN9]

The lawyer's obligation to act to avoid assisting client crime or fraud is addressed more particularly in connection with paragraph (b) of Rule 4.1 (“Truthfulness in Statements to Others”), which is now identified as a “specific application” of the general duty set forth in Rule 1.2(d). [FN10]
3. Communication with Client

The text of Rule 1.4 (“Communication”) was expanded to identify more specifically various aspects of the lawyer's duty to keep the client “reasonably informed” about the status of a matter. The expansion also consolidated all discussion of the duty to communicate in this Rule rather than having some parts stated in Rule 1.2. The comment now makes clear that a lawyer who has blanket settlement authority does not have to advise the client of every offer.

4. Fees

Paragraph (a) of Rule 1.5 (“Fees”) has been amended to make clear that charging an excessive fee is a disciplinable offense, as it was under the Model Code. In addition, paragraph (a) now requires that costs and disbursements, as well as fees, be “reasonable under the circumstances.” The Commission initially proposed to include the “degree of risk assumed by the lawyer” [FN11] as a factor to be considered in determining the reasonableness of a fee, as a substitute for current paragraph (a)(8), but in the end decided against it. The Commission rejected a proposal to add “the relative sophistication of the lawyer and the client” [FN12] to this list. The Commission added a comment explaining that the enumerated factors are not exclusive and that not all factors will be relevant in each instance. It further states the method by which lawyers may properly charge for services performed or incurred in house, along the lines suggested in ABA Ethics Opinion 379 (1993). Thus, a lawyer may seek reimbursement for in-house costs and services, such as copying and telephone charges, either by charging “a reasonable amount to which the client has agreed in advance,” or by charging “an amount that reasonably reflects the cost incurred.”

The House rejected the Commission's proposal that a lawyer be required to give the client written notice of the basis or rate of the fee she intends to charge. [FN13] Thus the rule remains that such notice must be given “preferably in writing.”

With respect to contingent fees, paragraph (c) already required the lawyer to obtain the client's signed agreement to a fee arrangement where the fee is contingent. New commentary makes clear that a contingent fee, like any other fee, is subject to the rule's reasonableness standard. The Commission's only guidance for determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, is that a lawyer must “consider the factors that are relevant under the circumstances.” It retained the reference in existing commentary to “applicable law” that “may impose limitations on contingent fees, such as a ceiling on the percentage allowable,” but deleted language requiring a lawyer to offer a client alternative bases for a fee where there is doubt whether a contingent fee is in the client's best interest. It retained the bar on contingent fees in domestic relations matters involving divorce or child custody, including actions to change the terms of the original divorce or custody decree, but new commentary explains that this bar does not extend to post-divorce actions to collect arrearages.
With respect to a fee paid in property instead of money, revised comment [4] replaces the vague reference to “special scrutiny” with an explicit cross-reference to Rule 1.8(a), making clear that a fee paid in property may be regarded as a “business transaction” with the client. [FN14] The Reporter’s Explanation of Changes notes that a recent ABA Business Law Section report on alternative billing practices recommended that Rule 1.8(a) treatment be given to fees paid in stock or property.

Rule 1.5(e) will now require a client's agreement to a division of the fee in all cases, even those in which the division is in proportion to the services performed. The client must also agree to the share each lawyer will receive, and this agreement must be confirmed in writing — though the agreement need not be signed by the client. The Commission decided to retain the requirement that each lawyer assume joint responsibility for the representation where the division is not in proportion to the services performed. [FN15] New commentary explains more precisely what “joint responsibility” entails, replacing a vague reference to Rule 5.1 in existing commentary with a clear requirement that each lawyer receiving part of a fee retain “financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.” [FN16] Finally, the commentary emphasizes, through a cross-reference to Rule 1.1, that the referring lawyer has an obligation to refer the matter to a competent lawyer.

5. Confidentiality

While the Commission decided not to change the broad concept of “information relating to the representation” under Rule 1.6 (“Confidentiality of Information”), it did recommend a substantial expansion of the grounds for discretionary disclosure. Under existing Rule 1.6, a lawyer may reveal client information only if impliedly authorized to do so, to defend herself against criminal or disciplinary charges or in a fee controversy with the client, or “to prevent the client from committing a criminal act that is likely to result in imminent death or substantial bodily harm.”

Under the Commission's proposed changes to Rule 1.6(b), disclosure would be permitted (but not required) “to the extent the lawyer reasonably believes necessary” to prevent “reasonably certain death or substantial bodily harm”; to prevent the client from committing a crime or fraud reasonably certain to result in substantial financial injury, if it involves the lawyer's services; and to prevent, mitigate or rectify the consequences of a client's financial fraud or crime in furtherance of which the lawyer's services were used. The Commission's proposed changes to paragraph (b) were intended to expand the grounds for permissive disclosure, in line with the Restatement and the recommendations of a number of scholars, substantially reverting to the original proposals of the Kutak Commission.

In addition to the “implied authorization” and “self-defense” exceptions to confidentiality already in the rules, the Commission added another new provision explicitly permitting disclosure to obtain legal advice about compliance with the Rules. Note that new commentary to Rule 1.6 directs that “a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose.”
Finally, the Commission decided that disclosure should in no case be mandatory under Rule 1.6, even where disclosure is required by another rule or by a law or court order. At the same time, however, Rule 1.6 should not forbid disclosure in such situations. Thus a final new section of paragraph (b) permits, but does not require, the lawyer to disclose information where she is otherwise legally obliged to do so. As a result, Rule 1.6 does not add an ethical dimension, or the possibility of discipline, to whatever legal disclosure obligation the lawyer may otherwise have. New commentary deals with a lawyer's duty to raise non-frivolous challenges to disclosure requirements external to the Rules, including disclosures required by order of a court or other tribunal. The only disclosure obligation under the rules that overrides Rule 1.6 is that contained in Rule 3.3 (“Candor to the Tribunal”). [FN17]

The House adopted most of the Commission's recommended new bases for permissive disclosure, but rejected the two relating to prevention and mitigation of client financial crime or fraud. [FN18] Thereafter, as a conforming amendment, the Commission restored and combined three existing comments relating to the lawyer's obligation to withdraw where his services will be used by the client “in materially furthering a course of criminal or fraudulent conduct.” The consolidated Comment [14] provides that in such circumstances a lawyer may also “withdraw or disaffirm” any opinion or other written work product. [FN19] A corporate lawyer finding himself in such circumstances should “make inquiry within the organization,” as provided in Rule 1.13 (“Organization as Client”). [FN20]

6. Conflict of Interest - Current Clients

The Commission completely reorganized Rule 1.7 (retitled “Conflict of Interest: Current Client”), and substantially revised the commentary, in an effort to clarify the rule's provisions on concurrent conflicts. However, the basic prohibitions of Rule 1.7 remain substantively unchanged. Paragraph (a) now defines what constitutes a conflict of interest, and distinguishes conflicts in which a lawyer may be “directly adverse” to a client from those in which his representation of the client may be “materially limited.” Paragraph (b) provides that a lawyer may undertake a representation involving a conflict with the “informed consent” of each affected client, except in certain situations.

Client consent to a conflict is valid only if confirmed in writing, though the writing need not be signed by the client. (The terms “informed consent” and “confirmed in writing” are defined in Rule 1.0.) [FN21] New commentary explains that “the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to resolve disputes or ambiguities that might later occur.” The Commission was persuaded that the requirement of a writing has proved workable in California's diverse bar, and that it protects both clients and lawyers.

As noted, Rule 1.7(a) distinguishes two basic types of concurrent conflicts. A “directly adverse” conflict under paragraph (a)(1) is defined in commentary as one in which the lawyer takes a position on behalf of one client against another client, in the same or an
unrelated matter. A directly adverse conflict might also arise if a lawyer were required to cross-examine her own client. A directly adverse conflict may arise in a transactional setting as well as in litigation, as where a lawyer represents a buyer against a seller who is a client in an unrelated matter.

Even where there is no direct advereness, a conflict may exist under paragraph (a)(2) if there is a “significant risk” that a lawyer's ability to carry out an appropriate course of action for the client would be “materially limited as a result of the lawyer's other responsibilities or interests.” “Material limitation” conflicts always require an examination of the facts, and may derive from the lawyer's responsibilities to another client or to a former client, or from the lawyer's own interests or duties to a third person. Commentary explains that simultaneous representation in unrelated matters of clients whose interests are only economically adverse does not constitute a “directly adverse” conflict, although it may constitute a “material limitation” conflict, depending upon the facts. Similarly, a “positional conflict,” in which a lawyer takes inconsistent legal positions in different tribunals on behalf of different clients, may in some circumstances constitute a “material limitation” conflict.

The specific prohibition previously contained in Rule 1.8(i), barring a lawyer from representing a client when a close family member is on the other side of a matter, has been replaced by new commentary to Rule 1.7 explaining that such a representation will ordinarily (but not always) constitute a conflict under Rule 1.7(a)(2). However, as a personal interest conflict, it will ordinarily not be imputed to other members of a firm under the amendments to Rule 1.10. [FN22] Thus, for example, a husband and wife may not appear on opposite sides of a case; however, a member of the husband's firm may participate in a matter in which the wife is opposing counsel. Exceptions to this general rule could arise where one or both of the firms involved is very small, so that the financial interest of both spouses in the matter is substantial.

Paragraph (b) defines three circumstances in which a conflict is “nonconsentable,” i.e., where a lawyer cannot properly ask for consent: 1) a lawyer may not represent multiple clients even in a transactional setting, if the lawyer does not “reasonably believe” that she can “provide competent and diligent representation to each affected client”; 2) a lawyer may not undertake a representation “prohibited by law,” even with client consent; and 3) a lawyer or lawyers from the same firm may under no circumstances represent clients asserting claims against one another in the same litigation or other proceeding before a tribunal. New commentary provides additional guidance on nonconsentability in a transactional setting, as well as on common representation generally.

The Commission discussed at length the issue of prospective consent to conflicts. A new comment to Rule 1.7 explains that a lawyer may ask a client to consent to conflicts that may arise in the future, but warns that the efficacy of such advance consents will depend upon the extent to which the client “reasonably understands the material risks that the waiver entails.” For this reason, a general open-ended consent will ordinarily not be effective. Advance consent is more likely to be effective where a client is “an experienced user of the legal services involved” and is “reasonably informed regarding
the risk that a conflict may arise,” particularly if the client is independently represented in connection with giving prospective consent, and if the consent is limited to future conflicts unrelated to the subject of the representation.

Other new comments deal with such controversial and unsettled conflicts issues as corporate family conflicts, and class action conflicts. With respect to the latter, “unnamed members of the class are ordinarily not considered to be clients.” When a lawyer represents a corporation, he does not necessarily represent constituent or affiliated organizations for conflicts purposes. Conflicts of interest that may arise between an organization and its constituents, including constituents who purport to speak or act for the organization, are more specifically addressed by Rule 1.13 (“Organization as Client”), in whose provisions the Commission proposed no substantive change. [FN23]

New commentary also discusses how a lawyer should respond to “unforeseen developments” giving rise to a conflict in the course of a representation, such as changes in corporate and other organizational affiliation, or the addition or realignment of parties in litigation, and whether the lawyer may continue to represent any of the clients in the circumstances. A lawyer's obligation to withdraw where a conflict arises after a representation has begun is reviewed in several contexts. Where more than one client is involved, the questions are whether a lawyer must terminate both representations and whether client consent is sufficient to permit the lawyer to continue any participation in the matter.

The issues raised by common representations, in litigation and in transactional settings, are now elaborated in a series of new comments to Rule 1.7. These new comments discuss the circumstances under which a lawyer may undertake a common representation in the first place if it appears that the clients' interests potentially conflict; the effect of common representations on client-lawyer confidentiality and the attorney-client privilege; limits on the scope of representation and advocacy in this context; positional conflicts that arise in litigation; and the lawyer's options if a conflict unexpectedly arises in the course of the representation and cannot be resolved (the lawyer “ordinarily ... will be forced to withdraw from representing all of the clients if the common representation fails”). The commentary recognizes that conflicts may arise in estate planning, where a lawyer is called upon to prepare wills for several family members, such as husband and wife, and points out that the identity of the client may depend upon the law of the jurisdiction. In order to comply with the rules, the lawyer should “make clear [his] relationship to the parties involved.” 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.”

Rule 2.2 (“Intermediary”) was deleted entirely. The Commission was concerned that this rule has been the source of some confusion insofar as it suggests that a lawyer representing multiple clients as “intermediary” is not fully subject to Rule 1.7. An entirely new rule on third party neutrals addresses some of the issues previously covered by Rule 2.2. [FN24]
7. Conflict of Interest — Former Clients

No substantive change was made in the text of Rule 1.9 (formerly “Conflict of Interest: Former Client,” retitled “Duties to Former Clients”), but the commentary was substantially modified to focus on the lawyer's continuing duty of confidentiality to former clients, particularly in a subsequent representation involving “the same or a substantially related” matter. An entirely new Comment [3] explains that matters will be deemed “substantially related” for purposes of the rule “if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.” The commentary explains that information acquired in a prior representation that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Moreover, in the case of an organizational client, “general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation.” The passage of time may render information obtained in a prior representation obsolete, a circumstance that may also be relevant in deciding whether two matters are substantially related.

Another addition to commentary makes clear that a lawyer who has represented multiple clients in a matter may not subsequently represent one client against the others in the same or a substantially related matter, without the consent of all affected clients.

8. Imputation and Screening

The Commission made no change in the rule that imputes conflicts arising under Rules 1.7 and 1.9 to all lawyers associated in a “firm” under Rule 1.10 (formerly “Imputed Disqualification: General Rule,” retitled “Imputation of Conflicts”). The commentary to Rule 1.0 (“Terminology”) now explains that a “firm” may include lawyers sharing office space without adequate measures to protect confidential information. [FN25] The Commission considered but ultimately decided against recommending a change in the scienter provisions of Rule 1.10, to impute one lawyer's conflicts to others in his firm who know “or reasonably should know” of the conflict. (The scienter provisions of rules dealing with imputation of conflicts in specific situations, listed in the following paragraph, have been brought into conformity with the subjective knowledge standard in current Rule 1.10.)

As amended, the text of Rule 1.10(a) now exempts from imputation “personal interest conflicts” that do not present a “significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.” Thus, for example, the personal disqualification of a lawyer who has a financial interest in an opposing party, or who is personally related to or negotiating for employment with opposing counsel, would ordinarily not be imputed to other lawyers in the firm. The Commission added commentary to Rule 1.7 addressing the conflict that arises when a lawyer negotiates for employment with an adversary while a case is pending. [FN26]
New commentary to Rule 1.10 states that the conflicts of nonlawyer firm personnel such as paralegals, and conflicts of a lawyer resulting from prior work as a nonlawyer (including as a law student), are not imputed to others in the firm, though such persons “ordinarily must be screened” from any personal participation in the matter. [FN27]

The Commission proposed in its August 2001 report to permit screening without client consent in the case of lawyers moving between firms, to avoid disqualification of an entire firm where a lateral hire previously worked on a matter. [FN28] However, the House rejected this proposal. Accordingly, the only situations in which non-consensual screening is permitted are those involving former government lawyers, judges and third party neutrals, [FN29] and lawyers who interview prospective clients. [FN30]

9. Conflict of Interest — Government Lawyers

The Commission consolidated the conflict of interest obligations of government lawyers in a revised Rule 1.11 (formerly “Successive Government and Private Employment,” retitled “Special Conflicts of Interest for Former and Current Government Officers and Employees”). This rule reflects a dual concern with the lawyer's duties when opposing a former client, and with the special obligations of a government employee not to abuse the power of public office. The revised Rule 1.11 makes clear that lawyers employed by the government are fully subject as well to Rule 1.7.

The Commission wrestled with the issue whether former government lawyers should be subject to the requirements of Rule 1.9 when they are opposing their former government clients. After hearing concerns that applying the Rule 1.9 “substantial relationship” test to former government lawyers would inhibit transfer in and out of government, the Commission decided that the only applicable test for the disqualification of former government lawyers should be the one that already exists in Rule 1.11(a): a former government lawyer is disqualified only where she participated “personally and substantially” in “a particular matter,” whether or not she is adverse to the government. [FN31] A new comment [10] makes clear, however, that two arguably separate matters may be regarded as the same, depending on whether they involve the same basic facts, the same or related parties, and the time elapsed between them. The narrow definition of “matter” in the black letter was retained, so that a former government lawyer is barred from representing another client (either a private client or another public entity) only in matters involving a specific party or parties, thus excluding most rule-making and policy-making matters from the scope of the rule.

The revised Rule 1.11 also makes clear in its text that former government lawyers have a general obligation of confidentiality to their former government clients under Rules 1.6 and 1.9(c). The prohibition in existing Rule 1.11(b) against using “confidential government information” about a person acquired during government service against that person was retained.
The Commission made Rule 1.11(d) the sole source for the obligations of current government lawyers, incorporating by reference the provisions of Rule 1.7 respecting concurrent conflicts, and the provisions of Rule 1.9 respecting obligations to former private clients. In addition, government lawyers are barred from any participation on behalf of the government in a matter where they formerly represented another client, even if the former client consents, except with the consent of the government. [FN32] Whether movement from one government agency to another triggers application of the rule depends upon whether the two public entities should be regarded as the same client. The question of the identity of the government client is addressed in a comment to Rule 1.13. [FN33]

Rule 1.10 remains inapplicable to former and current government lawyers. [FN34] However, Rule 1.11 retains a special imputation provision applicable in the case of former government lawyers, providing that associated lawyers may not undertake a representation from which the former government lawyer is personally disqualified unless she is screened and apportioned no part of the fee resulting therefrom. The black letter of Rule 1.11(b) now provides that screening must be implemented in a timely manner, and that all affected parties must be notified. (The requirements of an effective screening arrangement are discussed in the Terminology section.) [FN35] While the conflicts of current government lawyers are not imputed to other associated government officers or employees, the commentary states that “ordinarily it will be prudent to screen such lawyers.”

10. Prospective Clients

Rule 1.18 (“Duties to Prospective Client”) is a new rule that addresses the “important events” that occur during the period in which a prospective client is deciding whether to retain a lawyer. The rule identifies the lawyer's duty of confidentiality to a person who discusses with her the possibility of forming a client-lawyer relationship, a well-settled matter under the law of attorney-client privilege. The rule extends the application of Rule 1.9 to prohibit representation adverse to the prospective client in the matter about which the lawyer was consulted, or one substantially related to it, but limits it to situations where the consulted lawyer received information that could be “significantly harmful” to the prospective client in the matter. Other lawyers in the firm may undertake or continue a representation in the matter without the prospective client's consent, but only as long as the personally disqualified lawyer took “reasonable measures” to avoid exposure to more potentially harmful information than necessary, and is screened from any participation in the matter. [FN36] Reference is made to the new definition of “screening” in Rule 1.0.

11. Transactions with Clients

The Commission reformulated and clarified some of the provisions of Rule 1.8 (“Conflict of Interest: Prohibited Transactions”), notably paragraph (a) regulating a lawyer's business transactions with clients. As amended, this provision requires the lawyer to advise the client in writing of the desirability of seeking independent legal counsel in the transaction, and to obtain the client's informed consent to the essential terms of the
transaction and the lawyer's role in it, including whether the lawyer is representing the client's interests in the transaction. The client's consent in this case must be evidenced by an actual writing. New commentary explains the risks associated with a lawyer's dual role as legal adviser and participant in a transaction with the client, pointing out that in some cases the conflict may be such that Rule 1.7 would preclude the lawyer from even seeking the client's consent to the transaction. [FN37]

The Commission initially proposed to amend the text of Rule 1.8(f) to require client consent not just to third party payment, as under the current rule, but also to third party “direction.” The Commission subsequently decided against making this change, out of a concern that it might be understood to impliedly condone third party direction without regard to the potential for interference with the lawyer's exercise of independent professional judgment on behalf of the client. [FN38]

The Commission deleted the “unless permitted by law” qualification on advance waiver of malpractice liability in paragraph (h)(1), so that an advance waiver will be permitted if the client is independently represented in giving it, whether or not there is a provision of “law” affirmatively permitting it.

As previously noted in the discussion of Rule 1.7, [FN39] the Commission decided to delete paragraph (i) of this rule, which absolutely prohibited persons closely related by blood or marriage from appearing on opposite sides of a matter. These issues are now addressed in the commentary to Rule 1.7 as a particular form of “personal interest” conflict that may or may not be prohibited under paragraph (a)(2) of that rule. The Commission believes that there is no longer a need for a special rule to avoid imputation of conflicts arising from close family relationships because personal interest conflicts are now ordinarily not imputed under Rule 1.10. [FN40]

The Commission added a new paragraph (j) to Rule 1.8 to prohibit “sexual relations” between a lawyer and a client, unless a consensual sexual relationship existed at the time the client-lawyer relationship commenced. New commentary provides that a lawyer for an organization, whether inside counsel or outside counsel, may not have a sexual relationship with a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters.

Another new paragraph (k) extends all of the prohibitions in Rule 1.8 to lawyers associated in a firm, except for the new prohibition on sexual relations with a client. (While sexual relations with a client will generally also give rise to a “personal interest” conflict under Rule 1.7, such conflicts are ordinarily not imputed to associated lawyers under the proposed amendments to Rule 1.10(a).) [FN41] The commentary notes that one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with the requirements of paragraph (a), even if the first lawyer is not personally involved in the representation of the client.

New commentary to Rule 1.8 deals with such controversial issues as a lawyer's use of information relating to the representation to the client's disadvantage, appointment of a
lawyer as executor of the client's estate, a lawyer's subsidization of lawsuits or administrative proceedings brought on behalf of a client, aggregate settlements, and prospective limitation of malpractice liability.

12. Organization as Client

The Commission considered including a specific provision in Rule 1.13 ("Organization as Client") permitting the lawyer to disclose wrongdoing by organizational constituents in the interests of the organization, but decided that this was unnecessary in light of its recommended general expansion of the permitted grounds for disclosure of client financial crime or fraud in Rule 1.6. After the House failed to adopt the Commission's proposals relating to prevention and mitigation of client financial crime or fraud, see section II.C.5 supra, the Commission did not revisit the special disclosure issues arising in the corporate context. Presumably this can be done at some point in the future through the ordinary process for rules amendment, if warranted.

The Commission amended the text of Rule 1.13 to clarify the point at which the lawyer must explain her role when dealing with organizational constituents whose interests are or may be adverse to the organization ("when the lawyer knows or reasonably should" replaces "when it is apparent"). It also revised the commentary dealing with the applicability of Rule 1.13 in the government context to incorporate a functional test for determining the identity of the government lawyer's client. The commentary was also amended to make clear that any special duty a government lawyer may have to prevent or rectify wrongful official action derives not from the rules of legal ethics but from external law.

13. Clients With Diminished Capacity

A number of amendments have been made to Rule 1.14 (formerly "Client Under a Disability," retitled "Client With Diminished Capacity") further explicating a lawyer's duties to a client whose capacity to make decisions concerning the representation is diminished by reason of minority or mental disability, or for some other reason. The term "diminished capacity" is substituted for "disability" throughout the rule. Where the lawyer believes that a client with diminished capacity is at risk of physical, financial or other harm unless action is taken, the lawyer may take "reasonably necessary protective action," including appointment of a guardian "in appropriate cases." In such circumstances, the lawyer may be impliedly authorized under Rule 1.6 to reveal information relating to the representation to protect the client's interests.

New commentary discusses the lawyer's relationship with the client's family members, noting the potential risk in the common practice of having family members or other persons participate in the lawyer's representation of a client with diminished capacity. Where necessary to assist in the representation, the presence of such persons does not abrogate the attorney-client privilege. The Commission deleted as unclear and potentially mischievous the sentence in commentary referring to the possibility that a lawyer may act as "de facto" guardian and added guidance for the lawyer in taking protective actions.
measures short of seeking a guardian. The Commission decided against including a requirement that a lawyer advocate the least restrictive action on behalf of the client.

14. Withdrawal from Representation

The Commission clarified and made minor revisions in the grounds for permissive withdrawal in Rule 1.16 (“Declining or Terminating Representation”). The text was restructured to make clear that a lawyer may withdraw for any reason if withdrawal can be accomplished “without material adverse effect on the interests of the client.” Where there would be such an adverse effect, paragraph (b)(4) now permits withdrawal only where the client insists upon taking action that the lawyer considers “repugnant” or with which she has a “fundamental disagreement,” not simply when she considers the client's actions “imprudent.” This limits the lawyer's ability to threaten withdrawal whenever she disagrees with the client over the course of the representation, which detracts from the client's ability to direct the representation.

The Commission initially proposed that a lawyer should be permitted to withdraw on grounds of “unreasonable financial burden” only if the financial burden was “unforeseeable” at the outset of the representation. Subsequently it decided not to include an explicit foreseeability requirement, on the ground that this would unduly restrict a lawyer's ability to withdraw. There may be circumstances in which the lawyer should be permitted to withdraw even where the financial burden could have been foreseen, and this factor is relevant in any event in determining whether the financial burden on the lawyer should be considered “unreasonable.”

Finally, lawyers are reminded of the requirement of obtaining court approval for withdrawal in certain circumstances. Additional issues affecting withdrawal where a conflict arises midway through a representation are addressed in new commentary to Rule 1.7; [FN42] and withdrawal as a remedial measure in cases where the lawyer's services have been or are being used in connection with client crime or fraud is addressed in the commentary to Rules 1.2(d), 3.3, and 4.1. [FN43]

The commentary now points out that “[o]rdinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded,” citing Rules 1.2(c), 1.3 comment [4], and 6.5. The lawyer is not required to give notice of withdrawal or termination to the client, though the commentary points out that “[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.”

15. Client Property

The Commission added a new provision to Rule 1.15 (“Safekeeping Property”) requiring a lawyer to deposit into a client trust account fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. The Commission was mindful of reports that the largest class of claims made to client protection funds is for the taking of unearned fees.
16. Sale of Law Practice

The Commission revised paragraph (b) of Rule 1.17 (“Sale of Law Practice”) to allow the sale of a law practice to more than one buyer but initially rejected a proposal to allow the sale of only a portion of a practice. Subsequent to filing its August 2001 report, the Commission was persuaded by concerns raised by solo and small firm practitioners that a lawyer should be permitted to sell an area of his practice. The additional amendment to Rule 1.17 was included in the Commission's report to the House in February 2002. The lawyer must cease practicing in the area that she sells and may receive no referral fees for any existing or new matters in the practice area after the sale.

The rule was also amended to make clear that existing agreements between the seller and firm clients as to fees and scope of representation must be honored by the purchaser, by deleting qualifying language in paragraph (d) permitting fee increases with client consent. The deleted language had been interpreted to permit the buyer to tell the seller's clients that the buyer would not work on their cases unless they agreed to pay a higher fee than they had agreed to pay the seller. The Commission was persuaded that this result was problematic because the seller could not unilaterally abrogate the fee agreement as a matter of contract law. The proposed change in paragraph (d) is in accord with the rules in a number of jurisdictions, including California, New York, and Florida.

17. Third-Party Neutrals

The Commission developed a new rule on lawyers serving as third-party neutrals in ADR settings. This new Rule 2.4 (“Lawyer Serving as Third-Party Neutral”) requires lawyers serving as neutrals to make clear the nature of their role in the matter to the parties. The Commission decided after consultation with various ADR groups not to attempt further to define the obligations of lawyers serving as third-party neutrals through lawyer ethics rules. For example, the Commission considered and rejected provisions that would have prohibited a neutral from giving legal advice to the parties, and one that would have prohibited a neutral from assisting the parties in drafting a settlement document.

The Commission also amended Rule 1.12 (formerly “Former Judge or Arbitrator,” retitled “Former Judge, Arbitrator, Mediator or Other Third-Party Neutral”) to extend the conflict of interest provisions of paragraph (a) to all third-party neutrals. This means that former mediators, such as former judges and arbitrators, may not represent a client in any matter in which they participated personally and substantially while a mediator, but others in their firm may do so if the former mediator is screened.

The Commission initially proposed to extend a broader conflict of interest rule to all third-party neutrals, and disallow screening for lawyers associated with them. It later decided against this in light of comments received that this would tend to discourage arbitration and mediation practice by lawyers in firms, including participation in voluntary court-sponsored ADR programs. The Commission was persuaded that third-party neutrals typically do not share confidential information with other lawyers and are usually precluded from doing so by applicable rules. Mediators, as well as arbitrators and
judges, will now be barred by paragraph (b) from negotiating for employment with a party to the proceeding or with a party's lawyer.

18. Limited Legal Service Programs

A new Rule 6.5 (“Non-Profit and Court-Annexed Limited Legal Service Programs”) addresses the ethical obligations of lawyers providing “short-term limited legal services” to persons of limited means under the auspices of a non-profit or court-annexed legal services program such as “legal advice hotlines, advice-only clinics, or pro se counseling programs.” In these programs a client-lawyer relationship is established, but the lawyer is subject to Rules 1.7 and 1.9(a) “only if the lawyer knows that the representation of the client involves a conflict of interest.” The commentary points out that a lawyer representing a client in the circumstances addressed by the rule “ordinarily is not able to check systematically for conflicts of interest,” and therefore may “rely on his personal recollection and information provided by the client in the ordinary course of the consultation.” The more relaxed treatment of conflicts of interest in the limited circumstances described in this rule was designed with an eye to the situation of part-time law firm volunteers fulfilling their pro bono obligations, but the Commission decided to make the benefits of the rule available to full-time legal service lawyers. If the representation becomes more extensive, the ordinary conflict of interest rules will apply.

A lawyer providing short-term limited legal services is subject to disqualification from any matter that he knows is being (or has been) handled by other lawyers in his firm. However, under paragraph (b) of the new rule, the personal disqualification of a lawyer engaged in a limited representation pursuant to the Rule is not imputed to other lawyers associated with him, either in his firm or in the program itself.

d. obligations to persons other than clients

1. Meritorious Claims and Contentions

After considering several possible changes in Rule 3.1 (“Meritorious Claims and Contentions”), the Commission decided to retain the current rule. The Commission initially proposed to substitute an objective standard (“non-frivolous”) for judging the legitimacy of an argument for an extension, modification or reversal of existing law. While Rule 11 of the Federal Rules of Civil Procedure now refers to “non-frivolous arguments,” the “good faith” formulation in the Model Rules has been widely adopted by the states and endorsed in Section 170 of the Restatement, and the Commission concluded that it had not been misunderstood. The Commission deleted from commentary the reference to a client's desire to bring an action “primarily for the purpose of harassing or maliciously injuring a person.”

2. Candor to the Tribunal
The Commission clarified and amplified a lawyer's obligation of candor to a tribunal under Rule 3.3 (“Candor Toward the Tribunal”). (The term “tribunal” is defined in new Rule 1.0 to include a court, an arbitrator in a binding arbitration proceeding, and a legislative or administrative body acting in an adjudicative capacity.) [FN44]

The Commission deleted the requirement of materiality that now qualifies a lawyer's obligation in 3.3(a)(1) not to make a false or misleading statement of fact or law to a tribunal. This change brings the duty not to make false statements into conformity with the duty not to offer false evidence set forth in 3.3(a)(3). The Commission also added a new sentence to (a)(1) addressing the lawyer's duty to correct a false statement of “material” fact or law previously made to the tribunal. The requirement of materiality in connection with the duty to correct in (a)(1) now parallels the duty in paragraph (a)(3) to take reasonable remedial measures if the lawyer comes to know that she has previously offered materially false evidence.

Respecting the truthfulness of evidence offered by the lawyer's client or a witness called by the lawyer, the text of (a)(3) more clearly distinguishes the situation where the lawyer “knows” the evidence is false or misleading from the situation where he only “reasonably believes” this to be the case. Where the lawyer knows the evidence is false, the lawyer is prohibited from offering the evidence. In addition, where the lawyer subsequently learns that “material” evidence offered by a client or a witness is false or misleading, she must take remedial steps, “including, if necessary, disclosure to the tribunal.” The Commission reaffirmed that the duty to take remedial measures applies “even if compliance requires disclosure of information otherwise protected by Rule 1.6.” [FN45]

The Commission discussed and rejected a suggestion that the lawyer's obligation not to offer false evidence, and to correct evidence that she subsequently learns is false, depends upon whether the evidence was deliberately falsified. Thus the lawyer's duty does not depend upon whether the client or other witness knows or otherwise appreciates that the evidence is false. New commentary explains that a lawyer does not violate the Rule if the lawyer knowingly elicits false testimony for the purpose of subsequently establishing its falsity. On the other hand, where the lawyer does not “know” but only “reasonably believes” the evidence to be false, she has discretion whether or not to offer it. The commentary provides that doubts about the veracity of testimony or other evidence should be resolved in favor of the client, though the lawyer “cannot ignore an obvious falsehood.”

The special obligations of a criminal defense lawyer are addressed in the rule text for the first time: the lawyer's discretion under paragraph (a)(3) to refuse to offer evidence she reasonably believes is false does not extend to the testimony of a criminal defendant. Consistent with the special protections historically accorded criminal defendants, the text of paragraph (a)(3) now specifically provides that a lawyer representing a criminal accused may not refuse to allow her client to testify even if the lawyer reasonably believes the testimony will be false. The commentary also emphasizes, however, that a lawyer representing a criminal defendant is generally subject to the duty in the first two sentences of paragraph (a)(3) not to offer testimony that the lawyer knows is false, and to
take remedial measures where the lawyer subsequently comes to know that testimony the lawyer previously offered is false. Finally, the commentary makes clear that where a court requires defense counsel to allow the accused to testify if he wishes to do so, the obligation of the advocate under the Rules is subordinate to such a requirement.

The Commission deleted paragraph (a)(2) of the present rule, and addressed the lawyer's duty to disclose crime or fraud in connection with an adjudicative proceeding more generally in a new paragraph (b). (The lawyer's general duty to “take remedial measures” when necessary to avoid assisting client crime or fraud is addressed in Rules 1.2(d) and 4.1(b).) [FN46] The new paragraph (b) provides that a lawyer who knows that any person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A new comment identifies the type of conduct sought to be reached under the rule: “bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.”

New commentary describes remedial measures short of disclosure, including remonstrating with the client, consulting with the client about the lawyer's duty of candor to the tribunal, and withdrawal from the representation. It also makes clear that the lawyer's obligation of candor applies “in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition.” Respecting the duration of the obligation, the commentary explains that a proceeding has concluded within the meaning of Rule 3.3 when a final judgment has been affirmed on appeal or the time for review has passed.

3. Impartiality and Decorum of the Tribunal

The Commission added a new paragraph (c) to Rule 3.5 (“Impartiality and Decorum of the Tribunal”) in recognition of the fact that Rule 3.5(b) has been held unconstitutionally overbroad when applied to post-verdict communications with jurors. [FN47] The new paragraph prohibits communication with jurors after discharge only if it is prohibited by law or court order, or if the juror does not wish to be contacted. It also specifically prohibits communications involving misrepresentation, duress, coercion, or harassment. The new paragraph permits more post-verdict contact than the old Model Rule, but affords jurors more protection than DR 7-108(D) of the Model Code, which prohibited communications with jurors only if they were “calculated merely to harass or embarrass,” or to influence the juror's actions in future jury service.

4. Truthfulness in Statements to Others

The Commission made no change in the text of Rule 4.1 (“Truthfulness in Statements to Others”) but clarified the duty imposed by paragraph (b) (a lawyer may not knowingly “fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure would be prohibited by Rule 1.6”). This
duty is identified in commentary as a “specific application” of the general duty set forth in Rule 1.2(d), [FN48] and it is most frequently invoked where a client's wrong-doing involves a lie or misrepresentation to a third party. The commentary explains the remedial measures the lawyer may be required to take to avoid assisting client crime or fraud, subject to the lawyer's duty of confidentiality to the client under Rule 1.6. [FN49] (Note that a lawyer's obligation of candor to a tribunal under Rule 3.3 (“Candor Toward the Tribunal”) is not qualified by the obligation of confidentiality in Rule 1.6.) [FN50]

The Commission clarified in commentary that the term “misrepresentation” in paragraph (a) of the rule includes “partially true but misleading statements or omissions that are tantamount to an affirmative false statement.”

5. Trial Publicity

The Commission initially proposed to amend comment [5] to Rule 3.6 (“Trial Publicity”) to delete from the list of statements deemed “more likely than not to have a material prejudicial effect” on a proceeding, the fact that a defendant has been charged with a crime, unless it is accompanied by a statement explaining that the defendant is presumed innocent until proven guilty. After receiving a number of critical comments, the Commission reconsidered this proposal and decided that the comment should not be changed. The special responsibilities of a prosecutor in connection with trial publicity, including statements of investigators assisting or associated with the prosecutor, are discussed in section II.D.9, infra.

6. Communications with Represented Persons

The Commission spent a great deal of time and energy considering possible amendments to Rule 4.2 (“Communication with Person Represented by Counsel”) to meet concerns raised by the U.S. Department of Justice. [FN51] In the end, the Commission decided to make only one amendment to the black letter of the rule, confirming that otherwise prohibited communications may be authorized by court order. New commentary provides that a court order may be sought, either to clarify the application and scope of the rule or, in exceptional circumstances, to authorize communication that would otherwise be prohibited by the rule.

Existing commentary has been revised to explain that communications “authorized by law” may include those made by a lawyer “on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.” They may also include those made in the course of “investigative activities of lawyers representing governmental entities, directly or indirectly through investigative agents, prior to the commencement of criminal or civil *468 enforcement proceedings.” In this latter regard, the revised commentary clarifies the relationship between Rule 4.2 and constitutional limits on government lawyers' investigative activities: “The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.”
New commentary makes clear that the no-contact rule does not preclude a lawyer from advising a represented person who is seeking a second opinion, as long as the lawyer is not otherwise representing a client in the matter. It also confirms that a lawyer may not make a communication prohibited by the rule through the acts of another — though parties to a matter may communicate directly with each other. Finally, it provides that the “no-contact rule” applies even when the represented person “initiates or consents to” the communication, and that a lawyer must immediately terminate communications if she learns that the person is one with whom communication is not permitted.

Perhaps most significant, the Commission modified the test in existing commentary for determining the applicability of the rule in the organizational context. A revised Comment [4] now prohibits communication with “a constituent” of the organization who “supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter, or whose act or omission in the matter may be imputed to the organization for purposes of civil or criminal liability.” [FN52] The Commission considered a proposal to include a specific prohibition on communications with members of a governing board and decided instead to change the term “agent or employee” in the discussion draft to “constituent.”

The Commission deleted the reference to any person “whose statement may constitute an admission on the part of the organization.” This potentially open-ended reference seems to have been based upon the law of evidence in a few jurisdictions, which provided that statements of certain employees were not only admissible against the organization but could not be controverted by the organization.

The Commission added a new sentence to confirm that consent of the organization's lawyer is not required for contacts with former constituents, reflecting existing interpretation of the rule and the Commission's judgment that there is not sufficient unity of interest between an organization and its former constituents to justify treating them as representatives of the organization. The commentary warns that a lawyer communicating with former constituents should not solicit or assist in the breach of any duty of confidentiality owed to the organization.

Finally, the commentary on the rule's scienter requirement was corrected to eliminate the suggestion that a lawyer's actual knowledge can be established by proof that the lawyer had “substantial reason to believe” that a person was represented, which is inconsistent with the relevant definition in Rule 1.0.

7. Dealing with Unrepresented Persons

The Commission restored to Rule 4.3 (“Dealing with Unrepresented Person”) a provision from the Model Code prohibiting a lawyer from giving legal advice to an unrepresented person whose interests “are or have a reasonable possibility of being in conflict” with those of her client, other than the advice to seek counsel. New commentary provides guidance on what constitutes impermissible advice-giving, and alludes to the particular
problems that may arise when a lawyer for an organization deals with an unrepresented constituent.

8. Inadvertent Disclosures

A new provision in Rule 4.4 (“Respect for Rights of Third Persons”) deals with the currently controversial issue of the “errant fax.” It provides that a lawyer who receives a document relating to the representation of the lawyer's client, and knows or reasonably should know that it was inadvertently sent, must promptly notify the sender. Beyond this, however, the Commission decided against trying to sort out a lawyer's possible legal obligations in connection with examining and using confidential documents that come into her possession through the inadvertence or wrongful act of another.

9. Special Responsibilities of a Prosecutor

The Commission made no substantive changes in the text of Rule 3.8 (“Special Responsibilities of a Prosecutor”). It decided, after initially proposing its deletion, to retain the requirement that prosecutors exercise “reasonable care” to prevent law enforcement personnel assisting or associated with them from making extrajudicial statements that they themselves would be prohibited from making. It also retained a controversial limitation on the issuance of subpoenas to defense counsel, as well as a provision making the prosecutor responsible for public statements made by investigators assisting or associated with the prosecutor. However, it deleted from commentary a reference to the disclosure obligations of a prosecutor in connection with grand jury proceedings, and decided against otherwise separately addressing the ethical issues that arise in connection with grand jury practice. The Commission decided against attempting to explicate the relationship between paragraph (d) of this Rule and the prosecutor's constitutional obligations under Brady and its progeny.

10. Reporting Misconduct

Rule 8.3 (“Reporting Professional Misconduct”) has been revised to make clear that information revealed to a lawyer participating in a lawyer assistance program will be exempt from the reporting requirements of this rule, regardless of whether the information would be considered protected by Rule 1.6. A new provision states that the rules generally do not address whether information transmitted in a lawyer assistance program is confidential, although the program itself may impose such a requirement.

11. Misconduct/Discrimination

The Commission included a new comment to Rule 8.4 (“Misconduct”) elaborating on the lawyer's responsibility under paragraph (a) not to violate the rules through the acts of another. This comment points out that while the lawyer must not “request or instruct an agent to [violate the rules] on the lawyer's behalf,” he is “not prohibited from advising a client of action that the client is lawfully entitled to take.” It rejected a proposal from the Department of Justice to add a specific exception for law enforcement. Finally, it decided
against adding a provision to the black letter of Rule 8.4 prohibiting discrimination, concluding that the discussion of this issue in Comment [2] (renumbered [3]), is adequate to deal with the issue.

e. the practice of law

1. Law Firm Management and Discipline

The Commission modified the text of Rule 5.1(a) (“Responsibilities of a Partner or Supervisory Lawyer”) and Rule 5.3(a) (“Responsibilities Regarding Nonlawyer Assistants”) to make clear that the responsibilities imposed by these provisions to ensure that other lawyers and nonlawyer assistants comply with the Rules apply not just to “partners” in a law firm, but to all lawyers with “managerial authority” in a firm (defined in Rule 1.0 to include corporate legal departments, legal services organizations, and law offices within government agencies). [FN53] New commentary to Rule 5.1 elaborates the duty of each responsible lawyer to make “reasonable efforts” to establish internal policies and procedures designed to provide “reasonable assurance” that all lawyers in a firm will conform to the Rules, including procedures designed to detect and resolve conflicts of interest, to account for client funds, and to ensure proper supervision of inexperienced lawyers, as well as nonlawyers employed by a firm. Similar additions will be made to the commentary to Rule 5.3.

The Commission initially proposed to extend the duties in Rules 5.1 and 5.3 to law firms as well as individual lawyers. However, it became persuaded that any possible benefit from being able to extend disciplinary liability firm-wide was small when compared to the potential cost of de-emphasizing the personal accountability of partners and supervisors.

The Commission also considered and rejected a proposal to delete paragraph (b) of Rule 5.2 (“Responsibilities of a Subordinate Lawyer”), which shields a subordinate lawyer from discipline if she acts in accordance with a supervisory lawyer's “reasonable resolution of an arguable question of professional duty.” The Commission was concerned that deleting this provision might mislead junior lawyers into thinking that they were safe in “following orders” of a senior lawyer.

The Commission amended the language of Rule 5.6 (“Restrictions on Right to Practice”) to make clear that the Rule applies to settlements between private parties and the government, as well as to settlements between purely private parties. [FN54]

2. Multidisciplinary Practice

In its August 2001 report, the Commission recommended no significant amendments to Rules 5.4 (“Professional Independence of a Lawyer”) and 5.7 (“Responsibilities Regarding Law-Related Services”) in light of the decision by the ABA House of Delegates in July 2000 to ask the Standing Committee on Ethics and Professional Responsibility to look into certain issues relating to fee-sharing and strategic alliances.
The Commission considered but decided against expanding the commentary to paragraph (c) of Rule 5.4 on the issue of third party direction that may interfere with the lawyer's professional independence. [FN55] It did, however, decide to add a provision to the text of Rule 5.4 specifically authorizing a lawyer to share court-awarded legal fees with a non-profit organization that employed, retained or recommended employment of the lawyer in the matter, affirming the conclusions of ABA Committee on Ethics and Professional Responsibility Formal Opinion 93-374.

In the fall of 2001, at the request of the Ethics Committee, the Commission agreed to include in its final set of recommendations to the House an amendment to Rule 5.7(a)(2) to clarify that when a lawyer provides non-legal services to a client, whether through a firm or through a separate entity, the lawyer has an obligation to take reasonable measures to assure that the person obtaining the non-legal services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist. The original Model Rules appears to limit that obligation to law-related services provided through a separate entity.

3. Information About Legal Services

The Commission considered a number of recommendations for relaxing the rules governing the provision of information about a lawyer's services, and decided against most of them. It did, however, update the rules to take account of such emerging trends as targeted solicitations and Internet advertising. It reduced the text of Rule 7.1 ("Communications Concerning A Lawyer's Services") to a simple prohibition against false or misleading communications (defined as those containing material misrepresentations or omissions) to provide additional guidance in commentary about what sorts of statements may be deemed misleading.

In addition, after initially rejecting proposals to amend Rule 7.2 ("Advertising") to allow payments to for-profit lawyer referral services, the Commission decided to allow such payments under limited circumstances, where the particular referral service has been “approved by an appropriate regulatory authority.” It also developed new commentary dealing with the obligations of a lawyer who accepts assignments or referrals from a prepaid or group legal service plan, or referrals from a not-for profit or “qualified” lawyer referral service. These changes conform the rule more closely to ABA policy favoring expanded consumer access to legal services, while at the same time protecting prospective clients. The hope is that states will establish a regulatory mechanism that ensures unbiased referrals to lawyers with appropriate experience, and such other protections as complaints procedures and malpractice requirements, in accordance with the ABA's model rules governing lawyer referral services.

With one exception, the Commission declined to relax the restrictions in Rule 7.3 ("Direct Contact With Prospective Clients") on in-person or live telephonic or electronic solicitations, while distinguishing real-time conversations in internet “chat rooms.” Specifically, it rejected a proposal to allow in-person solicitations to businesses and non-profit or government organizations but agreed to allow solicitations to lawyers (including
in-house counsel) and to family members and close personal friends. It also declined to adopt a specific prohibition on contacts with persons in a vulnerable physical, emotional or mental state. Finally, it tightened up the requirements in Rule 7.4 (retitled “Communication of Fields of Practice and Specialization”) respecting the terms on which a lawyer may advertise herself as a certified specialist.

4. Multijurisdictional Practice and Choice of Law

The Commission approved significant changes to Rule 5.5 (“Unauthorized Practice of Law”) and Rule 8.5 (“Disciplinary Authority: Choice of Law”) that recognize the fact that modern practice crosses jurisdictional boundaries in a variety of ways. While the House deferred action on these two rules pending completion of the work of the Commission on Multijurisdictional Practice, the Commission's proposals are worth describing briefly since they served as a starting point for its sister commission's work.

The Commission's proposed amendments to Rule 5.5 retain the basic premise that lawyers may regularly practice law only in a jurisdiction in which they are admitted to practice. However, it identifies four exceptions (“safe harbors”) that do not create significant risk to the interests of clients. [FN56] This incremental approach seemed an appropriate response to the growing sentiment against blanket “unauthorized practice” restrictions on lawyers, while acknowledging the concerns of those who may have a more parochial view.

Under proposed amendments to Rule 8.5, a lawyer who “renders or offers to render any legal services” in a jurisdiction where he is not admitted will be subject to the disciplinary authority and rules (including choice of law rules) of that jurisdiction, as well as the jurisdiction where he is licensed. [FN57] In addition, the Commission proposed a new approach to choice of law in cases not involving a matter before a tribunal: the rules of the jurisdiction in which the conduct took place should apply, unless the conduct had its predominant effect in another jurisdiction, without regard to whether the lawyer is licensed in either jurisdiction. A lawyer would not be subject to discipline if she makes a reasonable (if incorrect) determination about which jurisdiction's rules apply to her conduct. The choice of law provisions would apply to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

5. Pro Bono Service

The Commission discussed at length the question whether to amend Rule 6.1 (“Voluntary Pro Bono Publico Service”) to make mandatory a lawyer's obligation to perform 50 hours of pro bono service. After seeking public comment on the issue, the Commission decided to vote to recommend that pro bono service remain voluntary. It also considered and rejected several compromise options, including one that would leave the pro bono obligation voluntary but impose a *474 mandatory reporting requirement. However, in order to emphasize that pro bono publico service is a time-honored ethical obligation of members of the legal profession, the Commission elevated to text a provision previously
in commentary stating that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.” New commentary emphasizes law firms' responsibility to enable and encourage firm lawyers to meet their pro bono obligations. (The word “encourage” was added by the Commission in response to an amendment from the floor in February 2002.)

In considering whether to make pro bono mandatory, the Commission was concerned about reports that pro bono service by lawyers in large firms has declined in recent years. The Commission also noted that the need for pro bono service is greater than ever, given the withdrawal of most government support for legal service organizations, and that the current system of providing needed pro bono service on a voluntary basis does not seem to be working very effectively. In the end, however, it concluded that instituting a mandatory pro bono requirement enforceable through the disciplinary process was not an effective way of ameliorating this situation. [FN58]

III. The Next Stage

With the action of the House in February 2002, the Commission's work is essentially finished, though we expect that there will be a continuing role for individual Commissioners and the Reporters to play as its recommendations are considered in the states. All of us on the Commission have been grateful for the strong interest shown in our work by so many members of the profession and for the many insightful comments we received at every stage of our work. We are especially grateful to those hardy few who regularly attended our meetings and public hearings and who participated so helpfully in our sometimes protracted discussions. We could not have accomplished our task without our extraordinarily talented and patient Reporters and our equally talented and patient staff. Finally, we all owe a great debt of gratitude to our chair, whose good humor and steady nerves kept us on track and out of trouble most of the time, and whose herding skills were honed to perfection in the process.

From the beginning, the Commission sought to use the unprecedented openness of its process to build a substantial body of support for its proposals by the time they were ready for presentation to the House of Delegates. Judging from the lively engagement of so many members of the profession and the generally enthusiastic response to the Commission's work— including by the House of Delegates—this strategy appears to have been successful. As the action now moves to the states, the Commission hopes that the revised Model Rules will command consensus within the legal profession and respect within the larger community, and that its efforts will result in greater clarity and consistency in the rules of conduct that apply to all lawyers practicing throughout the United States.

[FNa1]. Margaret Love is a member of the Ethics 2000 Commission and Of Counsel to the Washington, D.C. firm of Brand & Frulla. A very early version of this Summary Article, inspired by a talk the author gave to the Georgetown University Law Center faculty, was published in the Winter 2000 issue of The Professional Lawyer. Since then, it has been revised several times as the Commission's work progressed, and posted on the
Commission's website. The author is grateful for the assistance of Chief Reporter Nancy Moore and Staff Counsel Charlotte Stretch in reviewing the Article for form and accuracy. However, while they have plainly improved it, they are not responsible for its contents. The official record of the Commission's work may be found in the two reports filed with the House in August 2001 and February 2002, which include proposed rules changes and detailed Reporter's Explanation of Changes explaining each one of them. Further legislative history may be found in the Commission's November 2000 preliminary report. The complete record of the Commission's work is available from the ABA Center for Professional Responsibility, including minutes, hearing testimony, a redlined version of the Rules as passed by the House, the Reporter's Explanation Memos submitted to the House, and text of the amendments submitted to the House at http://www.abanet.org/cpr/ethics2k.html (last visited May 5, 2002).

[FN1]. In his report to the ABA House of Delegates in August 2001, Delaware Chief Justice E. Norman Veasey, Chair of the Commission, recalled that in 1997 “then-incumbent ABA President Jerome J. Shestack, his immediate predecessor, N. Lee Cooper, and his successor, Philip S. Anderson ... persuaded the ABA Board of Governors that the Model Rules adopted by the ABA House of Delegates in 1983 needed comprehensive review and some revision, and this project was launched. Though some might have thought it premature to reopen the Model Rules to such a rigorous general reassessment after only 14 years, the evaluation process has proved that the ABA leadership in 1997 was right on target.” ABA Comm. on Evaluation of the Rules of Prof'l Conduct, Report with Recommendation to the House of Delegates, Chair's Introduction and Executive Summary (August 2001), at http://www.abanet.org/cpr/e2k-report.html (last visited May 5, 2002) [hereinafter Chair's Introduction, August 2001]. In addition to the Chair, the 12 appointed members of the Commission comprised practitioners, judges, academics, corporate and public section lawyers, and a lay public member (Lawrence J. Fox, Albert C. Harvey, Geoffrey C. Hazard, Jr., Patrick E. Higginbotham, W. Loeber Landau, Margaret Colgate Love, Susan R. Martyn, David T. McLaughlin, Richard E. Mulroy, Lucian T. Pera, Henry Ramsey, and Laurie D. Zelon). Two Reporters served throughout the life of the Commission (Nancy J. Moore, Chief Reporter, and Carl A. Pierce) and a third served for a part of that time (Thomas D. Morgan, 9/98-12/99). Seth Rosner and James Lee served as liaisons from the ABA Board of Governors. The Commission was ably assisted by staff from the ABA Center for Professional Responsibility (Charlotte K. Stretch and Susan Campbell).

[FN2]. Since 1997, three additional states have adopted some version of the Model Rules.

[FN3]. Justice Veasey explained in his August 2001 report to the House that, notwithstanding the perceived need for revision, “[t]here was also a strong countervailing sense that there was much to be valued in the concepts and articulation of the Model Rules. The Commission concluded early on that these valuable aspects of the Rules should not be lost or put at risk in our revision effort. As a result, the Commission set about to be comprehensive, but at the same time conservative, and to recommend change only where necessary. In balancing the need to preserve the good with the need for improvement, we were mindful of Thomas Jefferson's words of nearly 185 years ago, in a
letter concerning the Virginia Constitution, that ‘moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects.’” Chair's Introduction, August 2001, supra note 1.

[FN4]. At the August 2001 Annual Meeting, the ABA House considered and approved the proposed revisions in Rules 1.0 through 1.10, with three exceptions: the requirement of a writing for fees in Rule 1.5(b), see infra section II.C.4; the permissive disclosure to prevent or mitigate client financial crime or fraud in Rules 1.6(b)(2) and (b)(3), see infra section II.C.5; and the screening of lateral hires in Rule 1.10, see infra section II.C.8. The Commission filed an amended report prior to the February 2002 Midyear meeting of the House that included conforming amendments made necessary by the House decision not to accept certain Commission recommendations. See infra sections II.C.5 and II.C.8. The House approved all of the Commission's remaining proposals at that time. Of the twelve amendments that were submitted for the debate, three were accepted by the Commission as friendly; five were rejected by the House after debate; and four were withdrawn. The three friendly amendments were to Rule 1.17 permitting sale of an area of practice, see infra section II.C.17; to Rule 4.2 clarifying and relocating Comment [5], see infra section II.D.6; and to Rule 6.1 advising firms to “encourage” as well as “permit” pro bono practice, see infra section II.E.5. The House defeated amendments to Rules 1.14, 3.3, 4.3, and two amendments to Rule 4.2 (one to delete “or court order,” and one to require notice prior to obtaining a court order). Two amendments to Rule 4.2 (regarding Comments [2] and [6]) and amendments to Rules 1.18 and 8.4 were withdrawn. A motion to reconsider the House's earlier decision on Rule 1.6(b)(1) was defeated after discussion.


[FN6]. See infra sections II.B.6 and II.C.6.

[FN7]. See infra sections II.C.4 and II.C.11.

[FN8]. See infra section II.C.5.

[FN9]. ABA Comm. on Evaluation of the Rules of Prof'l Conduct, Report with Recommendation to the House of Delegates (August 2001), Proposed Rule 1.2, cmt. [11], available at http://www.abanet.org/cpr/e2k-whole_report_home.html (last visited May 5, 2002) [hereinafter August 2001 Report]. Even if the House had accepted the Commission's proposal to expand the scope of permissible disclosures under Rule 1.6 to client financial crime or fraud, see infra section II.C.5, disclosure would always have been considered as a measure reserved for the extreme case where other remedial measures, such as withdrawal and/or disavowal of work product, are insufficient to disassociate the lawyer from the client's wrongful conduct.

[FN10]. See infra section II.D.4.

[FN12]. The language in this proposal reflects that of California Rule of Professional Conduct 4-200(b)(2).

[FN13]. Under the rejected proposal, a lawyer would be obligated to communicate information about the basis or rate of the fee before or shortly after commencing the representation, except where she would be charging a regularly represented client at the same rate. A new client would have to be informed in writing of the scope of representation, and of his responsibility for expenses. Changes in the basis or rate of the fee would also have to be communicated in writing. The proposal included a de minimis exception to the writing requirement, suggesting the sum of $500 as a measure. At one point the Commission considered adding a provision requiring the lawyer to communicate changes in the scope of representation in writing, but decided against it on grounds that this would be impracticable and inefficient in many cases.

[FN14]. See infra section II.C.11.

[FN15]. In its preliminary report of November 2000, the Commission proposed to delete the requirement of joint responsibility where a fee is not divided proportionate to the work performed. However, after receiving a number of critical comments, the Commission decided to retain the restriction in the existing rule.

[FN16]. The Reporter's Explanation of Changes states that the new explanation of “joint responsibility” reflects the interpretation of the term in ABA Informal Opinion 85-1514, as well as a number of state ethics opinions.

[FN17]. See infra section II.D.2.

[FN18]. In preparation for the debate in the House over the “financial crime/fraud” exceptions to Rule 1.6, the Commission ascertained that the rules of lawyer ethics in forty-one jurisdictions permit disclosure to prevent criminal fraud by the client, and of these a few even require disclosure in such circumstances.

[FN19]. Id. This so-called “noisy withdrawal” is also mentioned in the commentary to Rules 1.2(d) and 4.1 as a possible obligation where withdrawal alone is not sufficient to disassociate the lawyer from the client's crime or fraud. See supra section II.C.2; see infra section II.D.4; see also ABA Comm. on and Prof'l Responsibility, Formal Op. 366 (1992).

[FN20]. See infra section II.C.12.
See discussion supra section II.B.1.

See infra section II.C.9.

See infra section II.C.12.

See infra section II.C.17.

See supra section II.B.2.

See Rule 1.7, Comment [10].

Special rules on imputation and screening apply to current and former government lawyers. See infra section II.C.9

A new paragraph (c) to Rule 1.10 would have allowed the moving lawyer to be screened to enable lawyers in her new firm to continue to handle the matter. The Commission was persuaded that non-consensual screening in these cases adequately balances the interests of the former client in confidentiality of information, the interests of current clients in hiring the counsel of their choice (including a law firm that may have represented the client in similar matters for many years), and the interests of lawyers in mobility, particularly when they are moving involuntarily because their former law firms have downsized, dissolved or drifted into bankruptcy. The Commission understood that there have been few significant complaints regarding screening of laterals in the seven jurisdictions whose rules currently permit it. In its initial screening proposal contained in its November 2000 preliminary report, the Commission proposed to preclude screening in situations when a moving lawyer has had a substantial role in a pending litigation matter. After further consideration, the Commission decided that there was no reason to treat litigation differently than transactions. It recognized that the difference between litigation and transactional practice is a factor that courts may consider in disqualification motions, where there is a concern about the appearance of impropriety.

See discussion of Rules 1.11(b) and 1.12(a) infra sections II.C.9 and II.C.17.

See discussion of new Rule 1.18 infra section II.C.10.

The Commission's August 2001 report reflects the conclusion that the substantive provisions of Rule 1.9, including in particular its “substantial relationship” test, should apply to both current and former government lawyers where they will be adverse to a former client. The Commission revisited the matter after hearing concerns expressed by several Association entities, and agreed to propose the narrower test in the existing rule to identify matters from which former government lawyers are disqualified. The revised proposal appears in the Commission's February 2002 report.

There was no provision for government consent in former Rule 1.11(c) that would permit a government lawyer to participate in a matter in which he previously
represented another client. The Commission saw no reason why this situation should be treated differently from one involving former government lawyers under paragraph (a)(3). This would include, but not be limited to, the exception mentioned in former Rule 1.11(c) (where “under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter”).

[FN33]. See infra section II.C.12.

[FN34]. See new Rule 1.10(e).

[FN35]. See supra section II.B.4.

[FN36]. The provision requiring lawyers who are consulted by prospective clients to take “reasonable measures” to avoid exposure to more disqualifying information than “reasonably necessary to determine whether to represent the prospective client,” was added to the rule after the Commission issued its August 2001 report.

[FN37]. As previously noted, amendments to the commentary of Rule 1.5 point out that a fee paid in property may be regarded as a “business transaction” subject to Rule 1.8(a). See supra section II.C.4.

[FN38]. See Rule 5.4 (“Professional Independence of a Lawyer”) infra section II.E.2.


[FN40]. See supra section II.C.8.

[FN41]. Id.

[FN42]. See supra section II.C.6.

[FN43]. See supra section II.C.2; see infra sections II.D.2 and II.D.4.

[FN44]. See supra section II.B.5.

[FN45]. See Rule 3.3 paragraph (c), formerly paragraph (b).

[FN46]. See supra section II.C.2; see infra section II.D.4.


[FN48]. See supra section II.C.2.

[FN49]. See supra note 12.
[FN50]. See supra section II.D.2.

[FN51]. The question of how Rule 4.2 applies to government lawyers supervising criminal investigations has been a bone of contention between the ABA and the Department of Justice since the late 1980s. The Commission held a number of meetings with representatives of the Department in an effort to develop mutually acceptable revisions of Rule 4.2. These negotiations came close to resolving outstanding issues in the spring of 1999, and a recommendation for amending the rule was submitted by the Commission and the Standing Committee on Ethics and Professional Responsibility to the ABA House of Delegates in August of that year. However, the recommendation was withdrawn at the Annual Meeting after the Justice Department declined to support the proposal.

[FN52]. The Reporter's Explanation of Changes in Report 401 explains that “The current Comment's inclusion of all ‘persons having a managerial responsibility on behalf of the organization’ has been criticized as vague and overly broad .... In focusing on the constituent's authority in the matter at issue and relationship with the organization's lawyer, the Comment provides clearer guidance than the broad general reference to ‘managerial responsibility.’”

[FN53]. See supra section II.B.2.


[FN55]. See discussion of Rule 1.8(f) supra section II.C.11.

[FN56]. The four “safe harbors” identified by the Commission are: 1) where the lawyer is preparing for a proceeding in which he expects to be admitted pro hac vice; 2) where he is acting on behalf of a client of which he is an employee; 3) where he is handling a matter that is “reasonably related” to his practice on behalf of a client in a jurisdiction where the lawyer is licensed; and 4) where he is “associated in a particular matter” with a lawyer admitted in the jurisdiction. As to the last-mentioned “safe harbor,” the commentary explains that the admitted lawyer may not “serve merely as a conduit” for the out-of-state lawyer. The commentary also notes that in-house counsel must comply with relevant state practice requirements. Finally, the commentary makes clear that the safe harbors are not intended to imply that conduct falling outside them constitutes the unauthorized practice of law.

[FN57]. The Reporter's Explanation of Changes notes that there are a number of ways in which discipline might be implemented by a non-admitting jurisdiction, including “making a disciplinary record, sending it to states in which the lawyer is admitted and having those states impose reciprocal discipline.” Alternatively, “if disciplinary authorities are ever given a broader range of sanctions, e.g., fines, fee forfeiture or an award of damages, the disciplining jurisdiction could act on the lawyer directly.”
During the debate over this rule, proponents of mandatory pro bono service focused on the difficulty many citizens have in finding a way to pay for the legal services they need, and justified mandatory pro bono service in terms of the proper functioning of the legal system. Those who favored keeping the pro bono requirement voluntary were also concerned about the provision of legal services to persons of limited means. However, they feared that imposing pro bono work on unwilling practitioners would foster an atmosphere of opposition and resentment that would be inconsistent with the ABA's goal of increasing pro bono participation. They also argued that a lawyer's pro bono efforts are demeaned by a mandatory rule and pointed to enforcement problems.