American Bar Association
Forum on the Entertainment and Sports Industries
2016 Annual Meeting
October 6-8, 2016 (Las Vegas, NV)

Ethically Representing Athletes and Celebrities in Difficult Situations

Thursday, October 6, 2016
2:30pm-4:00pm

Moderator
- **Robert J. Caldwell**, Shareholder
  Kolesar & Leatham (Las Vegas, NV)

Panelists
- **David Chesnoff**, Partner
  Chesnoff & Schonfeld (Las Vegas, NV)
- **Janeen Isaacson**, Assistant Bar Counsel
  State Bar of Nevada (Las Vegas, NV)
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  State Bar of Nevada (Las Vegas, NV)
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Rule 1.2

Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

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

COMMENT

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer’s duty to communicate with the client about such decisions. With respect to the means by which the client’s objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client’s objectives. Clients normally defer to the special
knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client’s behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer’s duty to abide by the client’s decisions is to be guided by reference to Rule 1.14.

Independence from Client’s Views or Activities

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

Agreements Limiting Scope of Representation

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

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


**Criminal, Fraudulent and Prohibited Transactions**

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client’s conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

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

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

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client’s instructions, the lawyer must consult with the client regarding the limitations on the lawyer’s conduct. See Rule 1.4(a)(5).
**ANNOTATION**

**Subsection (a): Client Decides Objectives of Representation and Must Be Consulted about Means Employed**

**Lawyer Must Defer to Client about Objectives and Must Consult about Means**

The general division of authority between lawyer and client is along the lines of “objectives” versus “means,” but these realms of authority actually overlap. Rule 1.2(a) provides that a lawyer must “abide by” the client’s instructions regarding the **objectives** of the representation and that the lawyer, “as required by Rule 1.4,” must “consult with the client” about the **means** by which such objectives are to be pursued. Hence, the rule gives the client ultimate authority over the objectives, but somewhat less authority over the means employed. Just how much authority a client has regarding “means” is not entirely clear, nor is it always possible to distinguish between whether a particular decision relates to the “objectives” or to the “means.”

The distinction between “objectives” and “means” is often expressed as the difference between decisions that directly affect the ultimate resolution of the case or the substantive rights of the client and decisions that are procedural or tactical in nature. The client generally has control over the former, and the lawyer over the latter. *See, e.g.*, Blanton v. Womancare, Inc., 696 P.2d 645 (Cal. 1985) (decisions that would impair substantive rights differ from procedural both in degree to which they affect client’s interest and in degree to which they involve matters of judgment that extend beyond technical competence); Conn. Ethics Op. 97-37 (1997) (decision about whether to join third party in civil action is issue relating to objectives of representation and is therefore matter for client to decide).

**• Lawyer Must Pursue Specific Objectives for Which Lawyer Was Retained**

A lawyer who fails to carry out the objectives of a representation chosen by the client violates Rule 1.2. *See, e.g.*, In re Hagedorn, 725 N.E.2d 397 (Ind. 2000) (lawyer hired to assist clients in adopting child failed to take steps to effectuate adoption, thereby violating Rules 1.1, 1.2, 1.3, and 1.4); *In re Watson*, 121 P.3d 982 (Kan. 2005) (lawyer failed to diligently prosecute change of custody motion that client instructed him to pursue); *In re Eugster*, 209 P.3d 435 (Wash. 2009) (lawyer for elderly client suspended for failing to diminish son’s control of client’s affairs as client requested and instead seeking to have son appointed legal guardian); D.C. Ethics Op. 353 (2010) (decision whether to replace potentially conflicted legal representative of incapacitated client goes to objectives of representation, which means “looking to the [representative] for the decision”).

In addition, a lawyer must adhere to a client’s decision to cease pursuing previously sought objectives. *See, e.g.*, Burton v. Mottolese, 835 A.2d 998 (Conn. 2003) (lawyer disciplined for continuing to litigate claim after clients instructed her to stop); *In re Friesen*, 991 P.2d 400 (Kan. 1999) (lawyer negotiated and accepted settlement without client’s authorization after client directed lawyer to dismiss action); *In re Humphrey*, 15 So. 3d 960 (La. 2009) (lawyer disciplined for filing notice of appeal after client dis-
charged her and filed consent to judgment through another lawyer); see also Red Dog v. State, 625 A.2d 245 (Del. 1993) (lawyer must respect defendant’s decision to forego further appeals and accept death penalty).

• Lawyer’s Limited Authority regarding Means/Tactics: Disagreements between Lawyer and Client regarding Means Employed

As to the allocation of responsibilities regarding the means to be used in attaining the client’s objectives, the comment to Rule 1.2 observes that “[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.” Model Rule 1.2, cmt. [2]. But Comment [2] also contemplates that disagreements about means may arise, and “this Rule does not prescribe how such disagreements are to be resolved.”

Some authorities have concluded that in the event of a disagreement, the client’s judgment should prevail even in matters of tactics, procedure, or the drafting of documents. See, e.g., State v. Ali, 407 S.E.2d 183 (N.C. 1991) (when counsel and fully informed criminal defendant client reach absolute impasse regarding tactical decisions, client’s wishes must control, in accordance with principal-agent nature of relationship); see also Olson v. Fraase, 421 N.W.2d 820 (N.D. 1988) (lawyer had duty to follow client’s reasonable instructions to prepare documents to create joint tenancy, despite honest belief that instructions not in client’s best interest); Olfe v. Gordon, 286 N.W.2d 573 (Wis. 1980) (lawyer may not ignore client’s wish to obtain certain type of collateral); Pa. Ethics Op. 97-48 (1997) (lawyer who thinks client is mistaken in wanting to take particular legal action is obligated to either follow client’s instructions or withdraw from representation); Phila. Ethics Op. 2008-11 (2008) (lawyer hired by insurer to defend driver-wife in husband’s suit against her for accident injuring family must comply with client’s instruction to give only minimal defense and not hire expert).

• Lawyer’s Implied Authorization regarding Means

The command in Rule 1.2(a) that a lawyer “shall” consult about means was tempered in 2002 with the addition of the provision that a “lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.” This provision, paralleling that contained in Rule 1.6(a) (permitting disclosure of client information when “impliedly authorized in order to carry out the representation”), was added to avoid any implication that a lawyer must always consult to obtain authority to act. American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 54–55 (2006). For criticism of this provision, see Steven Lubet & Robert P. Burns, Division of Authority Between Attorney and Client: The Case of the Benevolent Otolaryngologist, 2003 U. Ill. L. Rev. 1275 (2003) (it “essentially eviscerates the notion of client control, or even meaningful input, concerning the means of representation. Moneyed clients will enjoy exceptional influence over their lawyers, as always. Marginal clients will be told where to draw the line.”).
**Lawyer Must Abide by Client’s Decision Regarding Settlement of Claims**

A lawyer has no inherent power, by virtue of the fact that he or she represents a client, to settle the client’s claim. See *Fennell v. TLB Kent Co.*, 865 F.2d 498 (2d Cir. 1989); *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299 (Ind. 1998) (“a client’s retention of an attorney does not in itself confer implied or apparent authority on that attorney to settle or compromise the client’s claim”). Rule 1.2(a) specifically provides that it is the client who decides whether to accept a settlement offer and that the “lawyer shall abide by a client’s decision” in such matters.

Accordingly, this rule requires a lawyer to get the client’s specific authorization to enter a settlement agreement on the client’s behalf. *In re Friesen*, 991 P.2d 400 (Kan. 1999) (lawyer censured for negotiating and accepting settlement without client’s authorization after client directed lawyer to dismiss action); *State ex rel. Okla. Bar Ass’n v. Hummel*, 89 P.3d 1105 (Okla. 2004) (lawyer agreed to modification of divorce decree without prior consultation with client); *In re Indeglia*, 765 A.2d 444 (R.I. 2001) (lawyer accepted settlement offer in direct contravention of client’s instructions; whether lawyer believed client’s position was unreasonable was “irrelevant”); *In re White*, 663 S.E.2d 21 (S.C. 2008) (lawyer suspended for accepting insurer’s settlement offer without client’s authorization); *In re Wyssolmerski*, 702 A.2d 73 (Vt. 1997) (lawyer acted without clients’ approval, binding them to unauthorized settlements); ABA Formal Ethics Op. 96-403 (1996) (lawyer hired by insurer to represent insured may not settle matter if lawyer knows that insured objects to settlement, without first giving insured opportunity to reject defense and assume responsibility for own defense); see also *In re Hawk*, 496 S.E.2d 261 (Ga. 1998) (lawyer told insurance company that he still represented client who fired him; lawyer negotiated settlement without client’s knowledge or consent, and failed to deliver or account for funds to client); *In re Harshey*, 740 N.E.2d 851 (Ind. 2001) (lawyer violated Rule 1.2(a) by setting in motion chain of events resulting in court requiring acceptance of settlement offer despite client’s clearly expressed desire that offer be refused); cf. *In re Panel File No. 99-5*, 607 N.W.2d 429 (Minn. 2000) (lawyer disciplined for failing to inform opposing counsel or magistrate of client’s settlement offer despite client’s explicit request that he do so).

Regarding the authorization required when there are multiple clients represented in a single undertaking, see the Annotation to Model Rule 1.8 (Model Rule 1.8(g) requires that “each client” consent to any aggregate settlement).

• **Lawyer’s Authority to Settle Claim**

Whether a lawyer has authority to settle a claim is a matter of state substantive law. The issue generally arises in the context of client challenges to the enforceability of the resulting agreement. See, e.g., *Covington v. Cont’l Gen. Tire, Inc.*, 381 F.3d 216 (3d Cir. 2004) (refusing to enforce settlement to which lawyer agreed without client’s express authority); *Gravens v. Auto-Owners Ins. Co.*, 666 N.E.2d 964 (Ind. Ct. App. 1996) (“the requirement that an attorney must obtain his client’s authority or consent to settle a case is implicit in the client’s right to exercise ultimate authority over the settlement”); *Barrow v. Penn*, 669 N.Y.S.2d 452 (App. Div. 1998) (reversing dismissal after ostensible settlement because lawyer had no authority to settle).
Courts have found various means through which a client may grant settlement authority to the lawyer. See generally Restatement (Third) of the Law Governing Lawyers § 27 (2000) (Illustrations 3 and 4 contrast two situations in which lawyer does and does not have apparent authority to settle); ABA/BNA Lawyers’ Manual on Professional Conduct, “Lawyer-Client Relationship: Scope of Representation,” pp. 31:301 et seq. (containing discussion of lawyers’ express, implied, and apparent authority to settle client matters).

**LAWYER MAY NOT COERCe CLIENT TO APPROVE SETTELEMENT**

- **Fee Agreement May Not Be Used to Deprive Client of Right to Approve Settlement**

  Although a client may grant the lawyer express authority to settle, a retainer agreement that forbids the client from settling a case without the lawyer’s consent or that creates a financial disincentive to do so may be found to be against public policy and impermissible under Rule 1.2(a). See, e.g., *In re Grievance Proceeding*, 171 F. Supp. 2d 81 (D. Conn. 2001) (in federal grievance proceeding, written fee agreement delegating all settlement authority to lawyer found to violate Rule 1.2(a), but no discipline imposed because lawyer did not invoke those terms); *Compton v. Kittleson*, 171 P.3d 172 (Alaska 2007) (fee agreement guaranteeing lawyer greater of $175 per hour or one-third of recovery violated Rule 1.2 “because of its potential to restrict a client’s exclusive right to accept or reject an offer of judgment”); *In re Lansky*, 678 N.E.2d 1114 (Ind. 1997) (provision in fee agreement by which client gave up right to determine whether to accept settlement offer violates Rule 1.2(a)); *In re Coleman*, 295 S.W.2d 857 (Mo. 2009) (provision that lawyer “shall have the exclusive right to determine when and for how much to settle this case” violates Rule 1.2(a)); Ariz. Ethics Op. 06-07 (2006) (lawyer may not provide in retainer that lawyer may settle matter without client’s consent if client’s whereabouts unknown); Conn. Informal Ethics Op. 99-18 (1999) (contingent-fee agreement may not include clause requiring client to pay lawyer at hourly rate if client rejects settlement offer recommended by lawyer and defendant prevails; client has right to decide whether to accept settlement and economic pressure limiting that right violates rule); Nev. Ethics Op. 35 (2006) (retainer agreement may not give lawyer authority to settle matter without client consent); Wash. Ethics Op. 191 (1994) (fee agreement providing that if client rejects settlement offer lawyer believes is reasonable, fee will be based upon larger of offer or amount recovered at trial is improper and may not be used); see also Amy Owen, *May a Lawyer Agree with the Client That the Lawyer Will Approve All Settlements?*, 17 J. Legal Prof. 311 (1992).

- **Withdrawal from Case If Client Fails to Settle**

  Similarly, a lawyer who withdraws from a case due to a client’s unwillingness to settle may forfeit his or her entitlement to a fee. See, e.g., *Kay v. Home Depot, Inc.*, 623 So. 2d 764 (Fla. Dist. Ct. App. 1993) (denying fee recovery to lawyer whose only reason for withdrawing was that client refused settlement he advised); *May v. Seibert*, 264 S.E.2d 643 (W. Va. 1980) (acceptance of settlement terms solely within client’s province; refusal of such not adequate grounds for lawyer’s withdrawal). But see *Kannewurf v. Johns*, 632 N.E.2d 711 (Ill. App. Ct. 1994) (trial court did not abuse discretion in award-
ing quantum meruit fees to contingent-fee lawyer who withdrew when clients insisted he negotiate for settlement amount he believed was unreasonable; lawyer found to have had good cause to withdraw).

**RIGHTS OF CRIMINAL DEFENDANTS TO CONTROL CERTAIN ASPECTS OF LITIGATION**

In both the civil and criminal realms, the objectives-versus-means criterion is used to analyze the division of authority between lawyer and client. However, a lawyer representing a criminal defendant must meet obligations imposed by the Constitution, as well as those imposed by the ethics rules. The decision-making authority of a criminal defendant is therefore broader than that of a client in a civil matter.

• **Control over Substantive Decisions**

In addition to the general provision relating to control over the objectives and means of the representation, Rule 1.2(a) adds a more specific provision that in a criminal case, the lawyer must “abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.” See *In re Garnett*, 603 S.E.2d 281 (Ga. 2004) (ordering disbarment for, inter alia, refusing client’s instruction to enter guilty plea); *State v. Jones*, 923 P.2d 560 (Mont. 1996) (client’s decision to exercise right to jury trial rather than accept plea agreement cannot constitute good cause for lawyer withdrawal, as this would run directly afoul of Rule 1.2(a)); *McConnell v. State*, 212 P.3d 307 (Nev. 2009) (“counsel does not have the authority to override a defendant’s decision to plead guilty. That decision is reserved to the client.”); cf. *State v. A.N.J.*, 225 P.3d 956 (Wash. 2010) (though decision whether to accept plea bargain is for client under Rule 1.2, lawyer must “evaluate the evidence . . . and the likelihood of a conviction . . . so that the defendant can make a meaningful decision”); Wash. Informal Ethics Op. 2194 (2009) (lawyer offered early, revocable plea bargain before discovery is given by prosecutor must explain pros and cons of arrangement and must abide by client’s decision). See generally Annotation to Model Rule 1.4 (Communication).

A lawyer’s duty under Rule 1.2(a) to defer to certain client decisions in a criminal matter is a necessary corollary of a criminal defendant’s constitutional right to make decisions regarding matters that are “fundamental” or “substantive” because they derive from constitutional guarantees. *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992) (“It is important to remember that while defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense”). Several opinions address the contours of the constitutional right. See, e.g., *Jones v. Barnes*, 463 U.S. 745 (1983) (decisions about fundamental matters, including whether to plead guilty, waive jury, testify, take appeal, and, with some limitations, act as own advocate, are for defendant); *United States v. Boyd*, 86 F.3d 719 (7th Cir. 1996) (fundamental choices for accused to make include whether to be represented by counsel, plead guilty, waive jury, or testify); *Cooke v. State*, 977 A.2d 803, 842 n.42 (Del. 2009) (defendant’s constitutional right to control plea “is consistent with, although not controlled by, Rule 1.2(a)”); *Pruitt v. State*, 514 S.E.2d 639 (Ga. 1999) (after being informed of right to testify and present evidence, “a competent defendant, and not his counsel, makes the ultimate
decision about whether to testify or present mitigation evidence”); People v. Eyen, 683 N.E.2d 193 (Ill. App. Ct. 1997) (defendant did not knowingly waive right to jury trial and was not bound by counsel’s actions in requesting bench trial when defendant not present for pretrial hearing where type of trial decided); State v. Debler, 856 S.W.2d 641 (Mo. 1993) (defendant has right to make basic decisions regarding whether to plead guilty or go to trial, types of defenses to present at trial, and whether to testify; defense counsel advises defendant on effect of choices and then implements them); People v. Colon, 660 N.Y.S.2d 377 (1997) (defendant retains authority over fundamental decisions such as how to plead, whether to waive jury trial, and whether to testify or appeal; counsel has authority to make tactical decisions regarding selection of jury); accord ABA Standards for Criminal Justice, Standard 4-5.2(a) (3d ed. 1993).

• Tactics

On the other hand, decisions that involve tactics and trial strategy may constitutionally be made by the lawyer after consultation with the client. See generally ABA Standards for Criminal Justice, Standards 4-3.1(b), 4-5.2(b) (3d ed. 1993). Courts have thus deferred to the lawyer’s judgment in a wide variety of matters. See, e.g., Darden v. Wainwright, 477 U.S. 168 (1986) (not ineffective assistance for defense lawyers in capital murder case not to introduce mitigating evidence at sentencing, for fear of opening door to evidence in rebuttal); United States v. Washington, 198 F.3d 721 (8th Cir. 1999) (decision to request mistrial is strategic one for counsel to make); Poole v. United States, 832 F.2d 561 (11th Cir. 1987) (defense lawyer’s decision to stipulate to easily provable matter—that institutions defendant allegedly robbed were federally insured—was tactical, so client consent not needed); People v. Williams, 72 Cal. Rptr. 2d 58 (Ct. App. 1998) (defense lawyer authorized to waive formal recitation of reasons for enhanced sentence); People v. Arko, 183 P.3d 555 (Colo. 2008) (“decision to request a lesser offense instruction is strategic and tactical in nature, and is therefore reserved for defense counsel,” not defendant).

Several decisions suggest it is not merely permissible, but preferable, for lawyers to make such tactical decisions. See, e.g., United States v. Boyd, 86 F.3d 719 (7th Cir. 1996) (“the more technical the legal rule, the less appropriate it is for the accused to make the choice personally”; decisions about when to challenge jurors are tactical and thus for lawyer to make); McLaughlin v. State, 173 P.3d 1014 (Alaska Ct. App. 2007) (having lawyer decide whether to pursue interlocutory review after conviction but before sentencing “is based on sound policy. Whether to petition for review is generally a complicated strategic and tactical decision that is best left to the attorney.”); State v. Davis, 506 A.2d 86 (Conn. 1986) (general rule is still that witness selection is tactical decision for lawyer, notwithstanding state constitutional provision that gives defendant right “to be heard by himself and by counsel . . . and to have compulsory process to obtain witnesses in his behalf”); State v. Mecham, 9 P.3d 777 (Utah Ct. App. 2000) (lawyer retains responsibility for making tactical decisions, including whether to pursue motion to suppress evidence).
RULE 1.2

REPRESENTING CLIENTS WITH DIMINISHED CAPACITY

When a client’s ability to make decisions about the representation is diminished, the division of decision-making authority between the lawyer and client may be different. For a discussion of this issue, see the Annotation to Model Rule 1.14.

Subsection (b): Representation Not Endorsement of Client’s Views or Conduct

Rule 1.2(b) says that representing a client does not in itself constitute an endorsement of the client’s political, economic, social, or moral views or activities. There was no counterpart to this provision in the Model Code. The provision is intended to facilitate the representation of unpopular clients. See Andre A. Borgeas, Necessary Adherence to Model Rule 1.2(b): Attorneys Do Not Endorse the Acts or Views of Their Clients by Virtue of Representation, 13 Geo. J. Legal Ethics 761 (Summer 2000); cf. Labrake v. State, 152 P.3d 474 (Alaska Ct. App. 2007) (lawyers “expected to represent people whose conduct may be questionable, and whose views on social and moral matters may differ significantly from the lawyer’s”); Tenn. Ethics Op. 96-F-140 (1996) (lawyer who believes his religious and moral beliefs will impair representation must allow court to determine propriety of withdrawal). See generally R.I. Ethics Op. 88-30 (1989) (lawyer who has no personal knowledge of client’s dishonesty may continue to represent client after third person alleges client is “a fraud”; ethics rules do not require that lawyers represent only innocent clients).

Subsection (c): Limiting Scope of Representation

Rule 1.2(c), as amended in 2002, permits a lawyer to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Previously, subsection (c) allowed a lawyer to “limit the objectives of the representation if the client consents after consultation.” Model Rule 1.2(c) (1998) [superseded] (emphasis added). The new version replaced the term “objectives” with “scope,” because only the client can limit the objectives, and added the requirement that such limitations be “reasonable under the circumstances.” The amendment was intended to give express permission for limited-representation agreements and “provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal services to low or moderate-income persons who otherwise would be unable to obtain counsel.” American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 55 (2006).

UNBUNDLED LEGAL SERVICES

A lawyer who undertakes representation that is limited in scope is providing what are known as “unbundled” legal services—that is, representation in which lawyer and client agree that the lawyer will handle only certain types of claims and not others, see, e.g., Delta Equip. & Constr. Co. v. Royal Indem. Co., 186 So. 2d 454 (La. Ct. App. 1966), or that the lawyer will represent the client on a specific transaction without assuming any general duties to the client beyond assuring the sufficiency of the relevant documents, see, e.g., Lerner v. Laufer, 819 A.2d 471 (N.J. Super. Ct. App. Div. 2003), or that litigation

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will be conducted only at the trial level, see, e.g., Young v. Bridwell, 437 P.2d 686 (Utah 1968); see also Indianapolis Podiatry, P.C. v. Efroymson, 720 N.E.2d 376 (Ind. Ct. App. 1999) (by disclosing to one client potential conflict with other client and limiting representation to exclude claims between the two, firm avoided breaching duty of loyalty); D.C. Ethics Op. 343 (2008) (limiting representation to “discrete legal issue or with respect to a discrete stage in the litigation” may allow lawyer to avoid conflict under Rule 1.9).

Examples of mechanisms for providing such services include legal hotlines, websites, and pro se clinics. For a discussion of issues relating to the provision of limited legal services, see Mary Helen McNeal, Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients, 32 Wake Forest L. Rev. 295 (1997); John C. Rothermich, Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice, 67 Fordham L. Rev. 2687 (1999); and Fred C. Zacharias, Limited Performance Agreements: Should Clients Get What They Pay For?, 11 Geo. J. Legal Ethics 915 (Summer 1998). For a discussion of lawyers’ participation in programs sponsored by courts or nonprofit organizations offering short-term limited legal services, see Rule 6.5 (limiting a lawyer’s risk of disqualification for conflicts of interest resulting from participation in such programs).

**Ghostwriting Court Documents for Pro Se Litigants**

Lawyers sometimes provide only limited, behind-the-scenes advice or document preparation for clients who wish to appear pro se or who cannot afford to hire a lawyer to litigate the matter. Some authorities have disapproved such surreptitious representation, especially when it involves a lawyer ghostwriting a document filed in court by a pro se litigant, because it misrepresents that the litigant is acting without the assistance of counsel and permits a lawyer to evade the responsibilities imposed by Rule 11 of the Federal Rules of Civil Procedure (requiring lawyers to certify that there are grounds to support the allegations made in court filings). See Ricotta v. California, 4 F. Supp. 2d 961 (S.D. Cal. 1998) (lawyer’s involvement in drafting pro se plaintiff’s court documents constituted unprofessional conduct); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075 (E.D. Va. 1997) (ghostwriting document filed with court by pro se litigant is inconsistent with procedural, ethical, and substantive rules of court); Johnson v. Bd. of County Comm’rs, 868 F. Supp. 1226 (D. Colo. 1994) (practice of ghostwriting pleadings may subject lawyer to contempt of court “irrespective of the degree to which it is considered unprofessional by the governing bodies of the bar”); III. Ethics Op. 04-03 (2005) (lawyer acting as mediator in domestic relations matter between unrepresented spouses may not ghostwrite proposed judgment for spouses to file pro se); cf. Mass. Ethics Op. 98-1 (1998) (lawyer may provide limited background advice to pro se litigant, but not extensive services such as drafting litigation documents, which would mislead court and other parties).

Some authorities, however, have found that such lawyer ghostwriting is ethically permissible in certain circumstances. See ABA Formal Ethics Op. 07-446 (2007) (Model Rules do not prohibit lawyer from providing undisclosed legal assistance to pro se litigant as long as done in manner that does not “[violate] rules that otherwise would apply to the lawyer’s conduct”); Kan. Ethics Op. 09-01 (2009) (lawyer may help prepare document for pro se litigant to file in court but it must include legend “Prepared
with Assistance of Counsel’
); N.J. Ethics Op. 713 (2007) (lawyer may draft documents for pro se litigant without disclosure if it is not “tactic” to get favorable treatment for litigant and if litigant, not lawyer, controls “final form and wording”); cf. Ariz. Ethics Op. 05-06 (2005) (“the practice is not inherently misleading [because] a court or tribunal can generally determine whether [a] document was written with a lawyer’s help”).

Some authorities have required that any document filed by a litigant proceeding pro se also be signed by any lawyer who provided assistance in preparing it. Duran v. Carris, 238 F.3d 1268 (10th Cir. 2001) (participation in drafting pro se appellate brief must be acknowledged by signature); Ellis v. Maine, 448 F.2d 1325 (1st Cir. 1971) (“[i]f a brief is prepared in any substantial part by a member of the bar, it must be signed by him”); Conn. Informal Ethics Op. 98-5 (1998) (lawyer who prepares document for purportedly pro se litigant to file with court must so inform court); Nev. Ethics Op. 34 (2009) (lawyer who gives substantial drafting assistance to pro se litigant in paperwork filed with court must reveal role by signing); cf. Colo. R. Civ. P. 11(b) (“An attorney may . . . provide limited representation in accordance with Colo. RPC 1.2 to a pro se party involved in a court proceeding. Pleadings or papers filed by the pro se party that were prepared with the drafting assistance of the attorney shall include the attorney’s name, address, telephone number and registration number”). Also see Model Rule 3.3 (Candor toward the Tribunal) and Model Rule 8.4 (Misconduct).

**LIMITATION MUST BE REASONABLE**

Rule 1.2(c) requires that any limitation placed upon the representation be “reasonable under the circumstances.” This generally prohibits a limitation that would violate another ethics rule or provision of substantive law. The comment to Rule 1.2 provides the example of limiting the representation to a brief telephone conversation, which might be reasonable if the matter concerned a “common and typically uncomplicated legal problem,” but unreasonable “if the time allotted was not sufficient to yield advice upon which the client could rely.” Model Rule 1.2, cmt. [7]; see Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255 (Miss. 1988) (insurance policy may not contain provisions limiting ethical obligations owed by insurance company lawyers to insured clients); Del. Ethics Op. 2006-1 (2006) (approving retainer agreement that limits representation to uncontested divorce, as long as lawyer continues undertaking outside that limitation if instructed to do so by relevant court); see also Greenwich v. Markhoff, 650 N.Y.S.2d 704 (App. Div. 1996) (law firm may be liable for malpractice for failure to file personal injury action on behalf of client even though retainer agreement purported to limit scope of representation to workers’ compensation claim; retainer agreement did not obviate firm’s duty to apprise client that personal injury action might lie); Mich. Ethics Op. RI-298 (1997) (lawyer may not agree to be named as drafter of deed if lawyer not involved in drafting deed and does not review it before its execution); cf. Model Rule 1.5, cmt. [5] (lawyer may not enter fee agreement “whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client’s interest”).

Limiting representation of a divorcing spouse to mediation, and requiring withdrawal if the divorce becomes contested, is one of the defining features of the collaborative law process. Several ethics opinions have held that limitation reasonable under


INFORMED CONSENT OF CLIENT: DISCLOSURE

Limited-scope representation is permissible under Rule 1.2 only if the lawyer first clearly explains the limitations to the client and their likely effect on the undertaking and the client consents. See, e.g., Johnson v. Bd. of County Comm’rs, 85 F.3d 489 (10th Cir. 1996) (although separate representation permissible for government official sued in both official and individual capacity, lawyer may limit representation to official capacity only if he consults with client about his exposure in his individual capacity and client consents to limitation); Colo. Ethics Op. 101 (1998) (“lawyer engaged in unbundled legal services must clearly explain the limitations of the representation, including the types of services which are not being provided and the probable effect of limited representation”); see also ABA Formal Ethics Op. 96-403 (1996) (lawyer hired by insurer to represent insured must advise insured that lawyer intends to proceed at direction of insurer in accordance with insurance contract); N.Y. City Ethics Op. 2001-3 (2001) (lawyer may limit scope of representation to avoid conflict with current or former client, provided client whose representation is limited consents after full disclosure and limitation does not so restrict representation as to render it inadequate); cf. Indianapolis Podiatry, P.C. v. Efroymson, 720 N.E.2d 376 (Ind. Ct. App. 1999) (when limiting scope of representation, extent of required disclosure to client is “similar, if not identical, to that required in the context of a conflict of interest”). See generally Model Rule 1.5(b) (requiring that scope of representation, as well as basis for fees, be communicated to client before representation begins or shortly thereafter).

Subsection (d): Counseling or Assisting in Unlawful or Fraudulent Conduct

LAWYER MAY NOT ASSIST CLIENT IN CRIMINAL OR FRAUDULENT CONDUCT

A lawyer may not assist a client in conduct that the lawyer knows is criminal or fraudulent. See People v. Chappell, 927 P.2d 829 (Colo. 1996) (lawyer disbarred for assisting client in violation of child custody order, resulting in felony charges against client); People v. Theodore, 926 P.2d 1237 (Colo. 1996) (lawyer drove client to family home in violation of restraining order issued against client); Attorney Grievance Comm’n v. Protokowicz, 619 A.2d 100 (Md. 1993) (lawyer helped former client with breaking into client’s wife’s home, killing pet cat in microwave oven, and intending to steal evidentiary documents for use in proceedings); In re Hougé, 764 N.W.2d 328 (Minn. 2009) (lawyer suspended for hiring client and supervising activity that client was barred...

Even passive assistance, such as withholding information from a court or the government, may violate Rule 1.2. See, e.g., *People v. Casey*, 948 P.2d 1014 (Colo. 1997) (forty-five-day suspension for lawyer who failed to inform court that client facing trespassing charge was using someone else’s identity); *In re Price*, 429 N.E.2d 961 (Ind. 1982) (lawyer withheld information from government to assist client in obtaining Medicaid benefits illegally); *State ex rel. Okla. Bar Ass’n v. Golden*, 201 P.3d 862 (Okla. 2008) (lawyer convicted under federal misprision of felony statute disbarred for same conduct under Rules 1.2(c), 4.1, and 8.4); cf. *Chapman Lumber, Inc. v. Tager*, 952 A.2d 1 (Conn. 2008) (lawyer liable for helping client defraud creditor by failing to reveal that client did not own building deeded to creditor to settle debt). But see Utah Ethics Op. 97-02 (1997) (lawyer’s failure to give law enforcement authorities telephone number of client accused of crime does not amount to assisting client in committing crime). Also see the Annotations to Model Rule 3.3 (Candor toward the Tribunal) and Model Rule 8.4 (Misconduct).

**Lawyer May Not Advise Client to Engage in Criminal or Fraudulent Conduct**

Regardless of whether actual assistance is rendered, a lawyer may never advise a client to engage in criminal or fraudulent conduct. See, e.g., *People v. Gifford*, 76 P.3d 519 (Colo. O.P.D.J. 2003) (lawyer advised client to offer ex-wife real estate in exchange for favorable testimony in pending criminal case); *In re Scionti*, 630 N.E.2d 1358 (Ind. 1994) (lawyer counseled father not to return child to mother, notwithstanding court order to do so); *In re Johnson*, 597 P.2d 740 (Mont. 1979) (lawyer advised client to disregard ruling of court); *In re Werne’s Case*, 839 A.2d 1 (N.H. 2003) (lawyer reprimanded for advising client to disclose confidential court records to newspaper); *In re Edson*, 530 A.2d 1246 (N.J. 1987) (lawyer disbarred for advising clients to invent evidence in defense of drunk-driving case); Vt. Ethics Op. 97-6 (1997) (lawyer may not advise client to refuse to submit to evidentiary test for alcohol when such refusal would constitute a crime, but may advise client of legal consequences of taking or refusing to take such test and of any good-faith argument for contesting validity of law).

**When Lawyer Should Inquire into Client’s Affairs**

A lawyer’s assistance in unlawful conduct is not excused by a failure to inquire into the client’s objectives. See, e.g., *In re Bloom*, 745 P.2d 61 (Cal. 1987) (lawyer disbarred...
for aiding client in transporting plastic explosives to Libya; court dismissed argument that lawyer believed in good faith that transport of explosives authorized by National Security Council); *Fla. Bar v. Brown*, 790 So. 2d 1081 (Fla. 2001) (by failing to consider legality of request of president of insurance services company concerning campaign contribution reimbursement scheme, lawyer assisted his client in conduct that lawyer should have known was criminal or fraudulent); *Harrell v. Crystal*, 611 N.E.2d 908 (Ohio Ct. App. 1992) (lawyer who advised clients on tax shelter investments did not properly investigate investments and individuals involved, and did not request Letter Ruling regarding legality from IRS); see also ABA Informal Ethics Op. 1470 (1981) (lawyer should not undertake representation without making further inquiry if facts presented by prospective client suggest representation might aid client in perpetrating fraud or otherwise committing crime); cf. *In re Tocco*, 984 P.2d 539 (Ariz. 1999) (violation of Rule 1.2(d) requires knowing misconduct; mere showing that lawyer reasonably should have known conduct violated rule, without more, was insufficient).

**TAKING GOOD-FAITH POSITION**

Rule 1.2(d) permits a lawyer to assist a client in making a good-faith determination of the validity, scope, meaning, or application of the law. For an application of this principle, see ABA Formal Ethics Opinion 85-352 (1985), which explained (1) that a lawyer representing a client in preparation of a tax return may advise a statement of positions most favorable to the client if the lawyer has a good-faith belief that such positions are warranted in existing law or can be supported by a good-faith argument for an extension, modification, or reversal of existing law, (2) that a good-faith belief can exist even if the lawyer believes the position will not prevail, and (3) that good faith requires some realistic possibility of success. See also Ariz. Ethics Op. 88-02 (1988) (though lawyer has good-faith doubt about enforceability of health care provider’s proposed lien form, he need not advise client against signing form, but should advise client about all potential consequences before signing); Md. Ethics Op. 2004-05 (2004) (lawyer who learned that facts upon which former clients’ application for permanent U.S. residence are untrue may, but is not obliged to, reveal truth to Immigration Service, but must “remonstrate with former clients” to be candid to Immigration Service themselves); Vt. Ethics Op. 97-6 (1997) (lawyer may not advise client to refuse to submit to evidentiary test for alcohol when such refusal would constitute a crime, but may advise client of legal consequences of taking or refusing to take such test and of any good-faith argument for contesting validity of law).

**Former Subsection (e): Consultation with Client regarding Ethical and Legal Limitations on Lawyer’s Conduct**

Formerly, Rule 1.2 contained a subsection (e), which stated that “[w]hen a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.” Model Rule 1.2(e) (1983) [superseded]. This provision was deleted from Rule 1.2 by amendment in 2002. The substance of the provision is now contained in Model Rule 1.4(a)(5).
Rule 1.4

**Communication**

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

**COMMENT**

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

**Communicating with Client**

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

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

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

**Explaining Matters**

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

**Withholding Information**

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

ANNOTATION

Subsection (a)

As originally promulgated, Rule 1.4(a) simply stated that “[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.” See Model Rule 1.4(a) (1983) [superseded]. In 2002, the rule was amended to identify five specific requirements. See American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 70–76 (2006).

Subsection (a)(1): Duty to Inform Client of Decision or Circumstance with Respect to Which Client’s Informed Consent Is Required

Subsection (a)(1) requires a lawyer to “promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules.” The Model Rules specifically require a lawyer to obtain a client’s informed consent in a variety of situations. For example, Rule 1.2(c) requires informed consent if a lawyer wants to limit the scope of representation. Most often, however, a client’s informed consent is required when a lawyer seeks a waiver of duties relating to confidentiality and/or conflicts of interest. For a discussion of these situations, see the Annotations to Model Rules 1.6, 1.8, 1.9, 1.11, 1.12, 1.18, and 2.3.

Subsection (a)(2): Duty to Consult with Client about Means

Rule 1.4(a)(2) requires a lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” This language is almost identical to that contained in Rule 1.2(a), which states that “as required by Rule 1.4, [a lawyer] shall consult with the client as to the means by which [the client’s objectives] are to be pursued.” Rule 1.4(a)(2), however, adds the word “reasonably,” to preclude an interpretation that the lawyer would always be required to consult, even when a particular act is impliedly authorized. American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 73 (2006).

Some ethics opinions have concluded that under these rules, the “means” by which a representation is to be accomplished includes the personnel by whom it is to be accomplished if they include lawyers hired outside the firm, and that clients should be informed of such outsourcing. See ABA Formal Ethics Op. 08-451 (2008); N.C. Formal Ethics Op. 2007-12 (2008); Ohio Sup. Ct. Ethics Op. 2009-6 (2009).
For discussion of a lawyer’s duty to consult with a client regarding the means for pursuing the client’s objectives, see the Annotation to Model Rule 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer).

**Subsection (a)(3): Duty to Inform Clients of Status**

Rule 1.4(a)(3) requires lawyers to keep clients informed about the status of their legal matters. See *In re Boaten*, 22 P.3d 1034 (Kan. 2001) (lawyer failed to notify client of pending change-of-custody proceeding, resulting in uncontested change in custody of client’s daughter); *In re Sarama*, 26 So. 3d 770 (La. 2010) (lawyer representing client in unpaid tax matter took $17,000 from client without informing him whether money was for payment of tax debt or fees); *Attorney Grievance Comm’n v. Hill*, 919 A.2d 1194 (Md. 2007) (lawyer failed to inform client of show-cause hearing at which client was required to appear); *In re Disciplinary Action against Getty*, 452 N.W.2d 694 (Minn. 1990) (lawyer had duty to notify client of hearing); *In re Harris*, 868 A.2d 1011 (N.J. 2005) (lawyer failed to return client phone calls and otherwise ceased communication for months at a time); *Threadgill v. Bd. of Prof’l Responsibility of the Supreme Court*, 299 S.W.3d 792 (Tenn. 2009) (lawyer failed to keep client informed of status of negotiations with, and payments to, subrogees entitled to share of settlement proceeds).

The lawyer must inform the client if the client’s case has been dismissed. See, e.g., *People v. Nelson*, 40 P.3d 840 (Colo. O.P.D.J. 2002) (lawyer failed to inform clients that cases dismissed due to lawyer’s failure to prosecute); *In re Ballew*, No. S10Y0213, 2010 WL 1526485 (Ga. Apr. 19, 2010) (lawyer failed to inform client of settlement and dismissal of cases); *Idaho State Bar v. Souza*, 129 P.3d 1251 (Idaho 2006) (lawyer failed to tell client that he filed personal injury suit three days after limitations period had run and that suit was dismissed); *In re Barnes*, 691 N.E.2d 1225 (Ind. 1998) (lawyer failed to inform clients that case dismissed due to lawyer’s lack of diligence); *Ky. Bar Ass’n v. Taylor*, 4 S.W.3d 138 (Ky. 1999) (lawyer signed three separate agreed orders dismissing client’s complaint with prejudice, without client’s knowledge or consent); *In re Elbert*, 698 So. 2d 949 (La. 1997) (lawyer failed to inform clients of dismissal resulting from lawyer’s failure to file case in proper venue and effect service within proper time limits); *In re Zeitler*, 866 A.2d 171 (N.J. 2005) (lawyer repeatedly neglected matters to point of dismissal and failed to inform clients); see also *In re Rosenthal*, 446 A.2d 1198 (N.J. 1982) (lawyer should inform client of imminent dismissal even if client has announced intention to no longer prosecute claim, as it is always possible for client to change mind).

**Attempts to Cover Up Violate Duty**

If a lawyer errs or fails to follow client instructions on a material matter, the rule requires the lawyer to inform the client. See, e.g., *In re Schoeneman*, 891 A.2d 279 (D.C. 2006) (lawyer disciplined for, inter alia, telling client that discrimination case was “fine” when in fact it had been dismissed); *In re Thomas*, 740 A.2d 538 (D.C. 1999) (lawyer misled client into thinking that her money was in escrow account and then stopped providing her with any information); *Fla. Bar v. Fredericks*, 731 So. 2d 1249 (Fla. 1999) (lawyer misrepresented to client that lawsuit filed and resolved in client’s favor, when in fact no suit had been filed); *In re Hagedorn*, 725 N.E.2d 397 (Ind. 2000) (lawyer...
hired to assist clients in adopting child failed to take steps to effectuate adoption and misled clients about status of proceedings; In re Hasty, 227 P.3d 967 (Kan. 2010) (lawyer failed to tell client that file misplaced, discovery deadlines missed, and client’s pleadings ordered stricken); Attorney Grievance Comm’n v. Faber, 817 A.2d 205 (Md. 2003) (lawyer falsely told client that her bankruptcy petition filed); In re Hyde, 950 P.2d 806 (N.M. 1997) (lawyer neglected client matters, misled clients about status of case and work performed, failed to follow clients’ instructions, and billed for work not done); In re Brousseau, 697 A.2d 1079 (R.I. 1997) (lawyer who disagreed with client’s instructions to file partition suit ignored client’s instructions and falsely stated that suit filed); In re Glee, 472 S.E.2d 615 (S.C. 1996) (lawyer failed to file client’s personal injury claim within statute of limitations and led client to believe complaint filed and trial forthcoming); Colo. Ethics Op. 113 (2005) (duty under Rule 1.4 includes “[informing] the client of material adverse developments, including those resulting from the lawyer’s own errors”); Minn. Ethics Op. 21 (2009) (lawyer must inform client if lawyer’s conduct in representation creates nonfrivolous potential malpractice claim).

Similarly, a lawyer’s attempt to undo the damage resulting from the lawyer’s own error serves only to make matters worse through an additional act of dishonesty. See, e.g., In re Gibson, 991 P.2d 277 (Colo. 1999) (lawyer neglected matter and misrepresented status of case to client for four years; when case dismissed and defendant went out of business, lawyer created fictitious settlement documents and disbursed funds to client); In re Thyden, 877 A.2d 129 (D.C. 2005) (lawyer failed to tell client of sanction entered against client by bankruptcy court, and appealed sanction to district court); Fla. Bar v. Bazley, 597 So. 2d 796 (Fla. 1992) (lawyer did not tell client claim was barred by workers’ compensation statute; falsely told client he filed and won civil action and was collecting judgment, advancing payments to client out of his own funds); In re Mays, 495 S.E.2d 30 (Ga. 1998) (lawyer lied to client that suit settled, when he actually let statute of limitations run and used his own funds to pay purported settlement).

**Lawyer Must Communicate Promptly**

A lawyer must promptly convey important information about the client’s matter. See People v. Primavera, 942 P.2d 496 (Colo. 1997) (lawyer waited six months before notifying incarcerated client that he had been appointed to represent him in dependency and neglect matter, and waited three days before informing client of court order allowing children to return to home of client’s former wife, where her boyfriend allegedly molested them); Fla. Bar v. Nowacki, 697 So. 2d 828 (Fla. 1997) (lawyer undergoing cancer treatment delegated entire workload to new associate without consulting with clients); In re Garnett, 603 S.E.2d 281 (Ga. 2004) (lawyer appointed to criminal appeals failed to tell clients of affirmance of their convictions); In re Taylor, 741 N.E.2d 1239 (Ind. 2001) (lawyer failed to provide disabled and unemployed divorce client with interim billing or other information regarding escalating bills); In re Baxter, 940 P.2d 37 (Kan. 1997) (lawyer delayed informing client about agreement with adverse party to forego part of attorneys’ fee demand, for which lawyer sought reimbursement from client, and about fact that settlement check was received by firm and deposited into wrong account); In re Carrigan, 452 A.2d 206 (N.J. 1982) (lawyer should promptly notify clients of changes in lawyer’s address or telephone number); Cleveland Metro. Bar
Ass’n v. Thomas, 925 N.E.2d 959 (Ohio 2010) (lawyer failed to appear at final pretrial conference and then failed to inform client of consequent dismissal); State ex rel. Okla. Bar Ass’n v. Wilcox, 227 P.3d 642 (Okla. 2009) (lawyer failed to notify client of receipt of workers’ compensation payments until after deadline to negotiate checks passed); In re Disciplinary Proceeding against Marshall, 157 P.3d 859 (Wash. 2007) (lawyer filed appeal of dismissal of several clients’ claims without prior consultation); In re Disciplinary Proceeding against Anschell, 9 P.3d 193 (Wash. 2000) (immigration lawyer failed to inform certain clients that INS had not received naturalization applications, that other application for change of status had been denied, that lawyer had not filed another application, and that lawyer had lost other files); In re Schwartz, 496 N.W.2d 605 (Wis. 1993) (lawyer did not tell clients about opponent’s motions to compel for failure to answer interogatories, or judge’s imposition of discovery sanctions, including award of attorneys’ fees he himself paid); Or. Ethics Op. 2005-162 (2005) (union-member lawyer must keep employer-client informed about any strike contemplated by union).

SETTLEMENT OFFERS

Under Rule 1.2, whether to settle a matter is the client’s decision. Thus, under both Rules 1.2 and 1.4, a lawyer must communicate a settlement offer unless the lawyer is aware from prior discussions that the client would reject the offer. See Burton v. Maltolese, 835 A.2d 998 (Conn. 2003) (lawyer failed to convey defendants’ offers to waive claims for fees and costs and waive fees awarded defendants as sanctions in exchange for withdrawal of suit); In re Steele, 868 A.2d 146 (D.C. 2005) (lawyer failed to inform client of scheduled settlement conference and defendant’s initial settlement offer); In re Ballew, No. S10Y0213, 2010 WL 1526485 (Ga. Apr. 19, 2010) (lawyer failed to inform client of settlement offers lawyer accepted and consequent dismissal of cases); Comm. on Prof’l Ethics v. Behnke, 486 N.W.2d 275 (Iowa 1992) (lawyer handled client’s personal injury claim by telephone, with only one subsequent meeting, and settled it without consulting client); In re Baehr, 744 P.2d 799 (Kan. 1987) (lawyer failed to advise client of proposed settlement of insurance claim, or of judgment); In re Elbert, 698 So. 2d 949 (La. 1997) (lawyer failed to communicate settlement offer to clients); Green v. Va. State Bar, 677 S.E.2d 227 (Va. 2009) (plaintiffs’ lawyer made settlement offer to defendant without informing or getting authorization from clients); cf. First Nat’l Bank of LaGrange v. Lowrey, 872 N.E.2d 447 (Ill. App. Ct. 2007) (in legal malpractice case, lawyer breached standard of care by “by failing to advise” of settlement offer; citing Rule 1.4).

In addition, a lawyer must tell the client enough about the circumstances of the offer so that the client may consider alternatives, including retaining other counsel or deciding not to go forward at all. See, e.g., Rice v. Perl, 320 N.W.2d 407 (Minn. 1982) (lawyer failed to disclose law firm’s professional relationship with insurance claim adjustor responsible for settling client’s claim); Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255 (Miss. 1988) (lawyer must fully explain all ramifications of any offer of settlement).
CRIMINAL REPRESENTATION

The duty of a lawyer representing a criminal defendant to consult with the client about issues over which a client has decision-making authority is imposed by Rule 1.2, but is also a function of the defendant’s constitutional rights. See, e.g., Canaan v. McBride, 395 F.3d 376 (7th Cir. 2005) (lawyers failed to inform defendant of right to testify at penalty phase of trial and so breached constitutional “duties to consult with the defendant on important decisions and to keep the defendant informed of important developments”; citing Rule 1.4); In re Wolfram, 847 P.2d 94 (Ariz. 1993) (failing to consult with client about possibility of jury instruction on lesser-included offenses violated duty of communication as well as duty of diligence); Dew v. State, 843 N.E.2d 556 (Ind. Ct. App. 2006) (lawyer’s failure to convey prosecution’s plea agreement proposal amounts to ineffective assistance of counsel; citing Rule 1.4); In re Disciplinary Proceeding against Longacre, 122 P.3d 710 (Wash. 2005) (lawyer failed to discuss plea agreements offered by prosecution with his client); Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235 (W. Va. 2000) (lawyer failed to convey plea offers from federal prosecutor and explain their implications under federal sentencing guidelines); cf. In re LaFont, 898 So. 2d 339 (La. 2005) (Rule 1.4 required lawyer to communicate clearly that making plea agreement would not guarantee commutation of sentence). For discussion of a lawyer’s duty to consult with the client in a criminal matter, also see the Annotation to Model Rule 1.2.

MISSING CLIENTS

Even when a lawyer loses track of a client the duty to communicate important information persists and requires at least reasonable effort to find the client to deliver the information. See Ariz. Ethics Op. 06-07 (2006) (duty to consult with client before settling matter persists even if client’s whereabouts not known); La. Ethics Op. 05-RPCC-001 (2005) (lawyer closing her practice should send form letter to last known address of clients whose whereabouts are unknown, notifying them of lawyer’s termination of representation and of opportunity for clients to obtain files and property); Ohio Sup. Ct. Ethics Op. 2005-10 (2005) (before reporting client property to state as unclaimed, lawyer must make reasonable effort to contact client at last known address); S.C. Ethics Op. 98-07 (n.d.) (lawyer retained to pursue personal injury suit for missing client may not treat matter as terminated until he has made reasonable effort to locate client). Whether more is required after reasonable effort fails to locate a client depends upon the information to be conveyed and the circumstances of the representation. See, e.g., Burke v. Lewis, 122 P.3d 533 (Utah 2005) (trial judge properly appointed lawyer to represent litigant whose whereabouts were unknown, even though appointed lawyer could not communicate with client); Alaska Ethics Op. 2004-3 (2004) (lawyer facing impending limitations deadline for client who cannot be located may file suit without express authorization if lawyer believes prior communications with client conferred implied authorization and failure to file would have material, adverse effect); N.Y. State Ethics Op. 787 (2005) (lawyer who jointly represents wife in personal injury claim and missing husband in loss of consortium claim may not settle wife’s claim and thereby lose husband’s claim without his consent; if husband cannot be found, lawyer must withdraw from both representations; analyzing New York code).
MAY LAWYER DELAY OR AVOID TELLING CLIENT SOMETHING?

Comment [7] to Rule 1.4 suggests that “[i]n some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication.” The comment gives as an example the case of a lawyer withholding a psychiatric diagnosis of a client if the examining psychiatrist indicates that disclosure would be harmful to the client. However, the comment also states that the lawyer may not withhold information merely to serve the interests or convenience of the lawyer or a third person. See, e.g., D.C. Ethics Op. 327 (2005) (lawyer representing multiple defendants who all waived client-lawyer confidentiality vis-à-vis co-defendants may not withhold material information because one client later changes his mind); N.D. Ethics Op. 97-12 (1997) (lawyer may avoid disclosing client’s psychological records to client if lawyer reasonably believes that disclosure would result in substantial harm to client or others; lawyer should urge client to discuss records directly with psychologist, with or without lawyer present); cf. In re Disciplinary Action against Howe, 626 N.W.2d 650 (N.D. 2001) (although retainer agreement stated lawyer would send “itemized bills from time to time,” lawyer did not send bill for more than two years and then used nonpayment as excuse for discontinuing representation).

COMMUNICATING THROUGH OTHERS

A lawyer may not delegate to subordinates the obligation to communicate with a client. See, e.g., In re Galbasini, 786 P.2d 971 (Ariz. 1990) (lawyer violated Rule 1.4 when he failed to supervise nonlawyer employees and as consequence “had no idea who his clients were”); Mays v. Neal, 938 S.W.2d 830 (Ark. 1997) (lawyer reprimanded when all contact with client was through nonlawyer assistant, assistant worked with client even before lawyer knew of client’s existence, client never met or spoke with lawyer despite requests to do so, lawyer never explained his contract with client or objectives of legal representation, case settled without seeking client’s approval, and client not informed of receipt of settlement check); Fla. Bar v. Glueck, 985 So. 2d 1052 (Fla. 2008) (lawyer disbarred for allowing client communications to be conducted by nonlawyer employees of immigration consulting firm with which his firm shared office); In re Farmer, 950 P.2d 713 (Kan. 1997) (lawyer failed to return calls, failed to inform clients of court orders, and instructed nonlawyer staff to “handle” client phone calls); Attorney Grievance Comm’n v. Kimmel, 955 A.2d 269 (Md. 2008) (disciplining firm partners for failing to respond to inquiries of client whose case assigned to out-of-state associate).

Similarly, a lawyer risks violating Rule 1.4 by communicating with a third party instead of directly with the client. People v. Rivers, 933 P.2d 6 (Colo. 1997) (lawyer hired by client’s girlfriend to represent client, then subsequently fired by girlfriend, had duty to notify client to determine whether he still wanted lawyer to represent him); Machado v. Statewide Grievance Comm., 890 A.2d 622 (Conn. App. Ct. 2006) (lawyer who communicated with incarcerated client through client’s business partner disciplined for failing to inform client after business partner terminated representation); In re Dreier, 671 A.2d 455 (D.C. 1996) (lawyer’s unreasonable reliance on intermediary to communicate with client constituted violation of Rule 1.4); Fla. Bar v. Jasperson, 625 So. 2d 459 (Fla. 1993) (lawyer retained by wife to handle joint bankruptcy never met with hus-
band yet prepared and filed joint petition, depriving husband of right to make informed decision; cf. Attorney Grievance Comm’ n v. Lee, 890 A.2d 273 (Md. 2006) (lawyer who had difficulty communicating directly with imprisoned client, and who had previously communicated with client’s mother, disciplined for failing to continue communication through mother).

**WHEN A LAWYER LEAVES A FIRM OR THE PRACTICE OF LAW**

Lawyers who cease practicing law must notify their clients. See, e.g., People v. Martin, 223 P.3d 728 (Colo. O.P.D.J. 2009) (patent lawyer who sold building housing his office and abandoned documents disbarred after sole associate left firm and lawyer failed to respond to client communications); In re Cohen, 612 S.E.2d 294 (Ga. 2005) (lawyer living in Florida failed to tell Georgia client he adopted inactive status in Georgia and then failed to appear at arraignment); In re Ragland, 697 N.E.2d 44 (Ind. 1998) (lawyer failed to inform client he had been suspended from practice); In re Hughes, 874 So. 2d 746 (La. 2004) (lawyer continued to accept new clients and demand retainers just days before assuming office as judge); In re Disciplinary Action against Orren, 590 N.W.2d 127 (Minn. 1999) (lawyer abandoned law practice without notifying clients); Columbus Bar Ass’n v. Kiesling, 925 N.E.2d 970 (Ohio 2010) (lawyer abandoned practice, ceased to pay rent for office, and failed to collect or respond to mail communications from clients); La. Ethics Op. 05-RPCC-001 (2005) (lawyer closing practice must inform all clients in time to allow them to hire new counsel).

Some state ethics opinions have advised that lawyers have a duty to inform their clients if they will be leaving their firms or their practices, so that the clients have the opportunity to choose between following the lawyer or remaining with the firm. See, e.g., Ariz. Ethics Op. 99-14 (1999) (lawyer who had significant contact with client is required by Rule 1.4 to notify client of departure and give client opportunity to choose between going with lawyer or remaining with firm); Colo. Ethics Op. 116 (2007) (both departing lawyer and firm must notify clients of lawyer’s departure, preferably jointly); Ky. Ethics Op. E-424 (2005) (lawyer departing firm must inform clients in whose representation lawyer played significant role); Mo. Ethics Op. 970197 (n.d.) (lawyer must give notice of departure to clients with whom lawyer had significant contact); Pa.-Phila. Joint Formal Ethics Op. 2007-300 (2007) (both departing lawyer and firm must notify clients of lawyer’s departure; joint notice preferable); R.I. Ethics Op. 2003-07 (2003); S.C. Ethics Op. 97-30 (1997); see also D.C. Ethics Op. 221 (1991) (law firm may not restrict departing lawyer’s right to send departure announcements to clients and may not restrict lawyer’s responses to client inquiries about departure). But see Conn. Ethics Op. 00-25 (2000) (lawyer may—but is not required to—notify clients of pending departure from firm); Ohio Sup. Ct. Ethics Op. 98-5 (1998) (lawyer may notify clients he is leaving firm and indicate willingness to provide legal services).

**Subsection (a)(4): Duty to Comply Promptly with Reasonable Requests for Information**

A lawyer must promptly comply with a client’s reasonable requests for information. See People v. Damkar, 908 P.2d 1113 (Colo. 1996) (lawyer’s failure to reply promptly to clients’ requests for information violated Rule 1.4); In re Benge, 783 A.2d 1279 (Del. 2001).
2001) (lawyer who drafted trust document that required lawyer’s consent to amendments to document failed to respond to client’s phone calls and letters seeking lawyer’s consent); In re Bernstein, 707 A.2d 371 (D.C. 1998) (lawyer failed to respond promptly to clients’ phone calls and requests for information, and did not even inform clients lawsuit had been filed on their behalf until lawyer discharged, eighteen months after filing); Fla. Bar v. Flowers, 672 So. 2d 526 (Fla. 1996) (lawyer failed to respond to client’s questions about orders to show cause she received in guardianship case); In re Turner, 361 S.E.2d 824 (Ga. 1987) (lawyer refused, for over one year, to return clients’ telephone calls, keep appointments, or communicate with clients in any manner); In re Wenger, 112 P.3d 199 (Kan. 2005) (lawyer repeatedly failed to return phone calls from clients seeking information); Ky. Bar Ass’n v. Greer, 959 S.W.2d 97 (Ky. 1998) (lawyer failed to respond to any of client’s phone calls and letters regarding status of dissolution proceeding); In re Waltzer, 883 So. 2d 973 (La. 2004) (lawyer ignored phone calls from inquiring clients); In re Disciplinary Action against Cowan, 540 N.W.2d 825 (Minn. 1995) (lawyer failed to deliver abstract of client’s property to subsequent purchaser despite numerous requests over twenty-year period); State ex rel. Okla. Bar Ass’n v. Shomber, 227 P.3d 157 (Okl. 2009) (lawyer failed to respond to several clients’ requests for information regarding status of their immigration matters); In re Disciplinary Proceedings against Winter, 522 N.W.2d 504 (Wis. 1994) (probate lawyer failed to return some fifty calls from estate’s personal representative).

However, a lawyer’s failure to respond to every request does not necessarily violate the rule. See, e.g., In re Schoeneman, 777 A.2d 259 (D.C. 2001) (lawyer’s failure to return client’s phone calls for three weeks did not violate Rule 1.4 because client and lawyer spoke monthly and lawyer regularly informed client of his activities); cf. Lawyer Disciplinary Bd. v. Chittum, 689 S.E.2d 811 (W. Va. 2010) (no violation for lawyer’s failure to return client’s calls placed after divorce that lawyer had been appointed to obtain was accomplished).

Subsection (a)(5): Consultation with Client regarding Ethical and Legal Limitations on Lawyer’s Conduct

Subsection (a)(5) of Rule 1.4 was formerly Rule 1.2(e). It was moved in 2002 in accordance with the decision to place all rules imposing duties of communication with a client in Rule 1.4. American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 73 (2006). If a lawyer perceives that the client expects assistance that would be unethical or illegal for the lawyer to provide, the rule requires the lawyer to inform the client of the limitations on the lawyer’s conduct. See In re Marshall, 680 N.E.2d 1098 (Ind. 1997) (lawyer agreed to represent client in out-of-state matter, but failed to inform client that he was not licensed to practice law in that state); In re Breslin, 793 A.2d 645 (N.J. 2002) (lawyer failed to explain to former client that he would not participate in illegal scheme when former client presented him with envelope containing son’s résumé and bundles of money for delivery to police commissioner); ABA Formal Ethics Op. 08-453 (2008) (if firm’s ethics counsel concludes lawyer’s proposed conduct in representation would violate ethics rules, then that “requires an explanation to the client of the possible consequences of the proposed action”); cf. People v. Doherty, 945 P.2d 1380 (Colo. 1997) (lawyer should
have responded to client’s creation of false evidence by informing him of ethical problem it caused rather than neglecting case and ceasing to communicate with client).

Subsection (b): Duty to Explain the Law and the Benefits and Risks of Alternate Courses of Action

Rule 1.4(b) requires a lawyer to explain a matter to a client to the extent reasonably necessary for the client to make informed decisions concerning the representation. See Attorney Grievance Comm’n v. Snyder, 793 A.2d 515 (Md. 2002) (lawyer failed to explain implications of DWI case adequately to client, incorrectly advising her that she need not appear in court for initial appearance, resulting in her arrest). Also see “Criminal Representation” under the previous discussion of subsection (a)(3).

Accordingly, a lawyer must explain the legal effect of entering an agreement or executing a legal document. See, e.g., In re Morse, 470 S.E.2d 232 (Ga. 1996) (lawyer asked client to sign agreement settling workers’ compensation claim without explaining its legal effect); In re Ragland, 697 N.E.2d 44 (Ind. 1998) (lawyer failed to explain impact of settlement and indemnity agreement); In re Flack, 33 P.3d 1281 (Kan. 2001) (lawyer failed to meet individually with clients to explain estate plans and relied on nonlawyer staff to explain plans to clients); Mo. Ethics Op. 960066 (n.d.) (if binding arbitration clause in retainer agreement, lawyer must make certain client aware of provision and understands it); N.H. Ethics Op. 2008-09/1 (2009) (lawyer who drafts will or trust naming lawyer as fiduciary must “frankly discuss all available options pertaining to the selection of fiduciaries”); Tex. Ethics Op. 586 (2008) (lawyer must “explain the significant advantages and disadvantages of binding arbitration” if binding arbitration clause in retainer agreement).

Explaining a legal matter includes advising the client of any possible adverse consequences. See, e.g., In re Disciplinary Proceedings against Cohen, 82 P.3d 224 (Wash. 2004) (lawyer unilaterally transferred case to mandatory arbitration without telling client that losing arbitration would make client liable for opponent’s attorneys’ fees); In re Winkel, 577 N.W.2d 9 (Wis. 1998) (lawyer failed to inform clients about risk of criminal prosecution if clients surrendered business assets to bank and law firm without arranging to pay subcontractor bills); ABA Formal Ethics Op. 02-425 (2002) (lawyer must fully apprise client of advantages and disadvantages of arbitration clause in proposed fee agreement, including that arbitration normally results in client’s waiver of significant rights, such as right to jury trial, broad discovery, and appeal).

When a lawyer is aware of facts suggesting that a client’s objectives in a transaction are at risk, the lawyer must apprise the client of those facts and their legal implications so that the client can make an informed decision about alternative courses of action. See In re Sullivan, 727 A.2d 832 (Del. 1999) (lawyer whose failure to file brief resulted in dismissal of appeal sent letter to client more than a year later, informing her there were “no claims pending” in her case); In re Cable, 715 N.E.2d 396 (Ind. 1999) (lawyer failed to inform client that he was too busy to handle appeal); Attorney Grievance Comm’n v. Cassidy, 766 A.2d 632 (Md. 2001) (lawyer hired to draft and record deed failed to tell client he had been suspended, which was vital information because law requires certification by lawyer to record deed); In re Howe, 626 N.W.2d 650 (N.D. 2001) (lawyer failed to explain to client he was not following through with commitment to
reduce award to judgment, resulting in client’s inability to make informed decision to secure alternate counsel to complete matter before interest rate locked in); Ariz. Ethics Op. 97-6 (1997) (criminal defense lawyer whose client enters cooperation agreement with law enforcement agencies must fully advise client of real-world consequences of such cooperation, including fact that agencies did not have resources to protect client or his family); Mass. Ethics Op. 09-03 (2009) (lawyer jointly representing employer and employee in immigration matter must inform both if employment authorization revoked).
Rule 1.6  
Confidentiality of Information  

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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

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

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

(4) to secure legal advice about the lawyer’s compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or

(6) to comply with other law or a court order.

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer’s representation of the client. See Rule 1.18 for the lawyer’s duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer’s duty not to reveal information relating to the lawyer’s prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer’s duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence
of the client’s informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

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

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

**Authorized Disclosure**

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

**Disclosure Adverse to Client**

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

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

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

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

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

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

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

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

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

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

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

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

Former Client

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

Annotation

Nature and Origin of Duty of Confidentiality

Model Rule 1.6 sets out the lawyer’s professional duty to protect the confidentiality of client information. This ethical duty derives from both the law of agency and the law of evidence. See Restatement (Third) of the Law of Agency § 8.05 (2006) (agent may not disclose or use “confidential information” of principal for agent’s own purposes or those of third party); Restatement (Third) of the Law Governing Lawyers §§ 59–67, 68–86 (2000) (confidentiality rules derived from agency law and professional regulations; evidentiary attorney privilege protects confidential client-lawyer communications from coerced disclosure in course of legal proceedings).

Compliance with the duty of confidentiality under this rule requires not only that lawyers avoid improperly disclosing protected information, but also that they act competently to preserve confidentiality. See Model Rule 1.6, cmts. [16], [17]. In addition, under Rule 1.8(b), lawyers may not use protected information to the client’s disadvantage without the client’s consent. See also Model Rule 1.9(c) (Duties to Former Clients); Model Rule 1.13 (Organization as Client); Model Rule 1.18(b) (Duties to Prospective Client); Model Rule 3.3 (Candor toward the Tribunal); Model Rule 4.1(b) (Truthfulness in Statements to Others).
• Relationship of Rule 1.6 to Attorney-Client Privilege

The attorney-client evidentiary privilege is so closely related to the ethical duty of confidentiality that the terms “privileged” and “confidential” are often used interchangeably. But the two are entirely separate concepts, applicable under different sets of circumstances and using different standards. The ethical duty is extremely broad: it protects from disclosure all “information relating to the representation,” and applies at all times. The attorney-client privilege, however, is more limited: it protects from compelled disclosure the substance of a lawyer-client communication made for the purpose of obtaining or imparting legal advice or assistance, and applies only in the context of a legal proceeding governed by the rules of evidence. See Model Rule 1.6, cmt. [3]; Restatement (Third) of the Law Governing Lawyers §§ 68–86 (2000).

Accordingly, a court’s determination that particular information is not privileged is not the same as a determination that the lawyer has no ethical obligation to protect the information from disclosure in other contexts. See, e.g., Newman v. State, 863 A.2d 321 (Md. 2004) (confidentiality rule “not limited to matters communicated in confidence by the client but also to all information relating to the representation . . . whereas the attorney-client privilege only protects communications between the client and the attorney”); Spratley v. State Farm Mut. Ins. Co., 78 P.3d 603, 608 n.2 (Utah 2003) (ethical duty of confidentiality not coextensive with attorney-client privilege: “privilege might be waived allowing compelled disclosure by an attorney while the duty of confidentiality is still in full force”). Conversely, a lawyer’s voluntary and permissible disclosure under one of the confidentiality exceptions does not itself waive or otherwise disrupt the privileged nature of a communication for purposes of a subsequent attempt to compel disclosure. See In re Grand Jury Investigation, 902 N.E.2d 929 (Mass. 2009) (although lawyer’s disclosure of client’s threat to harm judge permitted by Rule 1.6, communication remained privileged and lawyer could not be compelled to testify about it at subsequent criminal proceeding). See generally Mitchell M. Simon, Discreet Disclosures: Should Lawyers Who Disclose Confidential Information to Protect Third Parties Be Compelled to Testify against Their Clients? 49 S. Tex. L. Rev. 307 (Winter 2007).

Although a determination of whether a lawyer must reveal client information in an adversarial proceeding will turn on rules of evidence rather than rules of ethics, the lawyer’s ethical duty of confidentiality governs important aspects of the lawyer’s response to a demand for information. When a demand is first made upon a lawyer, through legal process, to disclose client information, Rule 1.6 requires the lawyer to assert “all nonfrivolous claims” that the information is protected from disclosure by the attorney-client privilege or other applicable law. Model Rule 1.6, cmt. [13]; see, e.g., R.I. Ethics Op. 2000-8 (2000) (lawyer questioned at deposition about matters related to representation of deceased client is required by Rule 1.6 to invoke lawyer-client privilege and ethical duty of confidentiality and, if applicable, work-product doctrine; lawyer must comply with final order of court seeking disclosure).

Subsection (a): Protected Information  
Lawyer May Not Disclose Information Relating to Representation of Client

Rule 1.6(a) prohibits a lawyer from disclosing any “information relating to the representation of a client,” in the absence of implied or express consent or an applicable exception specified in the rule. See, e.g., People v. Hohertz, 102 P.3d 1019 (Colo. O.P.D.J. 2004) (lawyer phoned client when she was not at home and discussed matter with client’s roommate without permission). The range of protected information is extremely broad, covering information received from the client or any other source, even public sources, and even information that is not itself protected but may lead to the discovery of protected information by a third party. Model Rule 1.6, cmt. [4]; see, e.g., In re Goebel, 703 N.E.2d 1045 (Ind. 1998) (in effort to convince criminal client who threatened to murder guardianship client that lawyer did not know latter’s whereabouts, lawyer showed criminal client returned envelope containing incorrect address for her; however, criminal client able to guess mistake in address, go to her home, and murder her husband). A lawyer may use hypotheticals to discuss issues relating to the representation as long as “there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.” Model Rule 1.6, cmt. [4]; see, e.g., ABA Formal Ethics Op. 98-411 (1998) (in lawyer-to-lawyer consultations, use of hypotheticals that reveal identity of client may, under some circumstances, violate Rule 1.6).

• Previously Disclosed or Publicly Available Information

In contrast to both the attorney-client privilege (applicable only to communications made “in confidence” and waived upon disclosure) and Model Rule 1.9(c)(1) (permitting lawyers to “use” information relating to the representation of a former client to the disadvantage of that client when the “information has become generally known”), Rule 1.6 contains no exception permitting disclosure of information previously disclosed or publicly available. See, e.g., In re Anonymous, 654 N.E.2d 1128 (Ind. 1995) (lawyer violated Rule 1.6 by disclosing information relating to representation of client, even though information “was readily available from public sources and not confidential in nature”); In re Bryan, 61 P.3d 641 (Kan. 2003) (lawyer violated Rule 1.6 by disclosing, in court documents, existence of defamation suit against former client); State ex rel. Okla. Bar Ass’n v. Chappell, 93 P.3d 25 (Okla. 2004) (lawyer in fee dispute with former employer violated Rule 1.6 by filing motion referring to criminal charges that had been filed and later dismissed against former client); Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850 (W. Va. 1995) (“[t]he ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it”); In re Harman, 628 N.W.2d 351 (Wis. 2001) (lawyer violated Rule 1.6(a) by disclosing to prosecutor former client’s medical records that he obtained during prior representation; irrelevant whether those records “lost their ‘confidentiality’” by being made part of former client’s medical malpractice action); Ariz. Ethics Op. 2000-11 (2000) (lawyer must “maintain the confidentiality of information relating to representation even if the information is a matter of public record”); Nev. Ethics Op.
41 (2009) (contrasting broad language of Rule 1.6 with narrower language of Restatement (Third) of the Law Governing Lawyers); Pa. Ethics Op. 2009-10 (2009) (absent client consent, lawyer may not report opponent’s misconduct to disciplinary board even though it is recited in court’s opinion). But see In re Sellers, 669 So. 2d 1204 (La. 1996) (lawyer violated Rule 4.1 by failing to disclose existence of collateral mortgage to third party; because “mortgage was filed in the public record, disclosure of its existence could not be a confidential communication, and was not prohibited by Rule 1.6”); In re Lim, 210 S.W.3d 199 (Mo. 2007) (no violation of duty of confidentiality when lawyer reported client’s debt to INS on ground that debt was matter of public record).

**Disclosure of Client Identity**

Model Rule 1.6 prohibits the disclosure of a client’s identity unless the client consents or the disclosure is impliedly authorized. See, e.g., Ill. Ethics Op. 97-1 (1997) (lawyer may provide bank with names of clients as potential bank customers only with clients’ consent); Iowa Ethics Op. 97-4 (1997) (law firm brochures and newsletters may contain names of clients if clients give written permission; decided under Model Code).

In the context of litigation, however, the general rule is that a client’s identity is not protected by the attorney-client privilege unless “the net effect of the disclosure would be to reveal the nature of a client communication.” 1 Kenneth S. Broun et al., *McCormick on Evidence* § 90 (6th ed. 2006); see, e.g., *United States v. BDO Seidman*, 337 F.3d 802 (7th Cir. 2003) (requiring disclosure of information regarding identity of accounting firm’s clients who consulted with firm regarding their participation in potentially abusive tax shelters); *In re Subpoena to Testify before Grand Jury (Alexiou v. United States)*, 39 F.3d 973 (9th Cir. 1994) (lawyer must testify about identity of client who paid with counterfeit $100 bill; client’s name not considered confidential unless “intertwined” with confidential information or last link tying client to crime); *Brett v. Berkowitz*, 706 A.2d 509 (Del. 1998) (client identity privileged in exceptional cases when disclosure would provide “last link” in chain of evidence implicating client in crime and would reveal confidential communication between lawyer and client); *State v. Gonzalez*, 234 P.3d 1 (Kan. 2010) (public defender could not be compelled to disclose identity of client when defender already disclosed nature of client’s statement). See generally Steven Goode, *Identity, Fees and the Attorney-Client Privilege*, 59 Geo. Wash. L. Rev. 307 (Jan. 1991).

**Billing Information**

The rule also prohibits a lawyer from revealing a client’s financial or billing information without the client’s consent. R.I. Ethics Op. 2002-02 (2002) (lawyer for municipal council may not comply with individual council member’s request for unredacted itemized billing statement unless council consents). The issue arises often in the context of insurance representation, when a lawyer hired by an insurance company to represent an insured is asked to submit information supporting the lawyer’s bills to the insurer or a third-party auditor hired by the insurer. Ethics committees commonly find that a lawyer is impliedly authorized to give billing information to an insurer if it will not adversely affect the interests of the insured, but not to submit this infor-

On the other hand, billing information and fee agreements are generally not protected by the evidentiary attorney-client privilege unless disclosure would reveal the substance of confidential communications between a lawyer and a client. See, e.g., DiBella v. Hopkins, 403 F.3d 102 (2d Cir. 2005) (time records and billing statements not privileged when they do not contain detailed accounts of legal services rendered); United States v. Naegele, 468 F. Supp. 2d 165 (D.D.C. 2007) (billing statements that were general and did not reveal any litigation strategy or other specifics of representation not protected by attorney-client privilege); Hewes v. Langston, 853 So. 2d 1237 (Miss. 2003) (simple invoice normally not protected by attorney-client privilege, but “itemized legal bills necessarily reveal confidential information and thus fall within the privilege”).

**Disclosures Expressly or Impliedly Authorized**

Lawyers must obviously disclose a great deal of “information relating to the representation of a client” simply to do their jobs. These disclosures are permissible when the client has expressly or impliedly authorized them.

• **Implied Authorization**

Like Rule 1.2(a), which allows a lawyer to “take such action on behalf of the client as is impliedly authorized to carry out the representation,” Rule 1.6(a) specifically permits disclosure of client information when “impliedly authorized . . . to carry out the representation.” The exception is generally limited to disclosures that are clearly necessary to advance the representation of a client, such as facts “that cannot properly be disputed” or “a disclosure that facilitates a satisfactory conclusion to a matter.” Model Rule 1.6, cmt.[5]; see ABA Formal Ethics Op. 08-450 (2008) (without informed consent of client, lawyer may not reveal information to another, jointly represented client when disclosure would be harmful to first client, such as denial of insurance protection; “[i]mplied authority applies only when the lawyer reasonably perceives that disclosure is necessary to the representation of the client whose information is protected by Rule 1.6 . . . and no client may be presumed impliedly to have authorized such [harmful] disclosures”).

In general, what is “impliedly authorized” will depend upon the particular circumstances of the representation. See, e.g., ABA Formal Ethics Op. 01-421 (2001) (lawyer hired by insurance company to defend insured normally has implied authorization to share with insurer information that will advance insurer’s interests); ABA Informal Ethics Op. 86-1518 (1986) (lawyer may disclose to opposing counsel, without client consultation, inadvertent omission of contract provision); Ark. Ethics Op. 96-1
(1996) (in real estate transaction, many disclosures are impliedly authorized; many documents become public records, and other parties to transaction receive information such as purchase price, amount of offer, amount accepted, and condition of property; disclosures to obtain title insurance are also impliedly authorized); Haw. Ethics Op. 38 (1999) (lawyer may disclose information relating to representation of deceased client if doing so would effectuate client’s estate plan); Kan. Ethics Op. 01-01 (2001) (lawyer whose client inherited property from former client is impliedly authorized to disclose information from deceased client’s file to effectuate inheritance); see also Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850 (W. Va. 1995) (state attorney general not impliedly authorized to disclose to third party that state agency was changing its position on environmental issue, notwithstanding that lawyer had been directed to file public pleading in future); Mont. Ethics Op. 050621 (2005) (criminal defense lawyer may not, without client’s prior consent, tell judge or prosecutor whether client contacted him, even though client’s bond conditioned upon regularly phoning defense counsel); cf. ABA Formal Ethics Op. 93-370 (1993) (unless client consents, lawyer should not reveal to judge—and judge should not require lawyer to disclose—client’s instructions on settlement authority limits or lawyer’s advice about settlement).

Disclosures within Firm

The comment to Rule 1.6 states that lawyers in a firm are impliedly authorized to discuss with each other information regarding a firm client “unless the client has instructed that the particular information be confined to specified lawyers.” Model Rule 1.6, cmt. [5]. This is because clients who choose to be represented by law firms typically do so because of the expertise within law firms “and such a client expects that the firm will utilize all its available resources for the client’s benefit.” ABA Formal Ethics Op. 08-453 (2008) (impliedly authorized exception includes consulting “ethics counsel” within law firm regarding ethics implications of consulting lawyer’s conduct).

Disclosures When Working with Outside Lawyers and Nonlawyers

Lawyers and law firms are increasingly outsourcing legal and nonlegal support services, which necessarily involves the disclosure of client information outside the firm. Limited disclosures to a lawyer outside a law firm have been found to be impliedly authorized “when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer’s experience or expertise for the benefit of the consulting lawyer’s client.” ABA Formal Ethics Op. 98-411 (1998) (consulting lawyer may not disclose information protected by attorney-client privilege or information that would harm client; “[h]ypothetical or anonymous consultations thus are favored where possible”); see also Me. Ethics Op. 171 (1999) (client consent not required when consultation is for client’s benefit, consulted lawyer does not have conflicting interests, and no privileged information disclosed). But see In re Mandelman, 514 N.W.2d 11 (Wis. 1994) (lawyer violated Rule 1.6 when he asked other lawyers for help on several client matters and transferred client files without seeking clients’ consent).

Similarly, limited disclosure to a nonlawyer independent contractor may be impliedly authorized when necessary to carry out the representation. See, e.g., Vt.
Ethics Op. 2003-03 (n.d.) (permissible to use outside computer consultant to manage case files when necessary to carry out representation); see also ABA Formal Ethics Op. 95-398 (1995) (lawyer who gives computer maintenance company access to client files must make reasonable efforts to ensure use of adequate procedures to protect confidential client information).

In determining whether a particular disclosure would be impliedly authorized, the relationship between the law firm and the outside service provider must also be considered. If the relationship involves a high degree of supervision and control, such that the provider is “tantamount to an employee,” client consent is not typically required. ABA Formal Ethics Op. 08-451 (2008) (acknowledging that other rules, such as Rule 1.2(a) or Rule 1.4, might require lawyers to consult with clients before engaging temporary legal or nonlegal services). However, if the relationship between the firm and the provider is “attenuated, as in a typical outsourcing relationship,” the firm may not disclose client information without the client’s consent. Id.; see Colo. Ethics Op. 121 (2008) (disclosure of confidential information to outsourced workers usually requires client’s informed consent; factors to consider include degree to which lawyer and outsourced worker’s relationship is attenuated); Fla. Ethics Op. 07-2 (2008) (in determining whether client should be informed of participation of overseas providers, lawyer should consider “whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services”; disclosure of information should be limited to “information necessary to complete the work for the particular client”); N.Y. City Ethics Op. 2006-3 (2006) (under language tracking former Model Code, informed advance consent required to disclose client “confidences” and “secrets”); N.C. Ethics Op. 12 (2007) (disclosure of confidential information to overseas outsourced workers required written informed consent from client); Ohio Ethics Op. 09-006 (2009) (disclosure of confidential information to outsourced workers requires informed consent of client).

In any event, lawyers who outsource legal and nonlegal work must take precautions to “minimize the risk that any outside service provider may inadvertently—or perhaps even advertently—reveal client confidential information.” ABA Formal Ethics Op. 08-451 (2008). This is particularly important when considering outsourcing to foreign jurisdictions whose confidentiality rules may be different from those at home. See, e.g., Colo. Ethics Op. 121 (2008). See generally Mary C. Daly & Carole Silver, Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshore Legal and Law-Related Services, 38 Geo. J. Int’l L. 401 (Spring 2007); Mark L. Tuft, Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-Examining Current Ethical Standards, 43 Akron L. Rev. 825 (2010).

Disclosing Conflicts Information When Lawyers Move between Law Firms

The ABA Standing Committee on Ethics and Professional Responsibility has concluded that conflicts-checking disclosures by lawyers seeking to change firms are not typically impliedly authorized because a job change is ordinarily for the sake of the lawyer rather than for the benefit of the client. The committee also acknowledged that
there is no clear textual support for such disclosures, but nevertheless concluded that “lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for conflicts analysis.” ABA Formal Ethics Op. 09-455 (2009) (Model Rules are “rules of reason’ to be interpreted with reference to the purposes of legal representation and of the law itself”). But see Boston Ethics Op. 04-01 (2005) (limited disclosures for conflicts checking permissible under implied-authorization exception because “any other reading leaves a lawyer in this state unable to comply with Rule 1.7’s insistence that she develop ‘reasonable procedures’ to check for conflicts”). Regardless of the reasons cited, ethics committees that have addressed the issue agree that lawyers should be permitted to disclose conflicts information pursuant to a proposed move to another law firm. See D.C. Ethics Op. 312 (2002) (finding, under rule protecting only “confidences” and “secrets,” that client’s identity and basic information regarding nature of representation are not generally protected); Kan. Ethics Op. 07-01 (2007) (suggesting lawyer’s current firm limit access to “‘middle counsel’” such as retired partner or paralegal employed in separate conflicts-checking unit of new firm); Pa. & Phila. Joint Ethics Op. 300 (2007) (departing lawyer needs to disclose at least some limited information regarding clients’ identity and nature of work done for them). See generally Paul R. Tremblay, Migrating Lawyers and the Ethics of Conflict Checking, 19 Geo. J. Legal Ethics 489 (Winter 2006); Eli Wald, Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers’ Career Paths, 31 J. Legal Prof. 199 (2007).

Representing Clients with Diminished Capacity

A lawyer who takes action under Model Rule 1.14 to protect the interests of a client with diminished capacity is, according to Rule 1.14(c), “impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.” For discussion of a lawyer’s obligations when representing a client with diminished capacity, see the Annotation to Model Rule 1.14.

• Informed Consent

When disclosure of particular information is not “impliedly authorized” or otherwise covered by the rule’s exceptions, client consent is required. Previously, the Model Rules required client consent “after consultation.” The 2002 amendment to the rule changed the language throughout the Model Rules to require “informed consent.” This was not intended as a substantive change. See American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 124 (2006). The consent need not be confirmed in writing.

Informed consent requires an understanding of the risks and benefits attendant upon disclosure. See Model Rule 1.0(e) (defining “informed consent” throughout rules to denote “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct”); see also Model Rule 1.0, cmts. [6], [7] (providing additional explanation of what informed consent generally requires). It usually requires an affirmative response by the client; the lawyer may not assume consent from a client’s silence. Model Rule 1.0, cmt. [7]; see
ABA Formal Ethics Op. 01-421 (2001) (“disclosure to the client . . . in order to obtain informed consent within the meaning of Rule 1.6 must adequately and fairly identify the effects of disclosure and non-disclosure on the client’s interests,” including risk that information may then be disclosed to others, that lawyer-client privilege may be waived, and that information could be used to client’s disadvantage); see also McClure v. Thompson, 323 F.3d 1233 (9th Cir. 2003) (even if criminal defense lawyer had client’s consent to disclose to authorities locations of two murder victims’ bodies, consent not “informed” as lawyer had not advised client about potential harmful consequences of disclosure); Banner v. City of Flint, 136 F. Supp. 2d 678 (E.D. Mich. 2000) (lawyer who obtained confidences from initial consultation with prospective client violated rule when he deposed her in another matter without explaining availability of attorney-client privilege), aff’d in part, rev’d in part, 99 F. App’x 29 (6th Cir. 2004) (affirming district court’s finding of Rule 1.6 violation, court held rule requires lawyer to advise client “about the advantages and disadvantages of revelation in language the client can understand”), cert. denied, 543 U.S. 926 (2004); Commonwealth v. Downey, 842 N.E.2d 955 (Mass. App. Ct. 2006) (murder defendants did not give informed consent for lawyers to wear body microphones during trial at request of television production company; neither lawyer had explained arrangement’s potential pitfalls).

Unlike a conflicts waiver, informed consent to the disclosure of confidential information under Rule 1.6 need not be confirmed in writing.

**Duty of Confidentiality toward Prospective Clients**

A lawyer’s duty of confidentiality extends to a prospective client who consults a lawyer in good faith for the purpose of obtaining legal representation or advice, even though the lawyer performs no legal services for the would-be client and declines the representation. See ABA Formal Ethics Op. 80-358 (1990); see also Restatement (Third) of the Law Governing Lawyers § 15 (2000).

In 2002, a new Rule 1.18 (Duties to Prospective Client) was added to the Model Rules. Under Rule 1.18(b), “a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.” For discussion, see the Annotation to Model Rule 1.18.

**Duty of Confidentiality toward Former Clients**

The lawyer’s duty to preserve client confidences continues after the lawyer-client relationship has concluded (Comment [18]), and even after the client dies. See Restatement (Third) of the Law Governing Lawyers § 60 cmt. e (2000). This duty is specifically addressed in Rule 1.9(c)(2) (lawyer may not “reveal information relating to the representation except as these Rules would permit or require with respect to a client”). See the Annotation to Model Rule 1.9 for discussion.

**Organization as Client**

For a discussion of the duty of confidentiality in the corporate context, see the Annotation to Model Rule 1.13 (Organization as Client).
Subsection (b): Exceptions to Duty of Confidentiality—Permissive Disclosure

Rule 1.6 sets out six circumstances in which a lawyer is permitted—but not required—to disclose information relating to a client’s representation. Although nondisclosure in these circumstances would not violate this rule, it could violate other rules or law. Model Rule 1.6, cmts. [12], [15]; see Utah Ethics Op. 97-12 (1998) (lawyer who suspects client of committing child abuse not ethically—as opposed to legally—mandated to report suspected behavior, despite state statute mandating reporting). As discussed below, any disclosures made pursuant to one of these exceptions must be narrowly tailored to avoid any unnecessary disclosure.

Subsection (b)(1): Disclosure to “Prevent Reasonably Certain Death or Substantial Bodily Harm”

In 2002, Rule 1.6(b)(1) was amended to permit disclosure “to prevent reasonably certain death or substantial bodily harm.” (Former Rule 1.6(b)(1) permitted disclosure “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm” (emphases added).) The exception now authorizes disclosure to prevent accidental, but serious, physical harm that is reasonably certain to occur, either because “it will be suffered imminently or . . . there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat,” such as sometimes happens in the case of toxic torts. Model Rule 1.6, cmt. [6]; see Restatement (Third) of the Law Governing Lawyers § 66 (2000) (disclosure permitted if necessary to prevent reasonably certain death or serious bodily harm).

Most jurisdictions have adopted some form of this exception to Rule 1.6, and permit disclosure to prevent death or serious bodily harm. See, e.g., In re Grand Jury Investigation, 902 N.E.2d 929 (Mass. 2009) (lawyer properly disclosed client’s threat to harm judge); State v. Hansen, 862 P.2d 117 (Wash. 1993) (no violation of confidentiality by telling judge that individual who called lawyer to retain him threatened to kill judge and two lawyers in case); R.I. Ethics Op. 98-12 (1998) (lawyer threatened by client in prison may report action to parole board or attorney general, or apply for restraining order); see also McClure v. Thompson, 323 F.3d 1233 (9th Cir. 2003) (criminal defense lawyer who disclosed to authorities locations of bodies of two murder victims did not violate duty of confidentiality, as lawyer reasonably believed victims still alive and disclosure necessary to prevent their imminent death or substantial bodily harm). Some jurisdictions require such disclosure. See, e.g., Conn. Ethics Op. 08-06 (n.d.) (lawyer who reasonably believes client intends to kill others associated with case when he gets out of prison must make necessary disclosure to prevent harm).

It has been argued that the rule authorizes disclosure of information to prevent wrongful incarceration of an innocent person on the ground that, given the extremely violent nature of prison life in many prisons, any person who is incarcerated is likely to be threatened with or suffer substantial bodily harm. See Colin Miller, Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality, 102 Nw. U. L. Rev. Colloquy 391 (July 14, 2008). But see Inbal Has-
When the Law Preserves Injustice: Issues Raised by a Wrongful Incarceration Exception to Attorney-Client Confidentiality, 100 J. Crim. L. & Criminology 277 (Winter 2010) (existing rule has been interpreted to exclude wrongful incarceration as basis for disclosure).

**Subsections (b)(2) and (b)(3): Economic Crimes and Frauds**

**2003 Amendments**

In 2003, the ABA adopted subsections (b)(2) and (b)(3) of Model Rule 1.6. See *ABA/BNA Lawyers’ Manual on Professional Conduct*, 19 Current Reports 467 (Aug. 13, 2003). This marked the first time the Model Rules permitted disclosure of client information when the client uses or has used the lawyer’s services to commit a crime or fraud resulting in substantial injury to the property or financial interests of another. (The predecessor Model Code did, however, have a limited exception permitting a lawyer to reveal the “intention of [a] client to commit a crime and the information necessary to prevent the crime.” DR 4-101(A).) See generally American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005*, at 133–37 (2006).

Even before these amendments were adopted by the ABA in 2003, most state rules already contained provisions permitting limited disclosure to prevent or rectify the consequences of a client’s fraudulent or criminal behavior.

**Subsection (b)(2): Disclosure to Prevent Client from Committing Crime or Fraud Resulting in Financial Injury or Property Damage**

Model Rule 1.6(b)(2) permits a lawyer to disclose information relating to the representation of a client “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.” Only a few jurisdictions have adopted the ABA version of Rule 1.6(b)(2) verbatim. Some jurisdictions permit disclosure to prevent a crime or a fraud regardless of the type of consequences likely to result, some permit disclosure whether or not the lawyer’s services are involved, some permit disclosure to prevent a criminal but not a fraudulent act, some permit disclosure to prevent anyone from committing a crime or fraud, and some require disclosure. See, e.g., *In re Lane’s Case*, 889 A.2d 3 (N.H. 2005) (lawyer properly disclosed former client’s confidences in effort to prevent former client from stealing money from mother or deceased father’s estate); Alaska Ethics Op. 2003-2 (2003) (lawyer for personal representative of estate may, but is not required to, reveal personal representative’s criminal or fraudulent conduct to court or beneficiaries); Nassau County (N.Y.) Ethics Op. 01-07 (2001) (law firm that withdrew from representing distributees of decedent’s estate because they planned to conceal existence of additional distributee may, but is not required to, reveal information about additional distributee); Neb. Ethics Op. 90-2 (1990) (lawyer has discretion to disclose whereabouts of former client if client intends to commit crime).

Absent authority to disclose a client’s past crimes or frauds under Rule 1.6(b)(3)
or an analogous provision, a lawyer may not disclose a client’s wrongful past actions to prevent their continuing consequences and may not disclose even a client’s continuing crime or fraud if to do so would also reveal past wrongdoing. See, e.g., Ariz. Ethics Op. 2001-14 (2001) (lawyer for defendant in criminal appeal may not reveal client’s use of false name in trial court); Conn. Informal Ethics Op. 01-13 (2001) (lawyer may not disclose client’s continuing failure to file tax form); N.Y. City Ethics Op. 2002-1 (2002) (lawyer consulted for advice concerning client’s theft of car may not disclose client’s continuing crime of possessing stolen property).

• **Subsection (b)(3): Disclosure to Prevent, Mitigate, or Rectify Injury to Financial Interests or Damage to Property Resulting from Client’s Crime or Fraud**

Model Rule 1.6(b)(3) permits a lawyer to disclose information relating to the representation of a client “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.” Many jurisdictions have similar provisions. See, e.g., A. v. B., 726 A.2d 924 (N.J. 1999) (law firm drafting wills for husband and wife may reveal existence of husband’s illegitimate child to wife upon learning of child’s existence from another client; husband’s deliberate failure to inform wife of child’s existence constituted fraud on wife); Md. Ethics Op. 2004-05 (2004) (lawyer who learns that former clients in still-pending immigration case are misappropriating crucial facts to immigration authorities may reveal information necessary to rectify consequences of fraud); Md. Ethics Op. 2001-18 (2002) (lawyer for personal representative of estate who discovers evidence that client misappropriated estate’s funds may not disclose this unless lawyer’s services used to further misappropriation); Nev. Ethics Op. 25 (2001) (lawyer who was consulted but not retained by person who used lawyer’s advice to perpetrate fraud on bankruptcy court may reveal information to court); see also In re Lackey, 37 P.3d 172 (Or. 2002) (National Guard judge-advocate suspended for disclosing client confidences and secrets; disclosures intended to embarrass or injure officers with whom he had work-related conflicts, not to remedy government fraud); cf. In re Disciplinary Proceeding against Schafer, 66 P.3d 1036 (Wash. 2003) (six-month suspension for lawyer who disclosed client confidences and secrets to IRS, FBI, and press in course of exposing misconduct by judge).

• **Disclosure Required by Crime-Fraud Exception to Attorney-Client Privilege**

Under a generally recognized crime-fraud exception to the attorney-client privilege, a lawyer is not barred from disclosing otherwise privileged information about a client who consults the lawyer to further the commission of a crime or a fraud. See, e.g., Restatement (Third) of the Law Governing Lawyers § 82 (2000) (privilege does not apply when client “(a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or (b) regardless of the client’s purpose at the time of consultation uses the lawyer’s advice or other services to engage in or assist a crime or fraud”).

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Because of the differences between the ethical duty of confidentiality and the attorney-client privilege and their respective exceptions, a determination that disclosure of client information is permitted by the crime-fraud exception to the ethics rule does not necessarily lead to the same result under the crime-fraud exception to the attorney-client privilege. See, e.g., Newman v. State, 863 A.2d 321 (Md. 2004) (although lawyer had, pursuant to Rule 1.6, properly informed court presiding over custody matter of client’s threat to murder her husband and child, lawyer’s testimony about those statements at subsequent criminal proceeding was barred by attorney-client privilege); In re Grand Jury Investigation, 902 N.E.2d 929 (Mass. 2009) (ethical permissibility of lawyer informing judge of client’s threat to kill her not inconsistent with finding that client’s statements were protected from compelled disclosure by attorney-client privilege).

- **Disclosure Required by Rule 3.3**

  When a matter is before a tribunal, a lawyer may be required by Rule 3.3 to reveal to the court information otherwise protected under Rule 1.6 to avoid assisting a client in perpetrating a crime or fraud. For discussion of a lawyer’s duty of candor to a tribunal, see the Annotation to Model Rule 3.3.

- **Disclosure of Unlawful Conduct by Corporate Constituents**

  For discussion of a lawyer’s ability to disclose unlawful conduct by someone “associated” with a corporate (or other organizational) client, see the Annotation to Model Rule 1.13.

**Subsection (b)(4): Disclosure to Secure Legal Ethics Advice**

In 2002, a new exception—Rule 1.6(b)(4)—was added, permitting disclosure “to secure legal advice about the lawyer’s compliance with these Rules.” (This provision was originally numbered 1.6(b)(2), but renumbered when other subsections of Rule 1.6 were added in 2003.)

Although disclosure to secure ethics advice will “in most situations” be impliedly authorized, Rule 1.6(b)(4) permits disclosure even without implicit authorization “because of the importance of a lawyer’s compliance with the Rules of Professional Conduct.” Model Rule 1.6, cmt. [9]; see ABA Formal Ethics Op. 08-453 (2008) (disclosure to in-house law firm ethics counsel is typically impliedly authorized and is also expressly authorized by Rule 1.6(b)(4)).

**Subsection (b)(5): Disclosure to Support Claim or Defense against Client**

Rule 1.6(b)(5) permits disclosure (1) “to establish a claim or defense . . . in a controversy between the lawyer and the client,” (2) “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved,” and (3) “to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” (Rule 1.6(b)(5) was originally enacted as Rule 1.6(b)(2), renumbered in 2002 as 1.6(b)(3), and renumbered in 2003 as 1.6(b)(5).)
• Disclosure to Collect Fee

A lawyer “entitled” to a fee is permitted by subsection (b)(5) to disclose information relating to the representation, including proof of the services rendered, when reasonably necessary to collect the lawyer’s fee. This accords with the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. Model Rule 1.6, cmt. [11]. The disclosure must be necessary to establish or collect the fee, whether through litigation, obtaining an attorney’s lien, attaching client property, or other means. See, e.g., Pedersen & Houpt v. Summit Real Estate Group, 877 N.E.2d 4 (Ill. App. Ct. 2007) (exception extended beyond lawyer’s assertion of breach-of-contract claim to include claim for fraudulent misrepresentation when necessary to recover total outstanding fee); D.C. Ethics Op. 236 (1993) (when client has filed bankruptcy petition to discharge debt owed to lawyer’s firm, lawyer may reveal limited information about client’s assets if lawyer has good-faith expectation of recovering more than minimal amount); N.C. Ethics Op. 2004-6 (2004) (lawyer in fee dispute with former corporate client permitted to reveal information necessary to pierce corporate veil if lawyer has good-faith belief claim warranted); Or. Ethics Op. 2005-104 (2005) (lawyer may disclose information relating to representation of client who justified non-payment of bill by claiming lawyer committed malpractice); see also Ariz. Ethics Op. 93-11 (1993) (lawyer may not initiate criminal proceedings against client who paid with check drawn on insufficient funds; criminal complaints rarely necessary to collect fee). See generally Restatement (Third) of the Law Governing Lawyers § 65 (2000) (disclosure of client confidences permitted in self-defense and in compensation disputes when reasonably necessary); ABA/BNA Lawyers’ Manual on Professional Conduct, “Confidentiality: Disclosure: Attorneys’ Claims and Defenses,” pp. 55:701 et seq.

• Disclosure to Collection Agencies and Credit Bureaus

Although lawyers generally may refer delinquent client accounts to collection agencies that maintain records and provide reports is disfavored. See, e.g., Alaska Ethics Op. 2000-3 (2000) (lawyer may not report delinquent client’s status to credit bureau); Mont. Ethics Op. 20001027 (2000) (lawyer may use collection agency to collect legal fees if lawyer exhausted all other reasonable methods of collection and lawyer minimizes disclosure, but referral to credit bureau is not necessary for debt collection, is punitive, and risks unauthorized disclosures of client information); N.Y. State Ethics Op. 684 (1996) (lawyer may not report to credit bureau that client failed to pay past-due fee); Ohio Sup. Ct. Ethics Op. 91-16 (1991) (firm may use collection agency but should reveal confidences only to degree necessary to collect fee); Phila. Ethics Op. 90-23 (1991) (firm may disclose names of client to collection agency; confidentiality must be otherwise preserved); S.C. Ethics Op. 94-11 (1994) (lawyer may use collection agency, but not credit bureau); see also Tex. Ethics Op. 556 (2005) (law firm may not circumvent prohibition against using collection agency to collect unpaid fee by making agency employees “borrowed” law firm employees). But see Fla. Ethics Op. 90-2 (1991) (firm may subscribe to credit-reporting service and provide information regarding undisputed debts owed only by former—not current—clients); Kan. Ethics Op.
94-5 (1994) (lawyer may refer client account to credit bureau but may not reveal information unrelated to collecting debt).

• **Suits by Former In-House Counsel against Former Employer**

Whether, and to what extent, former in-house counsel may sue their former employers for employment-related matters varies among jurisdictions, and has changed over time.


Model Rule 1.6(b)(5), however, expanded the claim or defense exception that Model Code DR 4-101(C)(4) had previously limited to fee disputes and defending accusations of wrongful conduct. See ABA Formal Ethics Op. 01-424 (2001) (rules permit in-house lawyer to bring wrongful discharge suit against former employer and disclose information necessary to establish claim). Thus, in recent years, an increasing number of jurisdictions have concluded that a lawyer suing a former employer for wrongful discharge may reveal client confidences to the extent necessary to establish the claim. See, e.g., *Heckman v. Zurich Holding Co. of Am.*, 242 F.R.D. 606 (D. Kan. 2007) (plaintiff entitled to maintain retaliatory discharge action under Kansas law and to reveal confidential information necessary to establish claim); *Alexander v. Tandem Staffing Solutions*, 881 So.2d 607 (Fla. Dist. Ct. App. 2004) (whistleblower claim by former in-house counsel against employer constituted controversy between lawyer and client within meaning of Florida’s version of Rule 1.6(b)(5)); *accord Burkhart v. Semitool, Inc.*, 5 P.3d 1031 (Mont. 2000) (former in-house counsel may reveal client confidences to extent reasonably necessary to prove wrongful discharge claim); *Crews v. Buckman Labs Int’l*, 78 S.W.3d 852 (Tenn. 2002) (same holding); *Sparlely v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603 (Utah 2003) (former in-house counsel suing insurance company for wrongful discharge may disclose company’s confidences “as reasonably necessary” to establish claim). *But see Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991) (refusing to extend tort of retaliatory discharge to in-house counsel). *See generally Brenda Marshall, Note, In Search of Clarity: When Should In-House Counsel Have the Right to Sue for Retaliatory Discharge?*, 14 Geo. J. Legal Ethics 871 (Spring 2001); ABA/BNA Lawyers’ Manual on Professional Conduct, “Confidentiality: Disclosure: Attorneys’ Claims and Defenses,” pp. 55:701 et seq.

• Disclosure to Defend Claims Brought by Clients and Third Parties against Lawyer

Rule 1.6(b)(5) permits disclosure to defend claims or charges brought against the lawyer by third parties as well as clients. As noted in Comment [10], such charges may arise in civil, criminal, disciplinary, or other proceedings, and may be based upon wrongs allegedly committed by the lawyer against the client, or by the lawyer and client against a third person. See, e.g., Qualcomm Inc. v. Broadcom Corp., No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) (client’s criticism and blaming of its own lawyers for discovery violations constituted sufficient “accusatory adversity” justifying disclosure of confidential information in connection with motion for sanctions); Hamilton v. Rubin, LC No. 04-40221-CZ, 2006 WL 1751901 (Mich. Ct. App. June 27, 2006) (lawyer’s disclosure permissible under self-defense exception in action by former client’s associate accusing lawyer of fraud, conspiracy, and malpractice relating to sale of business interest in which former client involved); Helie v. McDermott, Will & Emery, 56 A.D.3d 398 (N.Y. App. Div. 2008) (self-defense exception may be invoked against allegations of malpractice by nonclient); Or. Ethics Op. 2005-104 (2005) (lawyer may disclose information relating to representation of former client to defend against disciplinary complaint filed by opposing party in matter). It is not necessary that the lawyer be named as a party to a proceeding in which the client or third party makes claims of wrongdoing on the part of the lawyer. See, e.g., Hartman v. Cunningham, 217 S.W.3d 408 (Tenn. Ct. App. 2006) (self-defense exception applied to lawyer’s affidavit submitted to refute claim in former client’s malpractice case against successor counsel for failing to advise him of potential claim against affiant-lawyer).

• Formal Complaint Not Necessary

A lawyer accused of wrongful conduct in connection with the representation of a client, or with complicity in a client’s wrongful conduct, need not wait until formal charges are filed. “The lawyer’s right to respond arises when an assertion of such complicity has been made. . . . [T]he defense may be established by responding directly to a third party who has made such an assertion.” Model Rule 1.6, cmt. [10]; see, e.g., In re Bryan, 61 P.3d 641 (Kan. 2003) (formal proceedings not required before disclosure in self-defense could be made under Rule 1.6(b)); Pa. Ethics Op. 96-48 (1996) (lawyer whose former clients defended against SEC fraud complaint by alleging lawyer’s lack of due diligence may discuss matter with SEC even though lawyer not named in complaint); S.C. Ethics Op. 94-23 (1994) (lawyer under investigation by Social Security Administration regarding handling of client’s disability claim may disclose client information to defend himself even though no formal grievance proceeding pending). Mere criticism of the lawyer, however, may be insufficient to warrant disclosures in self-defense, even when the criticisms appear in the press. See, e.g., Louima v. City of N.Y., No. 98 CV 5083(SJ), 2004 WL 2359943 (E.D.N.Y. Oct. 5, 2004) (“mere press reports” about lawyer’s conduct do not justify disclosure of client information even if reports false and accusations unfounded); N.Y. County Ethics Op. 711 (1997) (client’s criticism of lawyer to neighbor was mere gossip and did not trigger exception to confidentiality rule); Utah Ethics Op. 05-01 (2005) (criminal defense lawyer may not voluntarily disclose client confidences to prosecutor or to court in response to claim that lawyer’s
prior advice was confusing; no “controversy” between lawyer and client). But see Ariz. Ethics Op. 93-02 (1993) (interpreting “controversy” to include disagreement in public media).

• Threatening to Disclose Confidential Information

A lawyer is not permitted to threaten disclosure to intimidate or retaliate against a client. See, e.g., Fla. Bar v. Carricarte, 733 So. 2d 975 (Fla. 1999) (former corporate counsel whose employment was terminated threatened to reveal client’s trade secrets unless company gave him “severance pay”); State ex rel. Counsel for Discipline v. Wilson, 634 N.W.2d 467 (Neb. 2001) (lawyer threatened to disclose client information to INS and to court unless client paid for services lawyer previously provided at no charge). But see In re Lim, 210 S.W.3d 199 (Mo. 2007) (no violation when lawyer threatened to report client to collection agency and then to report client’s debt to INS if bill not paid).

SUBSECTION (B)(6): DISCLOSURE TO COMPLY WITH LAW OR COURT ORDER

An exception added to Rule 1.6 in 2002 permits disclosure “to comply with other law or a court order.” Previously the comment addressed this issue; the amendment specifically allowing disclosure was not intended as a substantive change. American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 126 (2006). Typically, a lawyer is requested to provide information as a result of a discovery request or subpoena; the lawyer must make all nonfrivolous arguments that the information is protected from disclosure and, unless the client has otherwise directed, must resist disclosure until a court or other tribunal orders it. Model Rule 1.6, cmt. [13]; see, e.g., ABA Formal Ethics Op. 94-385 (1994) (lawyer receiving court order or subpoena—whether from governmental agency or anyone else—for records relating to representation of current or former client must seek to limit order or subpoena on any legitimate grounds available to protect confidentiality); D.C. Ethics Op. 288 (1999) (lawyer subpoenaed by congressional subcommittee to produce client files must seek to quash or limit subpoena on all available grounds; if subcommittee overrides objections and threatens lawyer with contempt, then lawyer may—but is not required to—produce documents; threat of fines and imprisonment under federal law meets “required by law” exception); Pa. Formal Ethics Op. 2002-106 (2003) (lawyer may comply with arbitration panel’s order to disclose client information after raising issue of confidentiality).

The required-by-law exception may be triggered by statutes and administrative agency regulations. See, e.g., United States v. Legal Servs., 249 F.3d 1077 (D.C. Cir. 2001) (appropriations act requiring federally funded legal aid organizations to give client names to auditors triggered required-by-law exception to state’s confidentiality rule); N.C. Ethics Op. 2005-9 (2006) (lawyer for public company may reveal confidential information about corporate misconduct to SEC under permissive-disclosure regulations authorized by Sarbanes-Oxley Act, even if disclosure would be prohibited by state’s ethics rules). However, the exception is not triggered by contracts or other agreements between private parties. See Va. Ethics Op. 1811 (2005) (contractual obligation to reveal information did not trigger exception).
A much-litigated example of a law requiring disclosure of client information is the Internal Revenue Code, 26 U.S.C. § 6050, which compels lawyers to disclose, through IRS Form 8300, the identities of clients and the amounts and payment dates of all cash fees in excess of $10,000. This provision has consistently been upheld against attacks based upon confidentiality and privilege. See, e.g., United States v. Goldberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991) (rejecting challenges to disclosures based upon Fourth, Fifth, and Sixth Amendments and holding that lawyer-client privilege must bow to federal statute that “implicitly precludes its application”). See generally ABA/BNA Lawyers’ Manual on Professional Conduct, “Confidentiality: Required by Law or Court Order,” pp. 55:1201 et seq. Similar issues also arise in connection with the IRS’s “John Doe” summonses of law firms in connection with investigations of abusive tax shelters. See, e.g., In re Tax Liabs. of John Does, No. 03C 4190, 2003 WL 21791551 (N.D. Ill. June 19, 2003) (approving first such summons and ordering firm to reveal names of clients investing in tax shelter transactions organized or sold by law firm). Additional reporting requirements are found in the USA Patriot Act, including a requirement that anyone who must file a Form 8300 must also file a suspicious activity report (SAR) with the Treasury Department’s Financial Crimes Enforcement Network. But see N.Y. City Formal Ethics Op. 2004-02 (2004) (unclear whether required-by-law exception would permit lawyer representing both corporation and corporate employee to file SAR without advance consent of employee). See generally Kevin Shepherd, USA Patriot Act and the Gatekeeper Initiative: Surprising Implications for Transactional Lawyers, 16 Prob. & Prop. 26 (Sept./Oct. 2002).


**DISCLOSURE UNDER OTHER ETHICS RULES**

Rule 1.6 permits, but does not require, disclosure under certain circumstances. Other ethics rules, however, affirmatively require disclosure. Most do so only when the disclosure would not violate Rule 1.6 (for example, see Rules 4.1, 8.1, and 8.3), but some, such as Rule 3.3 (Candor toward the Tribunal), require disclosure of information even if it is otherwise protected by Rule 1.6. Finally, other rules, such as Rule 1.13 (Organization as Client), may permit the disclosure of information whether or not Rule 1.6 would permit it.

**DISCLOSURE STRICTLY LIMITED TO ESSENTIAL INFORMATION**

Any disclosure permitted under Rule 1.6 must be strictly limited to that which “the lawyer reasonably believes . . . is necessary to accomplish one of the purposes specified” in subsection (b). Model Rule 1.6, cmt. [14]; see, e.g., In re Bryan, 61 P.3d 641 (Kan. 2003) (lawyer’s many disclosures of adverse information about former client, includ-
ing informing store manager where client worked that client had history of making false claims, were not reasonably necessary to defend against client’s accusations that lawyer was stalking her); *Lawyer Disciplinary Bd. v. Farber*, 488 S.E.2d 460 (W. Va. 1997) (lawyer moving to withdraw from representation violated Rule 1.6 by adding affidavit reporting on his plea discussions with defendant); Or. Ethics Op. 2005-136 (2005) (disclosures made by former in-house counsel to support wrongful termination action against former employer must be made in least public manner possible); see also *In re Boyce*, 613 S.E.2d 538 (S.C. 2005) (lawyer sent letter to client and client’s employer threatening to sue both in effort to collect fee); N.Y. City Ethics Op. 1986-8 (1986) (suggesting that lawyer disclosing confidential information to collect fee should do so only to court in camera, with request that information be kept under seal); cf. ABA Formal Ethics Op. 10-456 (2010) (lawyer’s concern to protect reputation in response to claims of ineffective assistance almost always can be addressed by disclosures in setting subject to judicial supervision).

**ACTING COMPETENTLY TO PRESERVE CONFIDENTIALITY**

In addition to refraining from the deliberate disclosure of client information except when permitted, Rule 1.6 requires lawyers to act reasonably to avoid inadvertent or unauthorized disclosures, either by the lawyer or by other persons involved in the representation. Model Rule 1.6, cmt. [16] (“A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3.”); see, e.g., *Statewide Grievance Comm. v. Paige*, No. CV0301983355, 2004 WL 1833462 (Conn. Super. Ct. July 14, 2004) (lawyer’s custom of reusing paper containing client information as scrap impermissibly gave others access to protected information); N.J. Ethics Op. 692 (2002) (lawyer must act reasonably to protect client information when destroying client files); see also *State ex rel. Okla. Bar Ass’n v. McGee*, 48 P.3d 787 (Okla. 2002) (despite lawyer’s claim that he was unaware of secretary’s preparation of letter impermissibly disclosing confidential information, lawyer “stands ultimately responsible for work done by all nonlawyer staff”). See generally ABA/BNA Lawyers’ Manual on Professional Conduct, “Confidentiality: Overview,” pp. 55:101 et seq. (discussing duty to protect client information when storing or disposing of client files and working with nonlawyers). For a discussion of the lawyer’s responsibilities regarding support staff, see the Annotation to Model Rule 5.3 (Responsibilities regarding Nonlawyer Assistants).

**ELECTRONIC COMMUNICATIONS**

Electronic communications—such as those made by phone (landline or cell phone), by fax, or over the Internet—pose unique problems related to maintaining client confidences because of the ease with which they may be intercepted by unauthorized and unknown persons. Faxes, for example, may be received in common areas of a business or home and thus may be read by unauthorized persons. Electronic documents pose the problem of “metadata”—information “hidden” in a document that may reveal details about the document’s preparation, prior drafts, and authorship.
The lawyer’s duty of confidentiality as applied to electronic communication may require protective measures such as obtaining a client’s informed consent to use a particular means of communication, using encrypted e-mail, “scrubbing” a document of its metadata, or using a more secure means of communication. See Model Rule 1.6, cmt. [17]; Cal. Ethics Op. 2010-179 (2010) (because of “evolving nature of technology” and differences in security features, lawyer must “ensure the steps are sufficient for each form of technology being used and must continue to monitor the efficacy of such steps”); Fla. Ethics Op. 10-2 (2010) (providing guidance on measures to protect confidentiality in using or disposing of devices containing “storage media,” such as printers, copiers, facsimile machines, and scanners). See generally ABA/BNA Lawyers’ Manual on Professional Conduct, “Confidentiality: Electronic Communications,” pp. 55:401 et seq.; Hricik, The Speed of Normal: Conflicts, Competency, and Confidentiality in the Digital Age, 10 Computer L. Rev. & Tech. J. 73 (Fall 2005) (including extensive discussion of risks involved in digital storage of client information).

• Cell Phones


The more modern view appears to be that communications by cell phone pose no special problem unless there is a genuine risk of interception. See e.g., Ariz. Ethics Op. 95-11 (1995) (lawyer may use cellular phone to contact client but should exercise caution if genuine risk of interception); Del. Ethics Op. 2001-2 (2001) (absent extraordinary circumstances suggesting communication may be intercepted, communication of client information via cell phone does not violate Rule 1.6).

• E-mail

Ethics Op. 97-5 (1997); see also Ariz. Ethics Op. 97-04 (1997) (lawyers should use e-mail cautiously and should consider encryption); S.C. Ethics Op. 97-08 (1997) (lawyers may communicate with clients via e-mail but should discuss encryption options); cf. Iowa Ethics Op. 97-1 (1997) (client must give written consent to transmission of information by e-mail or Internet, after disclosure of potential for loss of confidentiality). See generally David Hricik, Lawyers Worry Too Much about Transmitting Client Confidences by Internet E-mail, 11 Geo. J. Legal Ethics 459 (Spring 1998).

If the client is communicating with the lawyer using an employer’s computer, the lawyer should advise the client that the employer’s right to monitor employee e-mail may result in the employer obtaining confidential information, and may also jeopardize the attorney-client privilege. See, e.g., Sims v. Lakeside Sch., No. C06-1412RSM, 2007 WL 2745367 (W.D. Wash. Sept. 20, 2007) (e-mails privileged based upon public policy despite employer’s no-privacy policy); Curto v. Med World Comm’ns Inc., No. 03CV6327 (DRH) (MLD), 2006 WL 1318387 (E.D.N.Y. May 15, 2006) (e-mails privileged given that employee used computer in home office and communicated outside employer’s network); In re Asia Global Crossing, 322 B.R. 247 (Bankr. S.D.N.Y. 2005) (e-mails privileged; insufficient evidence that corporation actually enforced policy permitting it to monitor employee e-mail); Scott v. Beth Israel Hosp., 847 N.Y.S.2d 436 (Sup. Ct. 2007) (employer’s “no personal use” policy, along with its monitoring policy, resulted in determination that e-mails not privileged). See generally Adam C. Losey, Clicking Away Confidentiality: Workplace Waiver of Attorney-Client Privilege, 60 Fla. L. Rev. 1179 (Dec. 2008).

With respect to information received from nonclients through unsolicited e-mails or other electronic communications, authorities generally conclude that the lawyer has no duty to protect the confidentiality of unsolicited information if the lawyer had no opportunity to avoid its receipt or warn that it would not be kept confidential. See Ariz. Ethics Op. 2002-04 (2002); Nev. Ethics Op. 32 (2005); Va. Ethics Op. 1842 (2008); Wash. Informal Ethics Op. 2080 (2006). For an in-depth discussion of this issue, see ABA/BNA Lawyers’ Manual on Professional Conduct, “Confidentiality: Electronic Communications,” pp. 55:401 et seq. Also see the Annotation to Model Rule 1.18 (Duties to Prospective Client).

• Metadata


• Social Networking Websites, Blogs, and Similar Communication Modes

New modes of communication—including through social networking sites, lawyer blogs, bulletin boards, chat rooms, or listservs—pose new dangers to client confidentiality. Communicating directly with clients through postings to websites poses obvious risks, as does providing lists of contacts on networking sites or providing links to other websites. Because users may be unaware of the extent to which others may have access to their information, commentators have suggested that lawyers and law firms develop policies and procedures for the use of social networking. See generally Steven C. Bennett, Ethics of Lawyer Social Networking, 73 Alb. L. Rev. 113 (2009); Leslie C. Levin, Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers, 37 Ariz. St. L.J. 589 (Summer 2005).

DUTIES OF RECIPIENT OF UNINTENDED DISCLOSURES

Model Rule 4.4(b) was amended in 2002 to address the ethical obligations of a lawyer who is the unintended recipient of documents that appear to be confidential; the lawyer in this position is directed only to “promptly notify the sender.” For discussion of this issue, see the Annotation to Model Rule 4.4.
Rule 1.7

Conflict of Interest: Current Clients

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

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

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

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

COMMENT

General Principles

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

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

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

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client. See Rule 1.9. See also Comments [5] and [29].

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

**Identifying Conflicts of Interest: Directly Adverse**

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

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

**Identifying Conflicts of Interest: Material Limitation**

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

**Lawyer’s Responsibilities to Former Clients and Other Third Persons**

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

**Personal Interest Conflicts**

[10] The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer’s client, or with a law firm representing the opponent, such discussions could materially limit the lawyer’s representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).
[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer’s family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, if a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

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

**Interest of Person Paying for a Lawyer’s Service**

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

**Prohibited Representations**

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

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

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

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

**Informed Consent**

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

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

**Consent Confirmed in Writing**

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


Revoking Consent

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

Consent to Future Conflict

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

Conflicts in Litigation

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

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

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

Nonlitigation Conflicts

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

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

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

**Special Considerations in Common Representation**

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

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

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

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

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

**Organizational Clients**

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

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

**Annotation**

**2002 Amendments**

Rule 1.7(a) as amended in 2002 sets forth the basic prohibition against representation involving conflicting interests ("concurrent conflicts"). The amended rule identifies two types of concurrent conflicts: direct-adversity conflicts (Rule 1.7(a)(1)), and material-limitation conflicts (Rule 1.7(a)(2)).
Rule 1.7(b) then sets forth a single standard of consentability and informed consent governing direct-adversity and material-limitation conflicts alike. Until the 2002 amendment, the rule used different formulas for each type of conflict: a representation directly adverse to another client was permissible with both clients’ consent if the lawyer reasonably believed the relationship with the existing client would not be adversely affected, and a representation that may have been materially limited by the lawyer’s interests or responsibilities to others was permissible with client consent if the lawyer reasonably believed the representation would not be adversely affected. The reporter to the Ethics 2000 Commission noted that “[l]awyers frequently [became] confused” applying this distinction. See American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 165 (2006).

The test in amended Rule 1.7(a)(2) (significant risk that the representation will be materially limited) is a rewording of the test in former Rule 1.7(b) (representation may be materially limited); the change is “not substantive,” according to the reporter’s notes, “but rather reflects how current paragraph (b) is presently interpreted by courts and ethics committees.” American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 165 (2006).

Subsection (b) adds a requirement that informed consent always be confirmed in writing.

The comment was amended in 2002 to address some recurring fact settings and to encompass concerns formerly addressed by Model Rule 2.2 (Intermediary). (Rule 2.2 was deleted in 2002 because it incorrectly suggested that intermediation was something other than an instance of common representation. American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 171 (2006).) Much of the former Rule 2.2 survives in Rule 1.7’s Comments [26] through [28] (nonlitigation conflicts) and Comments [29] through [33] (special considerations in common representation). See generally William Freivogel, A Short History of Conflicts of Interest. The Future?, 20 Prof. Law., no. 2, at 3 (2010); Charles W. Wolfram, Ethics 2000 and Conflicts of Interest: The More Things Change . . ., 70 Tenn. L. Rev. 27 (Fall 2002).

**Standing to Seek Disqualification**

The general rule is that only a former or current client has standing to bring a motion to disqualify counsel on the basis of a conflict of interest. In re Yarn Processing Patent Validity Litig., 530 F.2d 83 (5th Cir. 1976) (often cited in standing cases); Great Lakes Constr., Inc. v. Burman, 114 Cal. Rptr. 3d 301 (Ct. App. 2010); Cunningham ex rel. Rogers v. Anderson, 887 N.Y.S.2d 712 (App. Div. 2009).

A nonclient may seek disqualification only if there is an “ethical breach [that] so infects the litigation . . . that it impacts the moving party’s interest in a just and lawful determination of her claims.” Colyer v. Smith, 50 F. Supp. 2d 966 (C.D. Cal. 1999); see Jamieson v. Slater, No. CV 06-1524-PHX-SMM, 2006 WL 3421788 (D. Ariz. Nov. 27, 2006) (plaintiff had standing to move to disqualify opposing counsel, who was himself a co-defendant and whose actions while representing his co-defendants were subject of plaintiff’s suit; notwithstanding co-defendants’ waiver of conflict, lawyer’s interest in justifying what he did while representing them would “undoubtedly cloud” his abil-
ity to examine their alternatives); Doe v. Lee, 178 F. Supp. 2d 1239 (M.D. Ala. 2001) (plaintiff suing psychologist for disclosing her confidential records lacked standing to seek disqualification of defense counsel on grounds that counsel would have to cross-examine his own wife, who was potential material witness); Bernocchi v. Forucci, 614 S.E.2d 775 (Ga. 2005) (nonclient movant must show “violation of the rules which is sufficiently severe to call in question the fair and efficient administration of justice”). See generally Ivy Johnson, Standing to Raise a Conflict of Interest, 23 N. Ill. U. L. Rev. 1 (Fall 2002); Douglas R. Richmond, The Rude Question of Standing in Attorney Disqualification Disputes, 25 Am. J. Trial Advoc. 17 (Summer 2001).

Subsection (a): Conflict Identification

RULE 1.7(a)(1): DIRECTLY ADVERSE INTERESTS

• Representing Opposing Parties in Same Lawsuit

Representation of opposing persons in the same lawsuit is prohibited by Rule 1.7(a)(1). This type of conflict is not waivable. Model Rule 1.7(b)(3); see, e.g., Ex parte Osbon, 888 So. 2d 1236 (Ala. 2004) (in divorce proceeding, husband’s lawyer subpoenaed wife’s records from mental health agency; lawyer’s partner responded on behalf of agency); Vinson v. Vinson, 588 S.E.2d 392 (Va. Ct. App. 2003) (representing both husband and wife in divorce proceeding was “gross conflict of interest”); cf. Fremont Indem. Co. v. Fremont Gen. Corp., 49 Cal. Rptr. 3d 82 (Ct. App. 2006) (when lawyer’s two clients adverse in proceeding in which lawyer not involved, lawyer’s duty of loyalty not implicated and disqualification not justified); D.C. Ethics Op. 326 (2004) (lawyer may refer prospective client to another lawyer even though prospective client adverse to current client of lawyer in same matter).

• Representing Someone in Unrelated Suit against Existing Client

Rule 1.7(a)(1) prohibits a lawyer from representing anyone directly adverse to a current client, even if the matters are unrelated. See Harrison v. Fisons Corp., 819 F. Supp. 1039 (M.D. Fla. 1993) (even though law firm represented bank only as guardian of estate, firm could not be adverse to bank on unrelated matters; no distinction between fiduciary and individual capacity); Morse v. Clark, 890 So. 2d 496 (Fla. Dist. Ct. App. 2004) (law firm that represented trustee of decedent’s living trust in probate proceedings disqualified because assignee of intestate heirs already its client on unrelated matters; interest in upholding validity of living trust was directly adverse to heirs’ interests in maximizing size of estate); State ex rel. Neb. State Bar Ass’n v. Frank, 631 N.W.2d 485 (Neb. 2001) (lawyer may not represent client in workers’ compensation claim against employer’s insurer whom lawyer already represents in unrelated litigation); Ill. Ethics Op. 04-01 (2004) (lawyer cannot represent real estate buyer if one of lawyer’s clients is trying to collect debt owed by seller); Pa. Ethics Op. 00-67 (2000) (solicitor for political subdivision may not represent discharged subordinates of separately elected official whom they are suing for wrongful discharge; political subdivision is nominal defendant in employment suit); S.C. Ethics Op. 05-14 (2005) (without consent, lawyer may not represent mortgagor in foreclosure proceeding if mortgagee is client in other
foreclosure proceedings); see also ABA Formal Ethics Op. 92-367 (1992) (generally, lawyer may not undertake representation that will require cross-examination of another client as adverse witness). See generally Edwin S. Gault, Jr., Note, Simultaneous Representation of Adverse Interests: Suing One Client on Behalf of Another, 15 Miss. C. L. Rev. 189 (Fall 1994); Thomas D. Morgan, Suing a Current Client, 9 Geo. J. Legal Ethics 1157 (Summer 1996) (proposition that “a lawyer may never take a position directly adverse to a current client” is not the rule, nor should it be); Brian J. Redding, Suing a Current Client: A Response to Professor Morgan, 10 Geo. J. Legal Ethics 487 (Spring 1997); Norman W. Spaulding, Reinterpreting Professional Identity, 74 U. Colo. L. Rev. 1 (Winter 2003); Gregory Zimmer, Suing a Current Client: Responsibility and Respectability in the Conduct of the Legal Profession, 11 Geo. J. Legal Ethics 371 (Winter 1998).

When a lawyer is employed by a government entity, analysis of conflicts depends upon identifying precisely which government entity is the client. See, e.g., Brown & Williamson Tobacco Corp. v. Pataki, 152 F. Supp. 2d 276 (S.D.N.Y. 2001) (law firm that represented state agencies not disqualified from representing tobacco company in its suit challenging state statute); ABA Formal Ethics Op. 97-405 (1997) (lawyer not barred by Rule 1.7 from simultaneously performing legal services for government entity and private clients against another government entity in same jurisdiction, as long as two entities not considered same client); Ill. Ethics Op. 01-07 (2002) (two lawyers in same firm may continue to represent two different governmental units that function under separate boards and are not currently adverse on any issues).

• Disqualification Not Inevitable

A violation of Rule 1.7(a) does not always result in disqualification, particularly if the firm has implemented a screen and the complaining party cannot show it was harmed. See, e.g., Hempstead Video, Inc. v. Vill. of Valley Stream, 409 F.3d 127 (2d Cir. 2005); Bayshore Ford Truck Sales, Inc. v. Ford Motor Co., 380 F.3d 1331 (11th Cir. 2004); Wyeth v. Abbott Labs., 692 F. Supp. 2d 453 (D.N.J. 2010) (court approved same screen as that in Boston Scientific Corp. v. Johnson & Johnson Inc., 647 F. Supp. 2d 369 (D. Del. 2009), case involving same parties and patents as Wyeth).

• “Hot-Potato” Rule


Courts are more forgiving if the conflict was unforeseeable and arose through no fault of the law firm—as, for example, when a conflict is created by a corporate merger or acquisition. See Model Rule 1.7, cmt. [5] (lawyer may have option to withdraw from one of two representations when conflict created by “[u]nforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation”). This is sometimes referred to as the “thrust-upon” exception to the “hot-potato” rule. See, e.g., Carlyle Towers Condo. Ass’n,
Inc. v. Crossland Sav., FSB, 944 F. Supp. 341 (D.N.J. 1996) (conflict created by defendant’s merger with parent corporation of subsidiary for which plaintiff’s law firm had done transactional work did not require disqualification; firm had promptly withdrawn from representation of subsidiary); see also D.C. Ethics Op. 356 (2010) (when second client creates unforeseeable conflict, such as by submitting bid competing with that of first client, lawyer need not withdraw from representing first client even though her obligation of confidentiality to it precludes her from asking for second client’s informed consent).

• Simultaneously Representing Clients Involved in Different Suits over Related Matters

Simultaneous representation of clients involved in different lawsuits can give rise to a conflict if the suits involve related matters. See In re Big Mac Marine, Inc., 326 B.R. 150 (B.A.P. 8th Cir. 2005) (lawyer barred from representing debtor in bankruptcy case; lawyer already representing debtor’s owners in another bankruptcy proceeding, in which they might assert claims against debtor that lawyer would have to evaluate); Rembrandt Techs., LP v. Comcast Corp., No. 2:05CV443, 2007 WL 470631 (E.D. Tex. Feb. 8, 2007) (disqualifying law firm from simultaneously prosecuting patent infringement case for one client and representing potential infringer on other matters); Andrew Corp. v. Beverly Mfg. Co., 415 F. Supp. 2d 919 (N.D. Ill. 2006) (without consent, law firm may not render noninfringement opinion for one client if patent belongs to another client); In re Cole, 738 N.E.2d 1035 (Ind. 2000) (lawyer cannot represent defendant in delinquency case while serving as deputy prosecutor); In re Houston, 985 P.2d 752 (N.M. 1999) (lawyer could not reasonably believe he could adequately represent husband and wife in divorce and also represent husband on charges of criminal sexual contact with couple’s daughter and battery of wife); Mo. Ethics Op. 20010010 (2001) (lawyer retained by mother of minor child to represent child in personal injury case may not represent mother’s husband, who is not child’s father, in divorce action unless both spouses agree after full disclosure); Va. Ethics Op. 1774 (2003) (without consent, law firm may not render noninfringement opinion for one client if patent belongs to another client). See generally Charles W. Wolfram, Competitor and Other “Finite-Pie” Conflicts, 36 Hofstra L. Rev. 539 (Winter 2007).

• Direct Adversity in Nonlitigation Context

Comment [7] points out that direct adversity “can also arise in transactional matters.” See, e.g., Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Wagner, 599 N.W.2d 721 (Iowa 1999) (may not represent both buyer and seller in residential real estate transaction). However, outside the litigation context the lawyer is far more likely to encounter material-limitation conflicts under Rule 1.7(a)(2), discussed below, than direct-adversity conflicts under Rule 1.7(a)(1).

Rule 1.7(a)(2): MATERIAL-LIMITATION CONFLICTS

Rule 1.7(a)(2) focuses not on direct adversity of interests, but on the extent to which a representation is likely to be limited because of interests jeopardizing the lawyer’s exercise of independent professional judgment.
Responsibilities to Other Clients

Multiple representation that does not involve direct adversity of interests under Rule 1.7(a)(1) can still pose a conflict under Rule 1.7(a)(2) if responsibilities to one client could materially limit the representation of another. See, e.g., In re Shay, 756 A.2d 465 (D.C. 2000) (conflict materially limited lawyer’s representation of couple in estate planning when lawyer knew at time wills drafted that husband, unbeknownst to wife, was actually married to another person); Idaho State Bar v. Frazier, 28 P.3d 363 (Idaho 2001) (no violation of Rule 1.7 when lawyer representing both trust and beneficiary’s estate bills trust fees and costs to beneficiary’s estate, because no evidence that interests of estates not aligned or representation of estates affected); In re Twohey, 727 N.E.2d 1028 (Ill. 2000) (lawyer advised client to invest money in another client’s company); In re Toups, 773 So. 2d 709 (La. 2000) (assistant district attorney representing husband in divorce case should have withdrawn after client’s wife filed criminal complaint against husband); In re Bullis, 723 N.W.2d 667 (N.D. 2006) (lawyer for computer software company also represented company’s landlord, its chief financial officer, an investor, a creditor, and corporation that bought company; construing “adversely affect” test rather than “materially limit” test); In re Marshall, 157 P.3d 859 (Wash. 2007) (lawyer represented multiple plaintiffs in discrimination case without adequately explaining possible conflicts or obtaining waivers); N.Y. City Ethics Op. 2001-2 (2001) (detailed analysis of multiple representation in transactional matters); S.C. Ethics Op. 00-17 (2000) (lawyer may represent multiple parties at real estate closings if lawyer complies with requirements of Rule 1.7); see also D.C. Ethics Op. 301 (2000) (law firm representing 3,000 special education students seeking benefits from government may also represent class member in personal injury action against same defendant; possibility of conflict “remote”).

In litigation, multiple representation of co-parties in civil matters is permitted if there is no “substantial discrepancy” among positions, testimony, or settlement prospects. Model Rule 1.7, cmt. [23]; see, e.g., Patterson v. Balsamico, 440 F.3d 104 (2d Cir. 2006) (although defense of any 42 U.S.C. § 1983 action against municipality and its officers/employees presents potential joint-representation conflict, employee’s motion for new trial properly denied; his defense consistent with that of municipality, and counsel never argued that employee acted outside scope of his employment); Miller v. Alagna, 138 F. Supp. 2d 1252 (C.D. Cal. 2000) (city’s lawyers defending city and police officers in civil rights suit knew of potential conflicting defenses at outset but did not obtain informed consent; officers fired them after city fired officers; officers then moved successfully to disqualify them from continuing to represent city); J & J Snack Foods Corp. v. Kaffrissen, No. CIV A 98-5743, 2000 WL 562736 (E.D. Pa. May 9, 2000) (during settlement of wrongful death case, corporation first intervened to recoup what it spent on decedent’s medical care and then sued beneficiaries and their counsel for it; when counsel represented himself and continued to represent beneficiaries as his co-defendants, court—concerned that one beneficiary did not understand she had potential malpractice action against him—disqualified him from representing any beneficiaries); In re Adoption of Baby Girl T, 21 P.3d 581 (Kan. Ct. App. 2001) (lawyer may represent both adoptive and birth parents with fully informed consent of all); Pa. Ethics Op. 00-78B (2000) (lawyer may represent child as well as child’s onlooker sibling in personal

**• Duties to Former Clients and Prospective Clients**

Conflicts arising out of duties to former clients are discussed in the Annotation to Model Rule 1.9. Conflicts arising out of the duty to protect information received from a prospective client are discussed in the Annotation to Model Rule 1.18.

**• Positional Conflicts**

Positional or issue conflicts arise when a lawyer’s successful advocacy of a client’s legal position in one case could be detrimental to the interests of a different client in another case. See *Williams v. State*, 805 A.2d 880 (Del. 2002) (lawyer who argued in one pending capital appeal that trial court was required to give great weight to jury’s recommendation against death penalty permitted under Rule 1.7(b) to withdraw from second capital appeal in which he would be arguing that trial court gave too much weight to jury’s recommendation favoring death penalty); ABA Formal Ethics Op. 93-377 (1993) (law firm may not concurrently represent clients whose matters would require firm to argue directly contrary positions in same jurisdiction unless neither case likely to lead to precedent harmful to other and each client gives informed consent). See generally Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: A “Foolish Consistency”?*, 111 Penn St. L. Rev. 1 (Summer 2006); John S. Dzienkowski, *Positional Conflicts of Interest*, 71 Tex. L. Rev. 457 (Feb. 1993); Douglas R. Richmond, *Choosing Sides: Issue or Positional Conflicts of Interest*, 51 Fla. L. Rev. 383 (July 1999).

**• Corporate-Family Conflicts**

The majority rule is that there is no per se prohibition against undertaking a representation that is adverse to an affiliate of a corporate client. See *Certain Underwriters at Lloyd’s v. Argonaut Ins. Co.*, 264 F. Supp. 2d 914 (N.D. Cal. 2003); see also Pa. Ethics Op. 01-62 (2001) (representation of multiple franchisees of franchisor in connection with advice on leases poses no apparent Rule 1.7 conflict).

In some cases, however, the relationship between the parent and subsidiary is too
close to permit the firm to proceed. See, e.g., GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C., 618 F.3d 204 (2d Cir. 2010) (both entities used same law department and shared personnel and facilities). See generally William Freivogel, Selected Ethics Issues in Litigation Practice, 72 Tulane L. Rev. 637, 645–48 (Dec. 1997); Darian Ibrahim, Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses, 56 Ala. L. Rev. 181 (Fall 2004); Michael Sacksteder, Formal Opinion 95-390 of the ABA’s Ethics Committee: Corporate Clients, Conflicts of Interest, and Keeping the Lid on Pandora’s Box, 91 Nw. U. L. Rev. 741 (Winter 1997); John Steele, Corporate Affiliate Conflicts: A Reasonable Expectations Test, 29 W. St. U. L. Rev. 283 (Spring 2002); Charles W. Wolfram, Corporate-Family Conflicts, 2 J. Inst. for Study Legal Ethics 295 (1999).

See the Annotation to Model Rule 1.13(g) for discussion of conflicts presented by simultaneous representation of an organization and one or more of its constituents.

**• Simultaneous Representation of Co-Parties in Criminal Cases**

Much of the law involving conflicts of interests in criminal cases interprets the Sixth Amendment right to effective assistance of counsel. Key decisions from the Supreme Court include Mickens v. Taylor, 535 U.S. 162 (2002) (when trial court fails to address potential conflict of interest about which it reasonably should have known, defendant must establish that conflict adversely affected his lawyer’s performance); Wheat v. United States, 486 U.S. 153 (1988) (district court has discretion to disqualify defense counsel even if defendant waives conflict); and Glasser v. United States, 315 U.S. 60 (1942) (federal courts may not force defendant to accept appointment of counsel who is representing another defendant in same proceeding). (Glasser was extended to state court proceedings in Holloway v. Arkansas, 435 U.S. 475 (1978).) See generally Jeffrey Scott Glassman, Note, Mickens v. Taylor: The Court’s New Don’t-Ask, Don’t-Tell Policy for Attorneys Faced with a Conflict of Interest, 18 St. John’s J. Legal Comment. 919 (Summer 2004); Mark W. Shiner, Conflicts of Interest Challenges Post Mickens v. Taylor: Redefining the Defendant’s Burden in Concurrent, Successive, and Personal Interest Conflicts, 60 Wash. & Lee L. Rev. 965 (Summer 2003).

**• Lawyer’s Own Financial and Professional Interests**

A lawyer’s financial interests may conflict with a client’s interests. See In re Evans, 902 A.2d 56 (D.C. 2006) (when lawyer whose title company was insuring real estate in loan transaction learned that actual owner was unprobated estate of borrower’s deceased mother-in-law, lawyer initiated probate proceeding on borrower’s behalf to transfer title to her but did not explain his own financial interest in facilitating closing); ABA Formal Ethics Op. 04-432 (2004) (advancing bail on behalf of accused client may pose conflict if amount of bail is “material” to lawyer); ABA Formal Ethics Op. 02-427 (2002) (discussing propriety of lawyer taking security interest in client’s property to guarantee payment of fees). See generally John S. Dzienkowski & Robert J. Peroni, The Decline in Lawyer Independence: Lawyer Equity Investments in Clients, 81 Tex. L. Rev. 405 (Dec. 2002).

For discussion of the propriety of acquiring an ownership interest in a client, see the Annotation to Model Rule 1.8(a). For discussion of the conflict presented by
simultaneous negotiation of settlement and attorneys’ fees, see the Annotation to Model Rule 1.5.

Professional interests that are not purely financial can also materially limit a representation. See Jamieson v. Slater, No. CV 06-1524-PHX-SMM, 2006 WL 3421788 (D. Ariz. Nov. 27, 2006) (‘‘[The lawyer’s] position as both a co-defendant and counsel to the remaining defendants is so egregiously untenable that . . . any informed written consent to the concurrent conflicts of interest identified here would be ineffective.’’); In re Allsep, 541 S.E.2d 245 (S.C. 2001) (lawyer who represented client in foreclosure proceedings against real estate owners failed to advise client that real estate owners’ lawyer concurrently represented him in ongoing matter); ABA Formal Ethics Op. 08-453 (2008) (discussion of role of “ethics counsel” within law firm and duties to clients versus duties to law firm); ABA Formal Ethics Op. 97-406 (1997) (not necessarily improper for two lawyers to represent adverse interests at same time that one lawyer represents the other; each lawyer must evaluate whether relationship could materially limit representation of third-party client, but disclosure of their relationship is “prudent”); ABA Formal Ethics Op. 94-384 (1994) (lawyer usually need not withdraw from representation just because opponent files grievance against him or her, but if lawyer’s interest in avoiding discipline could materially limit representation, lawyer first must reasonably conclude representation will not be adversely affected and then must seek client’s consent); Conn. Ethics Op. 00-8 (2000) (no material-limitation conflict when lawyer drafts will and serves as both executor of and lawyer for estate, or when lawyer drafts will and subsequent trust agreement under which lawyer serves as co-trustee); Pa. Ethics Op. 02-1 (2002) (lawyer who represents asylum applicant in case pending with immigration court and employs applicant as translator may have conflict of interest if representation of applicant is materially limited by lawyer’s own interests as applicant’s employer; material limitation may result if applicant’s employment terminated); cf. Sands v. Menard, Inc., 787 N.W.2d 384 (Wis. 2010) (order of reinstatement in general counsel’s wrongful-termination suit violated public policy; parties’ “mutual animosity and distrust” created personal-interest conflict under Rule 1.7(a)(2)).


• **Lawyer’s Family Ties and Personal Relationships**

Family ties and personal relationships can create a material-limitation conflict. See, e.g., Petrovic v. Amoco Oil Co., 200 F.3d 1140 (8th Cir. 1999) (law firm representing plaintiff class disqualified because two class representatives were close relatives—husband
and sister-in-law—of partner in firm; clear danger their interests would conflict with
class’s interests when making decisions that could affect law firm’s fees); In re Driscoll,
856 N.E.2d 840 (Mass. 2006) (lawyer for bank lending money to his secretary notarized
secretary’s husband’s signature on loan documents without witnessing signature; had
she been a stranger, lawyer would have sought verification from husband); Haley v.
Boles, 824 S.W.2d 796 (Tex. App. 1992) (lawyer excused from handling indigent crim-
nal defense case because one firm partner was spouse of prosecutor assigned to case);
Ariz. Ethics Op. 2001-12 (2001) (when assistant public defender is in romantic rela-
tionship with law enforcement officer who regularly investigates and arrests office’s
clientele, informed client consent required to defend any client in whose case officer is
involved; if officer also expected to testify, conflict ordinarily nonconsentable); N.Y.
State Ethics Op. 738 (2001) (improper for lawyer to refer real estate client to title
abstract company in which lawyer’s spouse has ownership interest for other than purely
ministerial work; intimate relationship and economic interests of husband and wife
inseparable). See generally Stephen W. Simpson, From Lawyer-Spouse to Lawyer-Partner:

• Sex with Clients

A sexual relationship with a client that arises during the course of the representa-
tion can interfere with the lawyer’s ability to exercise independent professional judg-
ment on the client’s behalf. The 2002 amendments to the Model Rules identify sex with
clients as a specific instance of a material-limitation conflict. See Model Rule 1.8(j); see
also Model Rule 1.7, cmt. [12].

Even in the absence of the specific prohibition, however, courts have had no trou-
ble applying Rule 1.7 or its Model Code predecessor to lawyer-client sexual relationships. See, e.g., Horaist v. Doctor’s Hosp. of Opelousas, 255 F.3d 261 (5th Cir. 2001); In re
Ryland, 985 So. 2d 71 (La. 2008); Attorney Grievance Comm’n v. Hall, 969 A.2d 953 (Md.
wife is “per se violation of Rule 1.7”). See generally Phillip R. Bower & Tanya E. Stern,
Conflict of Interest?: The Absolute Ban on Lawyer-Client Sexual Relationships Is Not
Absolutely Necessary, 16 Geo. J. Legal Ethics 535 (Summer 2003); Linda Fitts Mischler,
Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex between
Domestic Relations Attorneys and Their Clients, 23 Harv. Women’s L.J. 1 (Spring 2000).

• Responsibilities to Others

Responsibilities attendant upon other kinds of relationships, in addition to per-
sonal relationships and lawyer-client relationships, can also create material-limitation
conflicts under Rule 1.7(a)(2). See Berry v. Saline Mem’l Hosp., 907 S.W.2d 736 (Ark. 1995)
(lawyer who had served on hospital’s board of governors may not represent patient
seeking hospital records under state’s freedom of information act for use in patient’s
action against hospital’s insurer; as former board member, lawyer had fiduciary duty
not to act to hospital’s detriment); Conn. Ethics Op. 00-17 (2000) (lawyer who is town
councilman may not represent plaintiff in personal injury action against employee of
town and town itself; representation would be materially limited by lawyer’s duties
to town); D.C. Ethics Op. 337 (2007) (lawyer’s responsibilities to person employing her
as expert witness may materially limit her ability to represent someone adverse to him in related matter); III. Ethics Op. 00-01 (2000) (conflict of interest exists between lawyer’s representation of one client and other similar clients if lawyer complies with client’s accountant’s request to sign confidentiality agreement that would prohibit lawyer from revealing ideas accountant developed to reduce client’s tax obligations). Compare United States v. Daniels, 163 F. Supp. 2d 1288 (D. Kan. 2001) (motion to disqualify denied; even though lawyer defending physician in fraud case was being paid by physician’s malpractice insurer and was representing physician and insurer in malpractice actions brought by fraud victims, physician was also being defended by two independent criminal defense lawyers and had knowingly waived conflict), with State v. Culbreath, 30 S.W.3d 309 (Tenn. 2000) (district attorney and his staff disqualified from prosecuting indecency case because of district attorney’s use of private lawyer who received substantial compensation from special interest group opposed to activities of sexually oriented businesses). See generally Nancy J. Moore, Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm, 16 Rev. Litig. 585 (Summer 1997).

Payment of a client’s fees by a third person, including an insurance company, is discussed in the Annotations to Model Rules 1.8(f) and 5.4(c).

**Subsection (b): Client Consent**

**INFORMED CONSENT**

If a lawyer reasonably believes that no client will be adversely affected, and if the representation is not prohibited by law and does not involve one client asserting a claim against another, the lawyer may represent conflicting interests if each affected client gives informed consent, confirmed in writing. Rule 1.0(e) defines “informed consent” to mean that the lawyer has “communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” See, e.g., Centra, Inc. v. Estrin, 538 F.3d 402 (6th Cir. 2008) (client’s “vague and general” knowledge of firm’s prior work “not an adequate foundation for informed consent”); Anderson v. Nassau County Dep’t of Corr., 376 F. Supp. 2d 294 (E.D.N.Y. 2005) (granting employer-defendants’ motion to disqualify plaintiff’s counsel, whose firm concurrently represented different employee in similar Title VII action in which plaintiff was fellow defendant; irrelevant that firm already disqualified in that action; employee’s offer to withdraw her claims against plaintiff to cure conflict “can only be viewed to support the . . . possible diminution in the vigor of representation that the Second Circuit has sought to prevent in granting motions to disqualify counsel”); Discomtrade Ltd. v. Wyeth-Ayerst Int’l, Inc., 200 F. Supp. 2d 355 (S.D.N.Y. 2002) (disqualification granted; “it is clear from the documentary record that [counsel] knew it had not secured an effective waiver before filing this lawsuit”); Image Technical Servs., Inc. v. Eastman Kodak Co., 820 F. Supp. 1212 (N.D. Cal. 1993) (no exception for international law firms with multinational clients; duty to obtain fully informed consent applies “no matter how difficult the communication hurdles”); In re Evans, 902 A.2d 56 (D.C. 2006) (rejecting lawyer’s argument that pursuant to “company policy” of his title company, lawyer’s associate responsible for informing client of lawyer’s interest in company; lawyer’s admission that he had not personally ensured client gave informed consent established violation of Rule 1.7); Iowa Supreme Court Attorney Dis-
ciplinary Bd. v. Clauss, 711 N.W.2d 1 (Iowa 2006) (lawyer for creditor also undertook to represent debtor in seeking to lift injunction against her business operations; warning client that lawyer represents both sides is not enough to validate waiver); In re Wyllie, 19 P.3d 338 (Or. 2001) (lawyer for three co-defendants hired by father of one to give second opinion about feasibility of pleas to lesser charges not excused from disclosing likely conflict of interest among co-defendants simply because co-defendants already represented by appointed trial lawyer); Fullmer v. State Farm Ins. Co., 514 N.W.2d 861 (S.D. 1994) (defendant must be advised by independent counsel and informed that her proposed new counsel served as witness for co-defendant in earlier trial before her consent to representation deemed valid); In re Guardianship of Lillian P., 617 N.W.2d 849 (Wis. Ct. App.) (waiver requires lawyer to disclose nature of all conflicts or potential conflicts relating to lawyer’s representation of client’s interests, and how they could affect lawyer’s exercise of independent professional judgment for client; client must understand risks involved in not choosing other representation), review denied, 619 N.W.2d 93 (Wis. 2000). See generally Peter R. Jarvis & Bradley F. Tellam, When Waiver Should Not Be Good Enough: An Analysis of Current Client Conflicts Law, 33 Williamette L. Rev. 145 (1997); Fred C. Zacharias, Waiving Conflicts of Interest, 108 Yale L.J. 407 (Nov. 1998).

• Written Confirmation

Rule 1.7(b)(4) requires a lawyer to obtain written confirmation of a client’s informed consent to the lawyer’s conflict of interest. This requirement was imposed by the 2002 amendments to the Model Rules. See Model Rule 1.7, cmt. [20]; see also Model Rule 1.0(b).

• Government-Entity Consent

Jurisdictions differ about whether a government entity may waive its counsel’s conflict of interest. Some jurisdictions adhere to a per se government-cannot-consent rule, relying upon the public interest and reasoning that a government lawyer may use—or suggest an ability to use—his or her position to secure consent improperly or to gain an improper advantage for a private client. See, e.g., State ex rel. Morgan Stanley & Co. v. MacQueen, 416 S.E.2d 55 (W. Va. 1992) (government inherently incapable of consenting to its law firm’s concurrent representation of government employees who, though not named as parties, are indirectly accused of acting contrary to government’s interest); N.J. Ethics Op. 697 (2005) (although court recently adopted Model Rules, it specifically chose to retain per se rule, “essentially a protective remnant of the appearance-of-impropriety rule”); Tenn. Ethics Op. 2002-F-146 (2002) (government cannot consent to public prosecutor’s representation of criminal defendants within same judicial district).

• Prospective Waivers

Rule 1.8

Conflict of Interest:

Current Clients: Specific Rules

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

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

2. the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

3. the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

2. a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

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

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

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

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

(1) acquire a lien authorized by law to secure the lawyer’s fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

**COMMENT**

*Business Transactions between Client and Lawyer*

[1] A lawyer’s legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the
lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer’s legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client’s business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client’s informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer’s role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer’s involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer’s financial interest otherwise poses a significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s financial interest in the transaction. Here the lawyer’s role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer’s dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer’s interests at the expense of the client. Moreover, the lawyer must obtain the client’s informed consent. In some cases, the lawyer’s interest may be such that Rule 1.7 will preclude the lawyer from seeking the client’s consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client’s independent counsel. The fact that the client was independently repre-
Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer’s duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency’s interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer’s benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer’s interest in obtaining the appointment will materially limit the lawyer’s independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client’s informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer’s financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

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

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer’s Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer’s independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer’s professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client’s informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s own interest in the fee arrangement or by the lawyer’s responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.
Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients’ informed consent. In addition, Rule 1.2(a) protects each client’s right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer’s liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule
has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer’s fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer’s efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer’s fiduciary role, in violation of the lawyer’s basic ethical obligation not to use the trust of the client to the client’s disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer’s emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client’s own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer’s ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization’s legal matters.
Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Annotation

Rule 1.8 addresses ten specific situations in which a lawyer’s own interests may compromise a client’s representation or otherwise harm a client’s interests. In most of these situations, the conflict cannot be cured by informed client consent. The lawyer must either avoid the situation entirely or comply with conditions designed to protect the client from overreaching by the lawyer.

2002 Amendments

Several subsections and corresponding comments were amended in 2002. Family relationships among lawyers, formerly the subject of subsection (i), are now addressed in Comment [11] to Rule 1.7. Former subsection (j) (acquiring a proprietary interest in litigation) was renumbered as subsection (i), and a new subsection (j) was added to prohibit most client-lawyer sexual relationships. Subsection (k) was added to impute to firm colleagues all but one (sex with clients) of Rule 1.8’s prohibitions; until this amendment, none of the rule’s prohibitions was to be imputed except gifts to lawyers. American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 210 (2006).

Subsection (a): Business Transactions between Client and Lawyer

Rule 1.8(a) prohibits business transactions between a lawyer and client unless the lawyer complies with specific conditions designed to protect the client. These protections are consistent with the common law governing the client-lawyer relationship and the law of agency. See Restatement (Third) of the Law Governing Lawyers § 126 (2000); Restatement (Third) of the Law of Agency § 8.03 (2006) (agent has duty not to deal with principal as or on behalf of adverse party in transaction connected with agency relationship).

Rule 1.8(a) does not apply to ordinary client-lawyer fee arrangements, which are governed by Rule 1.5, or to standard commercial transactions between a lawyer and client “for products or services that the client generally markets to others.” Model Rule 1.8, cmt. [1]. It does apply, however, to lawyers who sell their clients goods or services related to the practice of law, such as title insurance or investment services; its requirements must be met even if the transaction is not closely related to the subject matter of the representation. Id.
If Rule 1.8(a) applies, the transaction must be objectively fair and reasonable to the client. See, e.g., *In re Miller*, 66 P.3d 1069 (Wash. 2003) (rejecting “sophisticated client” defense); see also ABA Formal Ethics Op. 00-416 (2000) (lawyer may purchase accounts receivable from client and pursue collection for lawyer’s benefit as long as transaction fair and reasonable to client and Rule 1.8 conditions satisfied). Rule 1.8(a)(1) also directs that the terms of the transaction be fully disclosed and transmitted in a manner that can be reasonably understood by the client. See *Fla. Bar v. Ticktin*, 14 So. 3d 928 (Fla. 2009) (press release announcing lawyer would assume management of indicted client’s business did not constitute sufficient disclosure).

Rule 1.8(a)(2) requires that the client be advised in writing of the desirability of seeking the advice of independent counsel and be given a reasonable opportunity to do so. If the client does have independent counsel, the disclosure requirement of Rule 1.8(a)(1) can be satisfied by either the independent counsel or the lawyer involved in the transaction. See Model Rule 1.8, cmt. [4]. Rule 1.8(a)(3) requires informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction. See *In re Trewin*, 684 N.W.2d 121 (Wis. 2004) (clients’ signatures on loan documents did not constitute sufficient consent).

**COMMON SITUATIONS INVOLVING RULE**

Loans between lawyers and clients are among the most common situations to which Rule 1.8(a) is applied. See, e.g., *In re Timpone*, 804 N.E.2d 560 (Ill. 2004) (after representing client in divorce and sale of marital residence, lawyer borrowed money from proceeds); *In re Wilty*, 808 So. 2d 322 (La. 2002) (lawyer solicited loan from client receiving personal injury award); *In re Crary*, 638 N.W.2d 23 (N.D. 2002) (lawyer took loans from and sold annuities to elderly client and received undisclosed commissions); *In re Haley*, 138 P.3d 398 (Wash. 2006) (lawyer made loans to client). Other common situations are sales and investment transactions that unfairly favor the lawyer, or for which the lawyer has not provided the required disclosure. See, e.g., *In re Davis*, 740 N.E.2d 855 (Ind. 2001) (lawyer persuaded client to invest settlement funds in lawyer’s business ventures); *In re Lupo*, 851 N.E.2d 404 (Mass. 2006) (lawyer purchased real estate from elderly aunt for substantially less than fair market value); *In re Nelson*, 681 N.W.2d 352 (Minn. 2004) (lawyer solicited over $4 million in investments from clients). Rule 1.8(a) also applies to a lawyer’s personal use of client funds. See *In re Viehe*, 762 A.2d 542 (D.C. 2000) (lawyer entrusted with blank checks for real estate purchase wrote checks for personal use); *In re Letellier*, 742 So. 2d 544 (La. 1999) (lawyer with power of attorney for elderly client used client’s funds for loans to lawyer’s corporation); *In re Stern*, 682 N.E.2d 867 (Mass. 1997) (lawyer acting as trustee borrowed from trust to pay interest on personal debts without settlors’ knowledge).

**OWNERSHIP OR INVESTMENT INTEREST IN CLIENT AS FEE**

Comment [1] explains that Rule 1.8(a) applies when a lawyer accepts an interest in a client’s business or other nonmonetary property as payment of all or part of a fee. As Comment [4] to the rule on fees (Rule 1.5) also notes, fees paid in property instead
of money often have the essential qualities of a business transaction with the client. See, e.g., In re Snyder, 35 S.W.3d 380 (Mo. 2000) (accepting quitclaim real estate interest in lieu of cash fee violated Rule 1.8(a)); Cotton v. Kronenberg, 44 P.3d 878 (Wash. Ct. App. 2002) (in lieu of fee, which lawyer had estimated at $10,000 to $30,000, lawyer accepted client’s mobile home but promptly resold it for $42,000, belying his argument that transaction had been fair and reasonable within meaning of Rule 1.8(a)).

When a lawyer acquires stock in a client’s corporation in lieu of or in addition to a cash fee, a determination that the fee is reasonable under the factors enumerated in Rule 1.5(a) is insufficient to establish that the transaction also qualifies as “fair and reasonable” within the meaning of Rule 1.8(a), according to an ABA ethics opinion. ABA Formal Ethics Op. 00-418 (2000) (must consider additional factors, including risk of enterprise failing and stock’s marketability); see also In re Richmond, 904 A.2d 684 (N.H. 2006) (rejecting argument that Rules 1.5 and 1.8(a) are inconsistent); cf. Buechel v. Bain, 766 N.E.2d 914 (N.Y. 2001) (fee agreement giving lawyers interest in client’s patent was void; federal law authorizing this kind of arrangement does not obviate compliance with state ethics rules requiring informed consent and independent consultation). See generally John S. Dziekowksi & Robert J. Peroni, The Decline in Lawyer Independence: Lawyer Equity Investments in Clients, 81 Tex. L. Rev. 405 (Dec. 2002).

Rule 1.8(i), discussed below, makes specific exceptions for contingent-fee agreements and for liens authorized by law (whether statutory, common law, or contractual) to secure payment of lawyers’ fees. Comment [16] notes that when a lawyer contracts for a security interest in property other than that recovered through the litigation, however, the lawyer is engaging in a business transaction and must comply with Rule 1.8(a). See Petit-Clair v. Nelson, 782 A.2d 960 (N.J. Super. Ct. App. Div. 2001) (mortgages on personal residences given by corporate officers to secure lawyer’s fees for continued representation of corporations void for failure to comply with Rule 1.8(a)); ABA Formal Ethics Op. 02-427 (2002) (lawyer who acquires contractual security interest in client property to secure payment of fees must comply with Rule 1.8(a)).

CHANGING FEE AGREEMENTS

Although Rule 1.8(a) does not apply to ordinary client-lawyer fee agreements, it has been applied to efforts to modify agreements during the course of the representation. See, e.g., Naiman v. N.Y. Univ. Hosps. Ctr., 351 F. Supp. 2d 257 (S.D.N.Y. 2005) (purported supplemental fee agreement giving lawyer 50 percent of settlement invalid; “midstream modification that increases a contingency fee percentage may be a ‘business transaction’ that creates a conflict of interest”); In re Hefron, 771 N.E.2d 1157 (Ind. 2002) (lawyer switched from hourly to contingent fee after learning client would recover substantially more than anticipated); In re Curry, 16 So. 3d 1139 (La. 2009) (inserting more favorable terms into original fee agreement violated Rule 1.8(a)).

REFERRAL ARRANGEMENTS

Utah Ethics Op. 99-07 (1999); see also In re Phillips, 107 P.3d 615 (Or. 2005) (lawyer advised clients to consult insurance agents without disclosing he would share in their commissions); Model Rule 5.7, cmt. [5] (lawyer must comply with Rule 1.8(a) when referring clients to law-related service entity in which lawyer has any control). Some jurisdictions, however, have concluded that compensated referrals are improper even with full disclosure and consent. See, e.g., Me. Ethics Op. 184 (2004); Tex. Ethics Op. 536 (2001).

Subsection (b): Use of Information Related to Representation

Rule 1.8(b) governs the use (in contrast to disclosure, which is governed by Rule 1.6) of information relating to the representation of a current client. Once the client-lawyer relationship has ended, Rule 1.9 governs both disclosure and use of the information.

Rule 1.8(b) prohibits a lawyer from using information relating to the representation of a client to the client’s disadvantage without the client’s informed consent, unless permitted or required by other rules. Comment [5] notes, for example, that if a lawyer knows a client intends to develop several parcels of land, the lawyer may not use that information to buy one of the parcels in competition with the client or to recommend that another client make such a purchase. See In re Coggs, 14 P.3d 1123 (Kan. 2000) (lawyer used knowledge of client’s trust assets to borrow from trust); In re Guidone, 653 A.2d 1127 (N.J. 1994) (lawyer used client information to acquire interest in partnership buying property from client); ABA Formal Ethics Op. 05-435 (2005) (lawyer who simultaneously represents liability insurer and, in unrelated matter, claimant against one of its insureds may not use information relating to representation of insurer for claimant’s benefit); ABA Formal Ethics Op. 02-426 (2002) (lawyer acting as fiduciary may have conflict in using information gained in representation of beneficiary in unrelated matter); ABA Formal Ethics Op. 92-367 (1992) (seeking third-party discovery of client may involve information within contemplation of Rule 1.8(b)).

Rule 1.8(b) does not prohibit the lawyer from using client information in a way that does not disadvantage the client. In this respect, Rule 1.8(b) is more permissive than general fiduciary and agency law. See Restatement (Third) of the Law Governing Lawyers § 60(2) (2000) (lawyer who uses client’s confidential information for own pecuniary gain must account to client for profits); Restatement (Third) of the Law of Agency § 8.05 (2006) (agent has duty not to use confidential information of principal for own purposes); see also United States v. O’Hagen, 521 U.S. 642 (1997) (lawyer guilty of securities fraud under “misappropriation” theory for trading on confidential client information).

Subsection (c): Gifts to Lawyers

Rule 1.8(c) prohibits a lawyer from either soliciting a substantial gift from a client or preparing an instrument by which a client gives a substantial gift to the lawyer or a relative of the lawyer, unless the client and recipient are themselves relatives. “Relative” for purposes of this subsection includes anyone with whom the lawyer or client maintains a “close, familial relationship.” See In re Devaney, 870 A.2d 53 (D.C. 2005)
(lawyer prepared instrument conveying property to himself and his family); *In re Boulger*, 637 N.W.2d 710 (N.D. 2001) (lawyer drafted codicil giving himself large contingent gift); cf. *In re Colman*, 885 N.E.2d 1238 (Ind. 2008) (lawyer who “actively participated” in preparation of will naming lawyer as primary beneficiary and son as contingent beneficiary violated rule notwithstanding that instrument prepared by another lawyer). Comment [6] observes that a lawyer may accept a substantial gift that was not solicited, but cautions that such gifts must meet “general standards of fairness” and may be voidable under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. See, e.g., *Olson v. Estate of Watson*, 52 S.W.3d 865 (Tex. App. 2001) (will leaving testator’s entire estate to lawyer’s family unenforceable); Md. Ethics Op. 2003-08 (2003) (lawyer on church legacy committee may not prepare wills for church members who wish to bequeath property to church).

Rule 1.8(c) permits gifts if they are not substantial, or if the client and recipient are related. Comment [8] further notes that although Rule 1.8(c) permits a lawyer to seek appointment to a fiduciary position, including that of a client’s executor, the arrangement may create a conflict of interest within the meaning of Rule 1.7. See ABA Formal Ethics Op. 02-426 (2002) (lawyer may accept appointment as personal representative or trustee in will or trust prepared by lawyer for client; absent special circumstances, lawyer serving as fiduciary of estate or trust may appoint himself or other firm lawyers to represent him in that capacity if compensation for services reasonable). See generally April A. Fegyveresi, *Conflicts of Interests in Trust & Estate Practice*, 8 Geo. J. Legal Ethics 987 (Summer 1995).

### Subsection (d): Literary Rights

A lawyer who is representing a client is prohibited from making or negotiating an agreement giving the lawyer literary or media rights to an account based in substantial part upon information relating to the client’s representation. Comment [9] explains that a lawyer’s acquisition of such rights creates a conflict between the interests of the client and the personal interest of the lawyer. See, e.g., *Commonwealth v. Downey*, 842 N.E.2d 955 (Mass. App. Ct. 2006) (defense counsel’s agreement with television company to wear concealed microphone during murder trial created conflict of interest requiring new trial); *Harrison v. Miss. Bar*, 637 So. 2d 204 (Miss. 1994) (lawyer’s agreement with film producer for rights to her life story, including section on her representation of current client, violated Rule 1.8(d)); cf. D.C. Ethics Op. 334 (2006) (while representing client, lawyer may make agreement with media company seeking lawyer’s own story about case; Rule 1.8 not applicable, but lawyer must comply with Rules 1.6 and 1.7).

### Subsection (e): Financial Assistance to Client

With two exceptions discussed below, Rule 1.8(e) prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation. The lawyer may neither lend money to the client nor guarantee a third-party loan to the client. Comment [10] cites the need to avoid encouraging clients to pursue litigation that might not otherwise be brought, and the need to avoid giving the lawyer too great a financial stake in the litigation. See ABA Formal Ethics Op. 04-432 (2004)
(no per se prohibition on posting bail for client, but must be no significant risk that representation will be materially limited by lawyer’s personal interest in recovering advance).


ASSISTING NEEDY CLIENT


Several jurisdictions have, however, amended their versions of Rule 1.8(e) to explicitly permit emergency financial assistance, basic living expenses, or reasonably necessary medical and living expenses. See generally Danielle Z. Cohen, Advancing Funds, Advancing Justice: Adopting the Louisiana Approach, 19 Geo. J. Legal Ethics 613 (Summer 2006).

LAWYER OBTAINING LOAN FOR CLIENT LITIGATION EXPENSES

Some jurisdictions have concluded that although there are risks, a lawyer in a contingent-fee case may borrow funds from a lending institution to cover a client’s litigation expenses. See, e.g., Chittenden v. State Farm Mut. Auto. Ins. Co., 788 So. 2d 1140 (La. 2001) (with adequate disclosure and consent, lawyer may make agreement obligating client to repay lawyer interest on loan secured by lawyer to cover client’s litigation expenses); Ariz. Ethics Op. 01-07 (2001) (lawyer may arrange line of credit to fund litigation and charge client interest on loan if lawyer has no financial interest in lender, fully discloses arrangement to client, and charges client only actual interest incurred); Ky. Ethics Op. E-420 (2002) (lawyer may borrow funds to finance litigation costs and expenses in contingent-fee case as long as lawyer remains obligor, and may deduct...
interest on loan from proceeds of suit, but may not give lender security interest in contingent fee; collecting opinions); Mich. Ethics Op. RI-336 (2005) (lawyer may borrow to finance contingent-fee matter if full disclosure to client; loan costs must be billed to client as litigation expenses).

A lawyer may also inform a client about independent “litigation lenders” that offer nonrecourse funding in exchange for an interest in the proceeds of the client’s case, but the lawyer’s role must be carefully circumscribed. See, e.g., Fla. Ethics Op. 00-3 (2002); Utah Ethics Op. 06-03 (2006). See generally Douglas R. Richmond, Other People’s Money: The Ethics of Litigation Funding, 56 Mercer L. Rev. 649 (Winter 2005).

**Subsection (f): Person Paying for Lawyer’s Services**

The most common situation in which a lawyer is paid by someone other than the client is insurance defense work, but the situation also arises when parents hire counsel for their children, when employers pay employees’ legal expenses, and when friends or relatives pay for criminal defendants’ counsel. Comment [11] observes that third-party payors frequently have interests separate from those of the client, including an interest in minimizing legal fees and an interest in finding out about the case’s progress. For these reasons, Rule 1.8(f) imposes three conditions on acceptance of third-party payment: the client must give informed consent, there must be no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship, and information relating to the representation must be protected as required by Rule 1.6. Directly related to this is Rule 5.4(c), which prohibits a lawyer from permitting the person paying for the lawyer’s services to “direct or regulate the lawyer’s professional judgment.” See, e.g., ABA Formal Ethics Op. 02-428 (2002) (lawyer may draft will for testator at request of existing client who pays lawyer and is potential beneficiary, provided testator gives informed consent and requirements of Rule 1.8(f) as well as Rule 5.4(c) satisfied). See generally Nancy J. Moore, Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm, 16 Rev. Litig. 585 (Summer 1997).

Comment [12] also notes the applicability of Rule 1.7 in situations where the fee arrangement creates a conflict of interest for the lawyer. Although the two rules use different criteria—material limitation in Rule 1.7, and “interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship” in Rule 1.8(f)—no different substantive standard was apparently intended. See Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, The Law of Lawyering § 12.13 (3d ed. 2001 & Supp. 2004).

**Insurance Defense Counsel**

Under a typical liability insurance policy, the insurer designates and pays a lawyer to defend an insured policyholder against whom a claim has been made. This tripartite relationship among insurer, insured, and defense counsel is often characterized as the “eternal triangle.” See, e.g., Douglas R. Richmond, Lost in the Eternal Triangle of Insurance Defense Ethics, 9 Geo. J. Legal Ethics 475 (1996) (conflicts of interest inevitable hazard in eternal triangle; defense lawyers should embrace principle that insured is sole client). Jurisdictions differ on whether defense counsel represents the insured, the
Some hold that the insured is the defense lawyer’s only client. See, e.g., Essex Ins. Co. v. Tyler, 309 F. Supp. 2d 1270 (D. Colo. 2004); In re Rules of Prof’l Conduct & Insurer Imposed Billing Rules & Procedures, 2 P.3d 806 (Mont. 2000). Others consider the defense lawyer to have a “dual client” relationship with both the insured and the insurer absent a conflict of interest, although the insured is usually considered the “primary” client. See, e.g., Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court, 152 P.3d 737 (Nev. 2007) (adopting what it describes as majority view that defense lawyer represents both insurer and insured but insured is primary client); cf. ABA Formal Ethics Op. 96-403 (1996) (Model Rules offer no guidance on whether lawyer retained by insurer represents insured, insurer, or both; if insured objects to settlement that policy authorizes insurer to make, lawyer must give insured opportunity to reject insurer’s defense and assume defense at own expense). At least three jurisdictions require insurance defense lawyers to provide insureds with written statements of the terms and scope of the representation. See Fla. Rule of Prof’l Conduct 4-1.8(j) (2002); Ohio Rule of Prof’l Conduct 1.8(f)(4) (2007); Wis. Rule of Prof’l Conduct 1.2(e) (2007). See generally Ellen S. Pryor & Charles Silver, Defense Lawyers’ Professional Responsibilities: Part II—Contested Coverage Cases, 15 Geo. J. Legal Ethics 29 (Fall 2001); Ellen S. Pryor & Charles Silver, Defense Lawyers’ Professional Responsibilities: Part I—Excess Exposure Cases, 78 Tex. L. Rev. 599 (Feb. 2000).

Many insurers in the 1990s sought to control defense costs by imposing billing guidelines on defense counsel and requiring submission of fee and expense statements to third-party auditors. Numerous state opinions concluded this practice violated Rule 1.8(f) and other ethics rules. See ABA Formal Ethics Op. 01-421 (2001) (collecting opinions). See generally Susan Randall, Managed Litigation and the Professional Obligations of Insurance Defense Lawyers, 51 Syracuse L. Rev. 1 (2001). In addition to billing guidelines, some insurers attempted to control costs by establishing “captive” firms, employed directly by insurers, to represent policyholders in claims defense. Such arrangements have been permitted in some states, but found to violate Rule 1.8(f) as well as Rules 1.7 and 5.5 in others. See, e.g., Am. Ins. Ass’n v. Ky. Bar Ass’n, 917 S.W.2d 568 (Ky. 1996) (defense by insurer-employed lawyers presents conflicts of interest and constitutes unauthorized practice of law); Unauthorized Practice of Law Comm. v. Am. Home Ins. Co., 261 S.W.3d 24 (Tex. 2008) (staff lawyer may defend insured if insurer’s and insured’s interests congruent and affiliation fully disclosed).

**Criminal Matters**

In criminal cases, third-party payment of a defendant’s legal fees can raise due process and Sixth Amendment concerns. See Wood v. Georgia, 450 U.S. 261 (1981) (“inherent dangers” arise when criminal defense counsel hired and paid by third party; trial court on notice must inquire further to protect defendant’s rights); United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002) (firm was paid $10 million by police union to defend police officer charged with assault; union concurrently defendant in assault victim’s civil suit); Ariz. Ethics Op. 2001-06 (2001) (lawyer should not contract with county to represent indigent defendants if contract requires authorizations from nonlawyer third parties that might induce lawyer to act contrary to clients’ interests); cf. Devaney v. United States, 47 F. Supp. 2d 130 (D. Mass. 1999) (rejecting claim that lawyer pursued
plea bargain to minimize fees being paid by defendant’s brother-in-law; no violation of Rule 1.8(f) by mere payment of fees by third party).

**Subsection (g): Aggregate Settlements or Plea Agreements**

If a lawyer is participating in an aggregate settlement of claims by or against multiple clients or, in a criminal case, an aggregated agreement for guilty or nolo contendere pleas, Rule 1.8(g) requires the lawyer to obtain the informed consent of each client, confirmed in a writing signed by each client, after the lawyer has disclosed “the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.” See *In re Hoffman*, 883 So. 2d 425 (La. 2004) (lawyer must confer with each client directly and disclose each client’s share); ABA Formal Ethics Op. 06-438 (2006) (in seeking consent of multiple clients to aggregate settlement, lawyer must advise each client of total settlement amount, nature and amount of each client’s participation, fees and costs to be paid to lawyer, and how costs will be apportioned to each client); see also *Tilzer v. Davis, Bethune & Jones, L.L.C.*, 288 P.3d 617 (Kan. 2009) (interdependency of claims denotes aggregate settlement).

The informed consent requirement cannot be met by obtaining advance consent to a decision that will be made by the lawyer or by a majority of the client group. See *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512 (N.J. 2006) (lawyer may not obtain advance consent to abide by majority vote on settlement); N.Y. City Ethics Op. 2009-6 (2009) (lawyer may not ask clients to bind themselves to settlement approved by some, but not all, affected clients); cf. *Abbott v. Kidder Peabody & Co.*, 42 F. Supp. 2d 1046 (D. Colo. 1999) (group retainer agreement that allowed “steering committee” to control settlement created nonconsentable conflict). See generally Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. Kan. L. Rev. 979 (May 2010).

**Subsection (h): Limiting Liability and Settling Malpractice Claims**

Rule 1.8(h) was split into two parts in 2002 to clarify that it imposes two separate obligations. Subsection (h)(1) prohibits agreements prospectively limiting a lawyer’s liability to clients for malpractice unless the client is independently represented in making the agreement; the 2002 amendments deleted the condition “unless permitted by law,” with the drafters explaining they were unaware of any such law. American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct*, 1982–2005, at 207–08 (2006); cf. Restatement (Third) of the Law Governing Lawyers § 54(2) (2000) (agreements prospectively limiting lawyer’s malpractice liability unenforceable).

Comment [14] resolves three significant issues concerning the restriction on prospective limits of malpractice liability. First, Rule 1.8(h) does not prohibit agreements to arbitrate legal malpractice claims. See ABA Formal Ethics Op. 02-425 (2002) (retainer agreement may require binding arbitration of fee disputes and malpractice claims provided client fully apprised of advantages and disadvantages of arbitration and gives informed consent; arbitration provision must not limit liability to which lawyer would otherwise be exposed). Second, the rule does not prohibit lawyers from
practicing in limited-liability entities. See ABA Formal Ethics Op. 96-401 (1996) (lawyers may practice as limited-liability entity if individual lawyers remain personally liable for acts or omissions). Third, the rule does not prohibit agreements limiting the scope of the representation in accordance with Rule 1.2. See N.Y. City Ethics Op. 2001-3 (2001) (lawyer may limit scope of representation to avoid conflicts of interest if client consents and if restriction does not render lawyer’s counsel inadequate).

Subsection (h)(2) prohibits a lawyer from settling a claim or potential claim with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking independent counsel, and is given a reasonable opportunity to do so. See In re Braun, 734 N.E.2d 535 (Ind. 2000) (lawyer did not advise client to consult independent counsel before obtaining agreement releasing lawyer from liability and withdrawing disciplinary complaint in exchange for fee refund). The phrase “or potential claim” was added in 2002 to clarify that the prohibition applies to unasserted possible claims as well as actual claims. American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 208 (2006); see In re Greenlee, 143 P.3d 807 (Wash. 2006) (interpreting prior version of rule to cover potential claims).

Subsection (i): Acquiring Proprietary Interest in Litigation

Rule 1.8(i) restricts a lawyer’s ability to acquire a proprietary interest in a client’s cause of action or the subject matter of litigation. Subsection (i) was renumbered in 2002; it was formerly subsection (j).

The general prohibition of Rule 1.8(i) is, like that of Rule 1.8(e), derived from common-law doctrines of champerty and maintenance and is designed to avoid making the lawyer an interested investor in the client’s matter. Ankerman v. Mancuso, 860 A.2d 244 (Conn. 2004). Comment [16] notes the additional concern that a client may find it more difficult to discharge a lawyer with an ownership interest in the litigation. See ABA Formal Ethics Op. 00-416 (2000) (lawyer may purchase accounts receivable from client if transaction complies with Rule 1.8(a), but if accounts are subject of litigation conducted by lawyer, lawyer must either acquire entire claim or withdraw from representation).

The general prohibition is subject to three significant exceptions. First, subsection (e) permits certain advances for litigation costs. Second, subsection (i)(1) exempts liens “authorized by law”; an amendment in 2002 substituted “authorized” for “granted” to clarify that the exemption encompasses contractual liens. See American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005, at 209 (2006). Third, subsection (i)(2) recognizes contingent-fee arrangements in civil cases.

Contingent-fee agreements are discussed generally in the Annotation to Model Rule 1.5.

Subsection (j): Client-Lawyer Sexual Relationships

Rule 1.8(j) was added to the Model Rules in 2002, after several jurisdictions had adopted specific rules regarding client-lawyer sexual relations. “Although recognizing
that most egregious behavior of lawyers can be addressed through other Rules[,] ... having a specific Rule has the advantage not only of alerting lawyers more effectively to the dangers of sexual relationships with clients but also of alerting clients that the lawyer may have violated ethical obligations in engaging in such conduct.” American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005*, at 209 (2006). Jurisdictions without specific rules had addressed client-lawyer sex under rules dealing with misconduct or conflicts of interest. See, e.g., *In re Rinella*, 677 N.E.2d 909 (Ill. 1997) (lawyer who had sexual relations with three matrimonial clients overreached and took advantage of his position; lack of explicit prohibition no defense); *In re Berg*, 955 P.2d 1240 (Kan. 1998) (sexual relations with vulnerable divorce clients violated several ethics rules and warranted disbarment despite lack of express prohibition); see also ABA Formal Ethics Op. 92-364 (1992) (fundamental principle of lawyer’s fiduciary obligation to client, recognized in Rule 1.8, implies lawyer should not abuse client’s trust by taking sexual or emotional advantage); cf. *In re Bash*, 880 N.E.2d 1182 (Ind. 2008) (attempted sexual relations with client violated Rule 8.4(a)).

Rule 1.8(j) prohibits all client-lawyer sexual relationships, including consensual relationships, except those predating the formation of the client-lawyer relationship. The per se prohibition recognizes the fiduciary nature of the client-lawyer relationship and the significant dangers of exploitation and impaired independence of professional judgment. See *In re Overboe*, 724 N.W.2d 576 (N.D. 2006) (pattern of inappropriate sexual conduct with clients); *State ex rel. Okla. Bar Ass’n v. Downes*, 121 P.3d 1058 (Okla. 2005) (multiple acts of misconduct, including consensual sex with client). Sexual relationships that predate the client-lawyer relationship are exempt from Rule 1.8(j) because concerns for exploitation and client dependency are thought to be diminished in such situations, but Comment [18] cautions that the lawyer must nevertheless consider whether the relationship will pose a material limitation on the representation within the meaning of Rule 1.7(a)(2). When the client is an organization, Comment [19] clarifies that the prohibition is limited to relationships with constituents of the organization who supervise, direct, or regularly consult with the lawyer about the organization’s legal matters.

**Subsection (k): Imputation of Prohibitions**

Subsection (k) was added in 2002 to address imputation of the prohibitions in Rule 1.8. Before 2002, imputation of conflicts under Rule 1.8 was governed by Rule 1.10(a), the general imputation rule, which made an exception for personal-interest conflicts. American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005*, at 210 (2006) (before 2002 amendment, none of Rule 1.8’s prohibitions except that of Rule 1.8(c)—gifts to lawyer—was imputed).

The 2002 amendment eliminated reference to Model Rule 1.10 and instead imputes all of Rule 1.8’s prohibitions except that of subsection (j) (client-lawyer sexual relationships) to every associated firm lawyer.

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LAWYERS DOING BUSINESS WITH THEIR CLIENTS: IDENTIFYING AND AVOIDING LEGAL AND ETHICAL DANGERS

A Report of the Task Force on the Independent Lawyer

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Reporter

ABA
Defending Liberty Pursuing Justice
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SECTION I

INTRODUCTION AND EXECUTIVE SUMMARY

The issue of lawyers investing in their clients and client transactions is not a new one. However, the topic has been prominent recently, as law firms look for ways both to increase their partners’ profitability and to attract and retain associates.¹ The study of this issue by the American Bar Association’s Section of Litigation reflects the completion of the Section’s examination of three issues identified more than a decade ago as requiring special consideration by the organized bar.

In the mid-1980s, in the wake of the Kutak Commission’s examination of the old Model Code of Professional Responsibility (Model Code) and the ABA’s adoption of the Model Rules of Professional Conduct (Model Rules), a task force chaired by former ABA President Justin Stanley, known as the Stanley Commission, looked “beyond ethics” and into more fundamental issues of professionalism.² In its report, the Stanley Commission identified three issues as requiring further study: Ancillary business activities of lawyers; lawyers serving on the boards of directors of their clients; and lawyers investing in their clients and client transactions. The Litigation Section has spent more than a decade pursuing the examination recommended by the Stanley Commission and has been in the forefront of the debate over whether and in what circumstances the activities in question should be permitted.


In 1989, the Section created a Task Force on Ancillary Business Activities and undertook an exhaustive inquiry into that subject, which had not been the focus of any Model Code or Model Rule provision. The Section’s work on the issue prompted an in-depth examination and vigorous debate that culminated in the adoption in 1991 of Model Rule 5.7, strictly regulating ancillary business activities. Although the ABA Board of Governors later repealed that specific rule, the issue is now addressed by yet another version of Rule 5.7. The extensive analysis of the issue by all segments of the organized bar plainly increased attorneys’ understanding of the serious issues and risks entailed in ancillary business activities – to the bar as a whole, as well as to individual firms, practitioners, and clients – and provided significant guidance to those who choose to engage in such endeavors.

The Section commissioned the Task Force on the Independent Lawyer in 1995 to address the remaining two issues identified by the Stanley Commission. The membership of the Task Force has changed somewhat over time, but it always has included more than a half-dozen practitioners throughout the United States who represent individuals and corporations as either in-house or outside counsel, and law school professors who specialize in legal ethics.

The Task Force began its work by studying the issue of lawyers serving on the boards of directors of their clients. Although such board service was a well-established activity with deep historical roots, the issue had received scant analysis and was not the

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3 See generally D. Block, I. Warren & G. Meierhofer, Model Rule of Professional Conduct 5.7: Its Origin and Interpretation, 5 GEO. J. LEGAL ETHICS 739 (1992); see also infra at 60-77.

4 The Task Force is currently co-chaired by Jeffrey J. Greenbaum and Gene E.K. Pratter; its current members are Robert P. Cummins, Paul J. Dubow, Professor Stephen Gillers, Marcy G. Glenn, William H. Graham, William C. McClearn, Peter W. Till, Irwin H. Warren, and William A. Zolbert.
subject of any specific Model Rule or Model Code provision. The Task Force conducted an in-depth analysis of the subject, focusing on the history and importance of the independence of attorneys in fulfilling their roles for their clients and in Anglo-American society in general. In contrast to the ancillary business task force, the Task Force on the Independent Lawyer did not recommend the adoption or modification of any Model Rules to preclude, limit or condition the ability of attorneys to serve as directors of their clients. Instead, in 1998 the Task Force issued a lengthy report strongly cautioning against such service; explaining in detail a variety of significant issues, risks and problems for both the attorney and the client arising from such service; and suggesting a variety of alternatives designed to avoid or ameliorate those risks and problems. Soon thereafter, the ABA Standing Committee on Ethics and Professional Responsibility, “prompted by the work of the Task Force . . .,” issued a formal opinion on the subject of lawyer service as a director of a client corporation.

This Report represents the final assignment of the Task Force: A study of attorney investments in and business dealings with clients. The Task Force’s ultimate conclusion is that lawyer investments in their clients and client transactions can raise significant issues of ethics and professionalism. The nature and scope of such activities, and the circumstances in which they may be engaged, are so broad that many practitioners – and inevitably more clients – may not recognize all of the serious

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7 As this Report demonstrates, attorney business dealings with clients come in all shapes and varieties. For ease of reference, the phrases “investment in clients” and “business dealings with clients” are intended to encompass the sundry transactions into which lawyers and their clients may enter. Also, the Report’s references to “lawyer” or “attorney” often are intended also to reference the individual attorney’s law firm.
practical, “real world” risks or other implications of such investments; others may not be fully familiar with the applicability and requirements of the existing rules governing when and subject to what conditions, disclosure obligations, etc., such investment activities are permissible.

Critics of the practice of doing business with clients point to various risks for lawyers, their firms, and their clients. The primary risk is the conflict that the business relationship may create due to “the position of influence that lawyers have over their clients, and the possibility that lawyers could use their position to take advantage of their clients in business dealings.”

That conflict, with its attendant potential harm to the client, may arise because “[t]he advice that best serves the client’s interest may not be the same as that which most furthers the lawyer’s.” The attorney’s greatest risks are that the resultant conflict – whether real or merely perceived – will result in professional discipline or enhanced malpractice exposure.

As recognized by the Attorneys’ Liability Assurance Society (ALAS) in the 2000 edition of its Loss Prevention Manual:

It is not an overstatement to say that lawyers’ increasing involvement in client-related entrepreneurial and other extracurricular activities is threatening to become an

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8 American Bar Association & Bureau of National Affairs, Lawyer’s Manual On Professional Conduct 51:502 (as of 12/99) (ABA/BNA Manual); see also G. Hazard & W. Hodes, The Law of Lawyerying: A Handbook On The Model Rules Of Professional Conduct § 1.8:201, at 262 (2d ed. 1990 & 1992 Supp.) (Law Of Lawyerying) (“In addition to being the contract draftsman, the lawyer may know the client’s business extremely well and may also be aware of special risks or opportunities as a result of his familiarity with the legal context of the transaction.”) (footnote omitted).

9 ABA/BNA Manual at 51:502. A recent article identifies an additional risk for the client as the “forced cost of doing business,” i.e., the client’s feeling that “it has no choice but to allow the lawyer to invest.” G. McAlpine, Getting a Piece of the Action: Should Lawyers Be Allowed to Invest in Their Clients’ Stock?, 47 U.C.L.A. L. Rev. 549, 583 (1999).

10 ABA/BNA Manual at 301:1009.
unmanageable crisis within the legal profession. The term “client-related” entrepreneurial activities means that the activity in question arises out of some form of transaction with a client of the lawyer, as distinguished from entrepreneurial activity by the lawyer that has nothing to do with any client or any transaction in which the lawyer is rendering legal services.

In many of the most troublesome third-party claims, client-related entrepreneurial activity by the lawyer or the law firm complicates an already difficult defense task: the third-party plaintiffs (investors, stockholders, purchasers, lenders, regulatory agencies such as the FDIC, SEC, etc.) seize on such activities to support their claims that the defendants were careless, distracted lawyers, influenced by a personal profit motive and other conflicts of interest.

The fundamental problem with lawyers’ client-related entrepreneurial activities is the risk that the lawyer’s independence, objectivity and judgment will be – or will be perceived to be – seriously compromised.\(^\text{11}\)

Despite the practical ethical risks of doing business with clients, the Task Force does not recommend a \textit{per se} rule against such transactions.\(^\text{12}\) The Task Force recognizes that investments in clients can benefit clients, including by strengthening the connection between counsel and client as a result of the lawyer’s affirmative

\(^{11}\) ALAS LOSS PREVENTION MANUAL, Tab III.A at 3 (2000). Additional disadvantages from the lawyer’s perspective include the economic risk that the client’s venture will fail or the stock will prove to be worth less than the value of the legal services rendered, the appearance of impropriety (which could lead to a malpractice or professional discipline proceeding), and harm to the lawyer’s professional reputation. McAlpine, \textit{supra} n.9, 47 U.C.L.A. L. REV. at 584-86.

\(^{12}\) \textit{But see} ABA/BNA MANUAL at 301:1009 (“The most extreme advice, and probably the wisest, about involvement in financial dealings with clients is that a lawyer should just say no.”); C. Wolfram, \textit{MODERN LEGAL ETHICS} § 8.11.1, at 479 (1986) (WOLFRAM) (“Much can be said in favor of an absolute prohibition against a lawyer having nonprofessional business relationships with a client.”); \textit{In re Spear}, 160 Ariz. 545, 774 P.2d 1335, 1344 (1989) (“The better rule may be to prohibit entirely lawyer-client business dealings.”); MISS. BAR OP. 202 (1992) (though not absolutely precluding proposed business venture with client, emphasizing significant risks: “THE ETHICS COMMITTEE VIEWS BUSINESS RELATIONSHIPS WITH CLIENTS SUCH AS PRESENTED IN THIS FACTUAL SITUATION AS DANGEROUS AND WOULD STRONGLY ADVISE LAWYERS AND LAW FIRMS AGAINST PARTICIPATING IN SUCH ACTIVITIES.”) (capitalization in original).
commitment to the client’s enterprise, and by improving counsel’s understanding of the client’s business and, hence, its legal needs (at least where the attorney is rendering legal advice related to the business venture in which he or she has invested). These benefits also may assist the lawyer in the rendering of efficient and effective legal services. From the lawyer’s perspective, doing business with or investing in clients may be a prerequisite to obtaining certain work and, of course, it frequently presents an opportunity for profit far in excess of the return on traditional, hourly-fee-based legal services.\footnote{See ABA FORMAL OP. 00-418, \textit{supra} n.1 (“Many lawyers . . . believe that acquiring ownership interests in start-up business clients is desirable in order to satisfy client needs and also, because of growing competition with higher paying venture capital and investment firms, to attract and retain partners and associates.”); McAlpine, \textit{supra} n.9, 47 U.C.L.A. L. REV. at 569-82 (identifying benefits to clients as source of capital, decreased transaction costs, and incentivization of the lawyer to perform better and for reduced fees; identifying benefits to lawyers as return on investment, reward for risk (thereby allowing the lawyer to represent more start-up companies in which he or she also invests), preservation of future legal fees (if the company succeeds), and retention of associates). Some commentators identify the lawyer’s fiduciary obligations as the very reason why the ethics rules should permit, not discourage, attorney-client business dealings: “Who should a person (be she lay or professional) more comfortably trust and do business with than one (be he lawyer, minister or doctor) who owes her the tangential obligations of a fiduciary?” R. Anderson & W. Steele, Jr., \textit{Ethics and the Law of Contract Juxtaposed: A Jaundiced View of Professional Responsibility Considerations in the Attorney-Client Relationship}, 4 GEO. J. LEGAL ETHICS 791, 795 (1991).}

Moreover, such dealings are not \textit{per se} detrimental to the attorney-client relationship or to the client’s interests, particularly when the client and the attorney are equally sophisticated and have comparable bargaining positions in the transaction, or when the attorney’s legal work is unrelated to the business transaction with the client. Even where the client lacks the lawyer’s sophistication or is otherwise on an unequal footing in entering into a transaction with its lawyer, the Task Force concludes that the procedural and substantive protections under the common law of fiduciary duty and some (but not all) ethics rules are sufficient to guide attorneys in distinguishing
between permissible and impermissible transactions, and – if followed – are adequate to protect clients.

The Task Force reached consensus that due to the multiple risks inherent in investing in and doing business with clients, both lawyers and clients should think long and hard before they enter into a business transaction together. In assessing the primary risks (conflicts of interest and interference with the lawyer’s independent professional judgment), the following questions will be relevant:

1. **Who – the attorney or the client (or some third party) – is the impetus behind the investment, and what is that person’s motivation? In particular:**

   a. Is the attorney offering to invest in an effort to obtain a new client or retain an existing client? If yes, is the attorney acting in response to an offer to invest by a competing law firm?

   b. Does the attorney view the investment as a pure profit-making opportunity?

   c. Is the attorney’s investment critical or significant to the client’s completion of the transaction or the success of the venture?

   d. Is the investment being offered or requested in lieu of all or part of the legal fees that otherwise would be owed to the firm, and could the client afford the fees of this or another qualified firm absent the investment?

   e. Is the client insisting on the attorney investment as a show of confidence in the client or the transaction, including to encourage others to invest?

   f. Is the client offering the investment opportunity as a favor or gift to the lawyer?
g. How sophisticated is the client who is providing the investment opportunity, and is the client being advised by separate counsel with respect to the investment?

2. **What is the nature and magnitude of the investment and/or transaction, to both the lawyer and the client? In particular:**

   a. What is the absolute dollar value of the investment and the transaction as a whole?

   b. What is the lawyer’s relative interest in the transaction vis-à-vis the interests of the client and other investors?

   c. What is the materiality of the investment to the lawyer relative to his or her current income and total assets?

   d. What is the materiality of the attorney’s investment and/or of the transaction as a whole to the client?

   e. Is the nature of the attorney’s investment passive or active?

   f. Does the transaction relate to legal work being performed by the lawyer for the client, and if so, how?

   g. Is the transaction one that is routinely available to others on equal terms, or is it unusual or special to the lawyer?

   h. Ultimately, is the nature or magnitude of the investment likely to affect the lawyer’s independent professional judgment in advising the client?

Other questions worth asking and answering are:

3. **Will the attorney’s involvement as an investor undermine the attorney-client privilege and, if yes, does the client understand that risk? In particular:**
a. Will the client be confused as to when the attorney is speaking as
counsel and when he or she is speaking as an investor or in some other non-lawyer role,
e.g., when providing so-called “ancillary” or “law-related” services?

b. Is the attorney able to maintain the distinction between his or her role as counsel and as an investor?

4. Will the attorney’s involvement as an investor increase the risk of claims against the attorney (either by the client, lenders or other investors) if the transaction turns sour?

5. If the lawyer faces increased claims, will professional liability insurance provide coverage?

6. Where public company investments are concerned, will insider trading restrictions impact the lawyer’s ability to trade his or her interests?

This Report does not provide easy answers because the subject does not lend itself to easy answers. Nor is it a roadmap to whether (or subject to what conditions) a particular transaction with a client is or is not permissible. In every case, resolving that question will depend on a number of factors, not limited to those outlined above. What the Report will do, if successful, is to facilitate the identification of conflicts, threats to a lawyer’s independence, and other ethics issues in transactions between lawyers and clients. The Report’s purpose is to enable lawyers to assess the risks and act properly when a conflicting circumstance or opportunity first appears, rather than later, when the problem may be more serious, e.g., requiring withdrawal or disqualification or, worse, resulting in a claim for breach of fiduciary duty or malpractice, or professional discipline. Stated differently, the Report hopes to help attorneys act in advance to avoid problems, and to reduce the circumstances in which they will have no choice but
to act reactively after problems arise. The Task Force hopes that the Report generally will encourage both lawyers and clients to engage in close analysis and full, written disclosure of (and written consent to) the nature and risks of attorney-client business transactions. As an inevitable corollary to this “close analysis” goal, the Task Force hopes to minimize the number of ethically-problematic transactions.

Section II of this Report introduces the law of fiduciary duty as it applies to lawyers in their relationships generally with their clients. The section then examines the treatment of lawyer investments in their clients and ethical duties implicated by business dealings under the sundry ethical codes governing attorney conduct over the years, with special emphasis on the Model Rules; state variations from the Model Rules are identified when helpful. Section II also discusses the treatment of attorney business dealings with clients in the recently-finalized Restatement of the Law Governing Lawyers (the Restatement), and in proposals currently under consideration by the ABA’s Ethics 2000 Commission. The Report highlights the policies and purposes that common law courts, ethics committees, and the drafters of the ethics codes have advanced in support of their rulings, positions, and rules.

Section III studies particular kinds of transactions between lawyers and clients that arise with some frequency and where, therefore, the Task Force expects that the profession and the judiciary will benefit from its analysis. The Report considers (a) a lawyer’s investments in and business ventures with clients (whether as part of or separate from the lawyer’s fee agreement with the client), (b) in-house counsel’s receipt of an equity interest in a corporate employer’s business as an employment benefit, (c) provision by a lawyer of ancillary or law-related services, (d) negotiation or renegotiation of a fee agreement during the professional relationship, (e) the lawyer’s
acceptance of a security interest in a client’s property, and (f) an attorney’s receipt of a
valuable gift from a client (including designation of the lawyer as a beneficiary or
fiduciary in a testamentary document).

Section IV considers principles of imputation as they apply to conflicts created
by an individual lawyer’s business dealings with a client of the firm. Section V
presents the conclusions and recommendations of the Task Force. Finally, the Report
includes several appendices with additional information. Appendix A reprints the
relevant provisions of the Model Code, the Model Rules, the Ethics 2000 Commission’s
proposed rules, and the Restatement. Appendix B summarizes the drafting history of
Model Rule 1.8(a), the most-widely adopted and principal rule regulating attorney-
client business transactions. Appendix C outlines state variations from Model Rule
1.8(a). Appendix D is a reprint of a paper by Brian J. Redding, Vice President and
Associate Loss Prevention Counsel of ALAS, entitled “Investing in or Doing Business
with Clients: Some Thoughts on Lawyer Liability and Legal Ethics Issues.” Appendix
E provides sample firm policies concerning attorney investments in clients and sample
language for lawyers to consider using as they try to discharge their obligations to make
disclosures and obtain informed client consent. Appendix F is a bibliography of
materials written on this subject.

The Report is not limited, however, to identification of what either the ethics
rules or fiduciary duty law may permit or forbid in the various categories of
transactions that it examines. The Task Force believes that the Report will have its
greatest benefit if it also recommends lawyer and law office practices that, though not
required, may reduce the risk of a violation of rules or, at the very least, encourage
good client relationships and avoid misunderstanding.
SECTION II

OVERVIEW OF THE TREATMENT OF LAWYER BUSINESS DEALINGS UNDER THE COMMON LAW AND IN ETHICS RULES AND RESTATEMENTS

Both the law of fiduciary duty running from lawyer to client and lawyer ethics codes recognize that once the attorney-client relationship begins, and at least until it ends, the lawyer has special obligations when he or she deals with clients on matters in which the lawyer also has an interest. An attorney’s business dealings with his or her client generally will command these special obligations, for obvious reasons. After retention, the client, usually with the lawyer’s encouragement, will come to trust the lawyer and will expect that the lawyer is acting for the client’s, not the lawyer’s, benefit. The lawyer may have acquired confidential client information that gives the lawyer an advantage in financial transactions with the client. Meanwhile, the client is unlikely to have learned the lawyer’s confidential information. The client also may be dependent on the lawyer for the successful completion of the matter the lawyer is handling for the client; therefore, the client may be unable or unwilling to protect his or her own interests for fear of antagonizing the lawyer. The lawyer often will be more sophisticated than the client about the transaction in question; even if the client is equally or more sophisticated than the lawyer concerning the business aspects of the deal, the lawyer often will be better informed about its legal aspects. Based on these realities, courts and ethics committees have confirmed that “[t]here are no transactions which courts . . . will scrutinize with more jealousy than those between attorneys and their clients.”

14 McPherson v. Cox, 96 U.S. 404, 408 (1878); see also Maxwell v. Gallagher, 709 A.2d 100, 102 (D.C. 1998) (“The relation of attorney and client. . . . is not only highly confidential, but presents so many opportunities for the reaping of special benefits at the expense of the client by
This section examines generally how the common law of fiduciary duty and ethics rules regulate attorneys and protect clients when they choose to do business together, in particular, how the law addresses the conflicts that frequently result from the inherently unequal, yet fiduciary, relationship between attorney and client.

A few practical pointers:

First, lawyers sometimes become involved in conflict situations because, in entire good faith, they fail to recognize a divergence between their interests and those of their clients. Alternatively, an attorney may recognize some inconsistency in interest but may remain confident that he or she will not succumb to temptation or in any way reduce the lawyer’s professional commitment to the client’s goal. There is a natural and understandable tendency for lawyers, like others, to think that conflict rules are for “others” and that even acknowledging a conflict is somehow to concede that they “can’t be trusted.” None of that is true. When ethics rules or fiduciary duty law define a situation as presenting a conflict, they speak to the situation, not to the lawyer who happens to occupy it. In other words, the rules are universal, not lawyer-specific. Relying on the common law’s and the rules’ informed consent provisions, individual lawyers often may be able to steer around conflicting interests with undiminished zeal. Recognizing an actual or potential conflict and calling the client’s attention to it reflects no wrongdoing. On the contrary, it signals the lawyer’s sensitivity to an overriding professional duty and solicitude for the client’s autonomy. It also makes good business and professional sense.

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an attorney so disposed, that courts will closely scrutinize any transaction in which the attorney has assumed a position antagonistic to his client.”).
Second, while an attorney’s fiduciary and ethical duties often overlap, there are also important differences between these obligations. Perhaps most important is the difference in the forums in which ethics and fiduciary duty claims typically are decided, including (in most jurisdictions) the higher burden of proof and absence of a jury in the disciplinary setting. Also, the fiduciary and ethical standards are not coextensive. The violation of an ethics rules will not necessarily state a claim for breach of fiduciary duty. Thus, the Model Rules make clear at the outset that “[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules . . . are not designed to be a basis for civil liability.”

On the other hand, though not necessarily the case, “obligations traditionally viewed as ‘ethical’ or involving discipline alone” are increasingly turning up as “the basis for civil liability and other important consequences.” Equally important, compliance with all relevant ethics rules will not necessarily insulate the lawyer from civil liability (though it probably may be raised as an affirmative defense). Finally, there are significant and obvious differences in the remedies available (and, hence, risks to the lawyer) in the two settings.

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15 Model Rules, Scope.
17 Id. at 65.
Third, attorneys are wise to consider taking steps beyond those mandated by the ethics rules or common law to protect themselves and their clients. For example, even where those authorities do not specify that a client should be urged (or required) to seek the advice of independent counsel before entering into a business relationship with its attorney, in many circumstances such an outside legal opinion will be valuable – both to protect the client’s interest before its entry into the transaction and to protect the lawyer in the event of a later charge of overreaching or other inappropriate conduct. Similarly, written disclosures and consent – whether or not mandated by the applicable ethics rules – generally will be far preferable to oral disclosures and consent if the client eventually claims an ethical violation or a breach of fiduciary duty. The Task Force makes these recommendations not in an effort to heighten the ethical or legal standards applicable to attorneys but, rather, to protect both lawyers and their clients from adverse consequences of their business relationships.\footnote{See N.Y.C. FORMAL OP. 2000-3, supra n.1 (“Although not required under the Disciplinary Rule [New York’s version of DR 5-101(A), governing conflicts generally], the Committee recommends that the disclosure and consent be in writing for the same reasons we believe it is prudent under DR 5-104(A) [governing business transactions with clients].”).}

A. Common Law Of Fiduciary Duty

Lawyers are agents. Clients are principals. The word “attorney” denotes “one who is designated to transact business for another” or “a legal agent.”\footnote{BLACK’S LAW DICTIONARY 124 (7th ed. 1999).} All agents have fiduciary obligations to their principals.\footnote{RESTATEMENT (SECOND) OF AGENCY § 1 (1958).} Although the fiduciary obligation may be described in various ways, the Connecticut Supreme Court’s description in Konover Dev. Corp. v. Zeller, 228 Conn. 206, 635 A.2d 798 (1994), is characteristic: “[A] fiduciary or confidential relationship is characterized by a unique degree of trust and
confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other.”

As with all agents, the fiduciary obligations of attorneys descend from common law. In *Sargent v. Buckley*, 697 A.2d 1272 (Maine 1997), the Supreme Judicial Court of Maine wrote:

> We have held that an “attorney and client necessarily share a fiduciary relationship of the highest confidence. . . . The fiduciary obligations of an attorney are derived from common law and equity independent of professional rules of conduct. ‘[T]he basic fiduciary obligations are two-fold: undivided loyalty and confidentiality . . . [T]he common-law duties predate and exist despite independent, codified ethical standards. . . .’”

Some courts have suggested that lawyers have an especially high duty of loyalty and confidence to their clients. In other words, fiduciary status may not be a “one size fits all” concept. Some fiduciaries, lawyers among them, may have greater obligations than others. *Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537 (2d Cir. 1994), which apparently applied New York law, held that lawyers occupy a “unique position of trust and confidence” toward clients. In *re Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (1994), referred to the “unique fiduciary reliance stemming

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22 *Sargent*, 697 A.2d at 1275 (internal citations omitted); see also S.C. BAR ADVISORY OP. 96-26 (1996) (“An attorney not only must exercise reasonable care and diligence in acting for his or her client, but he or she is bound to conduct themselves [*sic*] as a fiduciary occupying a position of highest trust and confidence, so that, in all the relations and dealings with their [*sic*] clients, it is their [*sic*] duty to exercise the utmost honesty, good faith, fairness, integrity, and fidelity.”).

23 *Milbank*, 13 F.3d at 543 (emphasis added).
from people hiring attorneys to exercise professional judgment on a client’s behalf . . . [as] imbued with ultimate trust and confidence.”

Ordinarily, a lawyer’s fiduciary duty begins once the lawyer is consulted and ends with termination of the professional relationship. At least three reasons support imposing fiduciary obligations on a lawyer once the professional relationship is established. First, the client likely will have begun to depend on the attorney’s integrity, fairness, superior knowledge and judgment. Second, the attorney may have acquired information about the client that gives the attorney an unfair advantage in negotiations between them. Finally, the client generally will not be in a position where he or she is free to change counsel, but rather will be economically or psychologically dependent on the lawyer’s continued representation.

An attorney’s fiduciary duty to his or her client indubitably extends to business dealings between the two. The cases increasingly recognize a presumption of overreaching or undue influence, with the burden on the attorney to rebut the presumptive invalidity or voidability of the transaction. As stated by the Delaware Chancery Court:

In all relations with his client, an attorney is bound to the highest degree of fidelity and good faith. Strict adherence to this rule of conduct is required by time-honored, deeply rooted concepts of public policy. Since the relationship puts the attorney in a position to avail himself of the necessities of his client and to gain knowledge that can be used to the client’s disadvantage, any business

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24 Cooperman, 633 N.E.2d at 1071 (emphasis added); see also, e.g., In re Lowther, 611 S.W.2d 1, 2 (Mo. 1981) (“[B]ecoming personally involved with the affairs of clients . . . is an area wrought with pitfalls and traps and the Court is without choice other than to hold the attorney to the highest of standards under such circumstances.”); In re Smyzer, 108 N.J. 47, 527 A.2d 857, 862 (1987) (same); but see WOLFRAM § 4.1, at 146 (“Whatever the present version of the client-lawyer relationship in Anglo-American law, it is a relationship that is not unique.”).

transaction between attorney and client is presumptively invalid in law – a presumption that the attorney can overcome only by the clearest and most convincing evidence, showing full and complete disclosure of all facts known to the attorney and absolute independence of action on the part of the client.\textsuperscript{26}

In addition, a lawyer’s fiduciary duties constrain his or her conduct beyond those matters in which the lawyer is representing the client. They may apply as well when a lawyer is involved with a current client in a transaction even though the lawyer is not representing the client in that particular transaction. As stated by the Iowa Supreme Court:

DR 5-104(A) is not limited to those situations in which the attorney is acting as counsel in the very transaction which is the subject of the conflict of interest allegation. The rule is applicable as long as the attorney has influence arising from a previous or current attorney-client relationship, and the client is looking to the attorney to protect the client’s interests.\textsuperscript{27}

Thus, a lawyer was suspended from practice for one year where he encouraged his clients to loan him $20,000 without adequately disclosing the conflict, even though his work on their personal injury claim was completed: “[A]lthough there might not be a formal attorney-client relationship between the parties at the time of the transaction, . . .

\textsuperscript{26} Melson v. Michlin, 43 Del. Ch. 239, 223 A.2d 338, 344 (1966); see also Miller v. Sears, 636 P.2d 1183 (Alaska 1981); Ritter v. State Bar, 40 Cal. 3d 595, 709 P.2d 1303, 221 Cal. Rptr. 134, 138 (1985); In re Nichols, 95 N.J. 126, 469 A.2d 494, 497-98 (1984); Greene v. Greene, 56 N.Y.2d 86, 436 N.E.2d 496, 499, 451 N.Y.S.2d 46 (1982); Anderson, supra n.13, 4 GEO. J. LEGAL ETHICS at 800-04; cf., RESTATEMENT (SECOND) OF TRUSTS § 170(2) (1959) (as a fiduciary, “trustee in dealing with the beneficiary on the trustee’s own account is under a duty to the beneficiary to deal fairly with him . . .”).

\textsuperscript{27} Iowa Supreme Court Bd. of Prof. Ethics & Conduct v. Sikma, 533 N.W.2d 532, 537 (Iowa 1995) (suspending lawyer who entered into business deal with client, although only work for client was on unrelated workers’ compensation claim); see also In re Neville, 147 Ariz. 106, 708 P.2d 1297 (1985) (lawyer disciplined as a result of real estate deal between lawyer and client on other matters, even though client understood lawyer did not represent him on that deal).
[t]he test in deciding the applicability of [DR 5-104(A)] is whether an ordinary person would look to the lawyer as a protector rather than as an adversary.”

B. Ethics Rules

Because the practice of law is a self-regulating profession, rules of professional conduct for lawyers separately describe a lawyer’s obligations of loyalty. These significantly overlap, even if they are not identical to, obligations imposed by the law of fiduciary duty. Since the promulgation of the first ABA code of conduct, the 1908 Canons of Professional Ethics, attorney business dealings with clients have seen greater and greater self-regulation. Unlike appointment to a client’s board of directors, lawyer investments in and business transactions with clients are specifically treated in both the Model Code and the Model Rules.

The legal profession’s ethics rules (like the law of fiduciary duty) ordinarily do not forbid financial transactions between lawyers and clients. Instead, the rules generally permit attorney-client business dealings while protecting clients in two complementary ways. First, ethics rules may require that any agreement be reached in a way that fosters the client’s ability to make an independent choice. This might be seen as “procedural protection.” Examples of procedural protections are requirements that the terms of the arrangement be given to the client in a writing that the client can understand and that the client be advised to seek independent counsel before making an agreement. The precise procedural protections imposed by an ethics rule in any instance might depend on the nature and magnitude of the transaction and the adversity of the parties’ interests. The second way in which ethics rules may protect the client is

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28 Sexton v. Arkansas Supreme Court Comm. on Prof. Conduct, 299 Ark. 439, 774 S.W.2d 114, 117 (1989).
by requiring that the transaction be fair to the client. This can be seen as “substantive protection.”

Whether a lawyer’s particular interest creates a conflict under ethics rules, and whether the conflict is consentable or instead absolutely prohibits the conduct in question, often will be questions of judgment and degree. The overarching value is the client’s interest in receiving the lawyer’s entire devotion to the client’s cause, undiluted by other interests to which the lawyer may have allegiance and which may affect the lawyer’s independence, whether those interests are personal, familial, social, or professional. The ethics rules do not merely seek to prevent situations in which a lawyer consciously will undermine a client’s purpose. The Task Force assumes that those situations are comparatively rare. The rules also strive to prevent situations in which other interests, including the lawyer’s own interest, may have the unintended effect of tempering the lawyer’s devotion to the client’s matter or may lead to some unfair advantage – either from the outset or based on later developments that might not have been foreseen. Lastly, but equally important, the rules respect the client’s autonomy and the client’s right to confidence by requiring informed client consent. The client is then given the opportunity ultimately to decide whether the immediate or potential future risk of dilution in the lawyer’s commitment to the client’s cause is too great for comfort.

1. Canons Of Professional Ethics

None of the 32 Canons of Professional Ethics addressed the subject of attorney business dealings with clients. Rather, Canon 6 set forth broad principles, one of which addressed the issue only generally:
CANON 6
Adverse Influences and Conflicting Interests

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed. (Emphasis added.) The Canons imposed virtually no restraint – beyond a vague duty of disclosure – on an attorney’s business dealings with clients.

2. Model Code Of Professional Responsibility

When the ABA promulgated the Model Code in 1969, it made great strides in regulating attorneys’ business relationships with their clients. Because it is not possible to catalogue all situations in which lawyers and clients may participate and in which they may have divergent or potentially divergent interests, the Code includes both a general conflicts rule and a more specific rule that applies in particular to business dealings with clients.

Canon 5 is the basic conflict mandate, and it states that “A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.” DR 5-101(A), a binding rule of conduct, expands upon the general principal stated in Canon 5:
DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

Various Ethical Considerations, which are aspirational or explanatory Code provisions, expand upon the lawyer’s general duty to avoid conflicting interests. EC 5-1 states that the lawyer’s “professional judgment . . . should be exercised . . . solely for the benefit of his client and free of compromising influences and loyalties.” In particular, the lawyer’s personal interests should not “be permitted to dilute his loyalty to his client.” EC 5-2 counsels the attorney to decline proffered employment “if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client.” Moreover, under EC 5-3, “[a]fter accepting employment, a lawyer should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.”

DR 5-104(A) is the rule that specifically addresses business transactions with clients:

DR 5-104 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into business transactions with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.
The Code defines “differing interests” as used in DR 5-104(A) broadly, as “every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.”

EC 5-3 sets forth additional aspirations concerning a lawyer’s business transactions with a client:

The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgement on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property rights of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

Neither DR 5-104(A) nor EC 5-3, nor any other portion of the Code, sets forth the substantive and procedural protections that Model Rule 1.8(a) later would impose on business transactions with clients. The Code does not require the attorney-client transaction to be fair and reasonable to the client. It does not mandate a reasonably understandable written explanation of the transaction and its terms, a reasonable

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29 MODEL CODE, Definition (1); see R. Maltz, Lawyer-Client Business Transactions: Caveat Counselor, 3 GEO. J. LEGAL ETHICS 291, 308 (1989) (“Attorneys have argued that differing interests exist only if the client is ‘injuriously affected’ by the transaction; . . . The courts, however, have disregarded the relevance of the ‘bottom line’ or the ‘good-faith’ of the attorney and instead have focused upon the terms of the transaction.”) (footnotes omitted).
opportunity to consult with independent counsel concerning the transaction, or written consent from the client. Rather, despite its substantial improvement on the original Canons, the Code continues to repose tremendous discretion in the individual attorney to determine whether the business relationship will interfere with his or her professional judgment. Despite these limitations, the Code, for the first time, gave lawyers “a deterrent with a wallop – loss of license. For the first time, the Bar had a reason to treat a client properly, or face real consequences.”

3. Model Rules Of Professional Conduct

With the adoption of the Model Rules in 1983, the ABA significantly strengthened the client protections first included in the Model Code. Like the Code, the Rules include both general (Rule 1.7) and specific (Rule 1.8(a)) conflict rules that apply to attorney business transactions with clients.

Rule 1.7. Comment [1] to Model Rule 1.7, consistent with the law of fiduciary duty, recognizes that “[l]oyalty is an essential element in the lawyer’s relationship to a client.” Not only must the lawyer behave loyally, he or she also must avoid situations in which the risk of disloyalty is deemed too high. Model Rule 1.7 states the general rules with respect to conflicts of interest between a lawyer and current clients. While Rule 1.7(a) deals with conflicts between the interests of different clients, Rule 1.7(b) governs conflicts between the interests of the client and the lawyer’s own interests, including a lawyer’s business dealings with a client:

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30 Maltz, supra n.29, 3 GEO. J. LEGAL ETHICS at 298.
Rule 1.7 Conflict of Interest: General Rule

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

1. the lawyer reasonably believes the representation will not be adversely affected; and

2. the client consents after consultation.

Under Rule 1.7(b), which applies for the duration of the attorney-client relationship, a conflict exists if the interests of persons or entities other than the client may “materially limit[]” the representation of the client. Interests that may materially limit a representation include the interests of other clients or of third persons (e.g., friends or relatives of the lawyer), or “the lawyer’s own interests.” Comment [4] explains when representation is “materially limited”: “Loyalty to a client is . . . impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.” In deciding whether a conflict precludes representation, Comment [4] states that the “critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or will foreclose courses of action that reasonably should be pursued on behalf of the client.” Comment [6] emphasizes that “[t]he lawyer’s own interests should not be permitted to have adverse effect on representation of a client.”

Rule 1.7(b)(1) permits informed consent but only if “the lawyer reasonably believes the representation will not be adversely affected.” This language states both a
subjective and objective test. The lawyer must believe that “the representation will not be adversely affected” and this belief must be “reasonabl[e].” Even where consent is allowed and received, the lawyer is not permitted to compromise his or her commitment to the client’s cause or improperly exploit the client’s trust. When allowed, informed consent merely permits the lawyer to accept a matter because the lawyer has reasonably concluded that “the representation will not be adversely affected.” In other words, the lawyer must exhibit the same dedication to the client’s goal as he or she would be expected to provide if there were no extraneous interest that might have “materially limited” the lawyer’s work. Informed consent is not a license for malpractice or betrayal.

Rule 1.8. While Model Rule 1.7 is a general conflict rule, Rule 1.8 addresses particular and recurrent situations in which the interests of lawyer and client may clash or that may threaten the lawyer’s independent judgment. For these common situations, the Rules provide for particular resolutions or protocols. These include business transactions between a lawyer and a client, gifts from a client to a lawyer, financial assistance from a lawyer to a client, and a lawyer’s interest in a client’s litigation. In some of these situations, the Rules contemplates that the lawyer’s interest in the particular event or matter is such that the conduct should be forbidden outright because of the perceived danger to the lawyer’s independence. For example, Rule 1.8(d) absolutely precludes a lawyer from “mak[ing] or negotiat[ing] an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation” of a current client. Other subsections of Rule 1.8 do not outright ban certain practices but do require the lawyer to take specified precautions to ensure that the client is sufficiently alert to the lawyer’s interest and
agrees to proceed nonetheless. Thus, for example, Rule 1.8(h) permits a lawyer and client to enter into an agreement prospectively limiting the lawyer’s liability for malpractice, but only if “permitted by law” and if “the client is independently represented in making the agreement.”

Model Rule 1.8(a) is the subsection that most specifically addresses lawyer business dealings with clients:

**Rule 1.8 Conflict of Interest: Prohibited Transactions**

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

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

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

3. the client consents in writing thereto.

Although Rule 1.8(a) generally is perceived as a specific application of Model Rule 1.7, “lawyers who enter business transactions with clients and also intend to represent the client in the transaction must comply with the separate requirements of both rules.”

The drafting history of Rule 1.8(a) reveals the Kutak Commission’s progress from a fairly weak restriction to the more extensive client protections in the adopted rule. As proposed in the Commission’s 1980 Discussion Draft, Rule 1.8(a) (then

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31 N. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541, 546 n.36 (1997) (emphasis in original). Compliance with both rules is required because “Model Rule 1.8(a) does not deal directly with the adverse effect on the lawyer’s representation of the client, . . .” Id. (emphasis in original).
numbered as Rule 1.9(a)) stated only that “[a] lawyer shall not enter into a business, financial, or property transaction with a client unless the transaction is fair and equitable to the client.” The reference to “business, financial, or property transaction” was a reworded vestige of DR 5-101(A); the concept of substantive fairness – that the transaction must be “fair and equitable to the client” – was entirely new but presumably drew upon well-established common law fiduciary duties. Some bar associations (at least Florida and Pennsylvania, according to papers retained by the ABA) objected even to the “fair and equitable” standard. Meanwhile, the California and San Francisco Bar Associations sought to strengthen the rule to approximate the procedural protections afforded under the corresponding California rule, namely, (a) disclosure of the terms in writing in a reasonably understandable manner; (b) provision to the client of the chance to seek independent counsel’s advice; and (c) client consent, orally or in writing, to the lawyer’s entry into the transaction with the client. The rule that emerged after the February 1983 Midyear Meeting of the ABA House of Delegates looked essentially like the current version of Rule 1.8(a). Unfortunately, the transcript of the delegates’ discussion includes little explanation of why the body moved from the initial limited prohibition to the greater regulation that it ultimately approved. Nor was there any apparent discussion of how Rule 1.8(a) was intended to operate in particular circumstances.

Rule 1.8(a) applies only to business and other transactions “adverse to a client.” As used in the rule, the word “adverse” is a term of art. It does not mean that the parties are hostile or antagonistic in any way, only that their interests are not aligned.

32 Appendix B to this Report is a memorandum prepared by Task Force Reporter Marcy G. Glenn summarizing the drafting history of Rule 1.8(a).
Sometimes adversity of interests in this sense is obvious, as it is between the lawyer as borrower and the client as lender when negotiating the terms of a loan, or between the client as property owner and the lawyer as lien holder. Sometimes adversity may be less obvious, as it may be between the client as business owner and the lawyer as minority investor in that business. Acquisition of stock in the open market does not constitute a transaction “with a client” or acquisition of an ownership interest adverse to the client’s interest and, therefore, it should not be subject to Rule 1.8(a).33

Rule 1.8(a) does not categorically prohibit a lawyer from “enter[ing] into a business transaction with a client.” Rather, it sets forth specific substantive and procedural protections in order to protect the client’s interest. The basic substantive requirement is that “the transaction and terms on which the lawyer acquires the interest” must be “fair and reasonable to the client.” Neither the rule nor its comment attempts to define “fair and reasonable,” other than by stating in Comment [1] that “a lawyer may not exploit information relating to the representation to the client’s disadvantage.” The later-approved Restatement of the Law Governing Lawyers, which also includes the “fair and reasonable” standard for attorney-client business transactions, provides some guidance in assessing fairness: “An appropriate test is whether a disinterested lawyer would have advised the client not to enter the transaction with some other party.”34

Rule 1.8(a) includes multiple procedural protections for clients. First, the lawyer must “fully disclose[ ] and transmit[ ] in writing to the client in a manner which can be

33 See LAW OF LAWYERING, § 1.8:302, at 267 (1993 Supp.); ABA FORMAL OP. 00-418, supra n.1, at n.7. But a lawyer’s purchase of his or her client’s stock on the open market may be subject to Rule 1.7(b), depending on the circumstances.
reasonably understood by the client” the terms of the transaction. Second, the lawyer must give the client “a reasonable opportunity to seek the advice of independent counsel in the transaction.” Finally, the client must consent to the conflict in writing; under Rule 1.7(b), by contrast, the client’s consent need not be in writing.

Model Rule 1.8(a) differs in perspective from Model Rule 1.7(b). Rule 1.8(a) does not limit attorneys from taking on (or continuing to represent) clients due to conflicts. Rather, it limits attorneys from entering into certain business relationships with entities or individuals who already are clients. Its focus is not on the potential impact of the business relationship on the attorney-client relationship (which is the focus of Rule 1.7(b)), but on the potential impact of the preexisting attorney-client relationship on the fairness of the transaction. Whereas if an engagement violates Rule 1.7(b), the lawyer should not represent the client, if a business transaction violates Rule 1.8(a), the lawyer generally should continue to represent the client but should not enter into the transaction. Another difference, related to the first, is that Rule 1.8(a) applies only when an attorney “enter[s] into a business transaction with a client” rather than throughout the duration of the attorney-client relationship. Rule 1.7(b), by contrast, applies through the duration of the attorney-client relationship. Thus, a particular attorney-client transaction might have satisfied both rules at the time the deal was consummated; but if a later change in circumstances might materially limit the lawyer’s

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34 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126, Comment e (RESTATEMENT). See infra at 39-40.

35 According to the ABA Standing Committee on Ethics and Professional Responsibility, “compliance with Rule 1.8(a) does not require reiteration of details that the client already knows from other sources”; rather, “[a] good faith effort to explain in understandable language the important features of the particular arrangement and its material consequences as far as reasonably can be ascertained at the time of the stock acquisition should satisfy the full disclosure requirements.” ABA FORMAL OP. 00-418, supra n.1.
representation of the client, then the lawyer must address the conflict under Rule 1.7(b), but not under Rule 1.8(a).

Model Rule 1.8(b) is also frequently relevant to the subject of attorney business dealings with clients:

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

An attorney who is simultaneously representing a client and involved in a transaction with that client – particularly if the representation relates to their business deal – has an obvious opportunity to use to the client’s disadvantage information that the lawyer learned during the legal representation.\(^\text{36}\)

4. **Significant State Variations From The Model Rules**

Most states have adopted some version of Model Rule 1.8(a).\(^\text{37}\) Others have retained the Code, including versions of DR 5-101(A) and DR 5-104(A). The following significant states\(^\text{38}\) have rules that deviate from the Model Code and Model Rule treatment of lawyer-client business dealings:

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36 Other Model Rules will have a bearing on specific fact patterns and issues addressed in this Report. These include Rules 1.5 (fees), see infra at 50-52; 1.8(c) (attorney preparation of instrument giving the lawyer a testamentary gift), see infra at 98-110; 1.8(j) (attorney acquisition of interest in subject matter of litigation), see infra at 85-97; 1.10 (imputed disqualification), see infra at 110-17; and 5.7 (ancillary businesses), see infra at 60-77.

37 See Appendix C for a summary of the counterparts to Rule 1.8(a) in all fifty states and the District of Columbia.

38 “Significant” as used in this context refers solely to the number of attorneys practicing within the state.
California. California Rule 3-300 is largely comparable to Model Rule 1.8(a), but also requires written notification to the client that independent counsel may be consulted.\textsuperscript{39}

Connecticut. Connecticut Rule 1.8(a) applies to business transactions with former as well as current clients. Connecticut attorneys must advise the current or former client in writing of the wisdom of seeking the advice of outside counsel. Connecticut added Rule 1.8(a)(4), which requires the lawyer to advise the client whether the attorney will provide legal services in connection with the transaction or is participating in the deal only as a business person and not in a representational capacity.\textsuperscript{40}

Illinois. The Illinois version of Rule 1.8(a) bears little resemblance to the Model Rule. It omits the substantive protection of the “fair and reasonable” standard, as well as the procedural protections of written disclosure of the transaction and its terms, the mandatory opportunity to seek the advice of independent counsel, and the requirement of written consent. Instead, the Illinois rule bars attorney-client business transactions if the lawyer knows or should know that he or she has conflicting interests with the client or if the client expects the lawyer to exercise his or her professional judgment for the protection of the client, absent the client’s informed consent.\textsuperscript{41}

New Jersey. Beyond affording the client a reasonable opportunity to seek the advice of outside counsel, New Jersey Rule of Professional Conduct 1.8(a) requires

\begin{footnotes}
\item[39] CAL. R. PROF. CONDUCT 3-300.
\item[40] CONN. R. PROF. CONDUCT 1.8(a).
\item[41] ILL. R. PROF. CONDUCT 1.8(a).
\end{footnotes}
lawyers to advise clients of “the desirability” of seeking such independent guidance, and provides that the independent counsel consulted must be “of the client’s choice.”

**New York.** The New York rule on business transactions, DR 5-104(A), was revised in 1999 to require attorneys to advise clients to seek independent counsel’s advice, and to specify that the client must consent to both “the terms of the transaction and to the lawyer’s inherent conflict of interest in the transaction.”

**Pennsylvania.** Pennsylvania Disciplinary Rule 1.8(a) also requires lawyers to advise clients to seek the advice of independent counsel.

5. **Proposals Before The Ethics 2000 Commission**

The ABA Commission on Evaluation of the Rules of Professional Conduct, more commonly known as the Ethics 2000 Commission, has been charged with reviewing the Model Rules and formulating proposed changes to the rules and their comments. The Commission issued its report in November 2000 and it expects to make its final report to the ABA House of Delegates in May 2001. While it is impossible to predict whether the ABA will promulgate these revisions as proposed by the Ethics 2000 Commission, the proposals cast light on the current thinking of judges, practitioners and law professors with expertise in legal ethics, on the subjects of conflicts generally and attorney business transactions with clients in particular.

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42 N.J. R. PROF. CONDUCT 1.8(a).
43 N.Y. CODE PROF. RESP. DR 5-104(A).
44 PA. R. PROF. CONDUCT 1.8(a).
Rule 1.7. Both the structure and substance of the Commission’s current draft of Rule 1.7 depart significantly from Model Rule 1.7, which the Commission concluded has generated substantial confusion among members of the Bar:

**RULE 1.7**

**Concurrent Conflict of Interest: General Rule**

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

1. the representation of one client will be directly adverse to another client; or

2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s duties to another client or to a former client or by the lawyer’s own interests or duties to a third person.

(b) Notwithstanding the existence of a conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent in writing and

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

2. the representation is not prohibited by law; and

3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation.

The current draft defines a conflict of interest as including both “direct adversity conflicts” (addressed by present Rule 1.7(a)) and “material limitation conflicts” (addressed by present Rule 1.7(b)). The draft rule continues to examine the impact of an attorney’s personal interest (among other interests) on the representation of the client, and continues to look for a “material limit[ation].” However, while current Rule
1.7(b) recognizes a conflict where the representation “may be” materially limited by the lawyer’s own interests, the draft rule restricts this type of conflict to situations in which “there is a significant risk” that the representation will be so limited.

The Commission’s current draft also continues to evaluate consentability under both objective and subjective standards. As under Model Rule 1.7, the lawyer’s conclusion regarding the impact of the conflict on the representation must be reasonable. Whereas under Model Rule 1.7(b)(1), the lawyer must reasonably believe that “the representation will not be adversely affected,” under the current draft, the lawyer must reasonably believe that “the lawyer will be able to provide competent and diligent representation to each affected client.” The Commission’s draft includes extensive proposed revisions to the Comments to Model Rule 1.7, including (in proposed Comment [15]) a specific cross-reference to “Rule 1.8 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients.”

**Rule 1.8(a).** The Commission’s proposed draft of Rule 1.8(a) retains the basic structure of the Model Rule:

**RULE 1.8**

**Concurrent Conflict of Interest: Specific Rules**

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

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

(2) the client is advised in writing of the desirability of seeking and is given a reasonable
opportunity to seek the advice of independent legal
counsel on the transaction; and

(3) the client gives informed consent in
writing to the essential terms of the transaction and
the lawyer’s role in the transaction.

The current draft of the proposed rule maintains the “fair and reasonable”
standard in current Rule 1.8(a), but reflects a heightened emphasis on “papering” the
disclosures. Under current Rule 1.8(a), the lawyer merely must give the client a
reasonable opportunity to seek the advice of independent counsel; under the
Commission’s current draft, the attorney must advise the client in writing of the
desirability of consulting with independent counsel. The current draft clarifies that the
client ultimately must give informed consent in writing to both the essential terms of
the transaction and the lawyer’s role in the deal. These requirements are in addition to
the mandate in the current rule (continued in the Commission’s draft) that the lawyer
disclose the transaction and its terms to the client in writing and in a manner that can be
reasonably understood by the client.

The Commission’s proposed additions to Comment [1] to Rule 1.8, and its
recommended addition of two new comments regarding business transactions with
clients, if adopted, will provide significant background and guidance to practitioners:

[1] A lawyer’s legal skill and training, together with the
relationship of trust and confidence between lawyer and
client, create the possibility of overreaching when the lawyer
participates in a business, property, or financial transaction
with a client, for example, loan and sales transactions and
lawyers making investments for clients. The requirements
of paragraph (a) must be met even when the transaction is
not closely related to the subject matter of the
representation, as when a lawyer drafting a will for a client
learns that the client needs money for unrelated expenses
and offers to make a loan to the client. The Rule does not,
however, apply to standard commercial transactions between
the lawyer and the client for products or services that the
client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client and the restrictions in paragraph (a) are unnecessary and impracticable. The Rule applies to lawyers engaged in the sale of goods or services ancillary to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer’s legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client’s business as payment of all or part of a fee.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client’s informed consent, in writing, both to the essential terms of the transaction and the lawyer’s role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including risk presented by the lawyer’s involvement, and the existence of reasonably available alternatives, and should explain why the advice of independent legal counsel is desirable. See Rule 1.4 (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer’s financial interest otherwise poses a significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s financial interest in the transaction. Here the lawyer’s role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer’s dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer’s interests at the expense of the client. Moreover, the lawyer must obtain the client’s informed consent. In some cases, the lawyer’s interest may
be such that Rule 1.7 will preclude the lawyer from seeking the client’s consent to the transaction.

This proposed comment language makes clear that the rule applies to ancillary businesses (but not to fee agreements),\(^4^6\) confirms the application of the rule even where the transaction is unrelated to legal services that the lawyer is providing to the client, restates the mandatory nature of all the disclosures and consents required under the rule, and clarifies the interplay of Rule 1.8(a) with Rule 1.7.

Whether and, if so, when the ABA will promulgate the proposed changes to Rules 1.7 and 1.8(a) are uncertain. Just what the individual states might do, and when they might act, are even more impossible to forecast. Even if only portions of the current draft are incorporated in new Model Rules or state rules, the trend toward greater regulation of attorney business dealings with clients will continue.

C. The Restatement

In 1998 the American Law Institute approved The Restatement of the Law Governing Lawyers,\(^4^7\) a project that consumed more than a decade of discussion and debate among the ALI’s members. The Restatement is a formulation of the laws with which lawyers must comply in practicing law, including both the obligations in lawyer ethics codes and the commands in fiduciary duty law. Sections 121 through 135,

\(^4^6\) Comment [1] to current Model Rule 1.8(a) makes clear that the rule does not apply to “standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities’ services.” The proposed revision to the comment retains this language.

\(^4^7\) The official title is the Restatement (Third) of the Law Governing Lawyers. The “Third” refers to the fact that there were two prior series of Restatements, the first launched in 1923 and the second in 1952. The project on the Law Governing Lawyers was the first in the new third series, which began in 1986. For background concerning the ALI and the new Restatement, see generally Vol. X, No. 4, GEO. J. LEGAL ETHICS (Summer 1997); T. Fiflis, Introduction of the
concerning conflicts of interest, appear in Chapter 8. Although an extensive discussion of all of those sections, including the general conflict rules, is beyond the scope of this Report, certain sections have particular bearing on the issue of doing business with clients.

Section 125 states that, without consent, “a lawyer may not represent a client if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s financial or other personal interests.” Section 126 corresponds to Model Rule 1.8(a) in defining when and how a lawyer may enter into a business transaction with a client:

§ 126. Business Transaction Between a Lawyer and a Client

A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:

1. the client has adequate information about the terms of the transaction and the risks presented by the lawyer’s involvement in it;

2. the terms and circumstances of the transaction are fair and reasonable to the client; and

3. the client consents to the lawyer’s role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

As under the Model Rules, the Restatement requires the terms and circumstances of the transaction to be “fair and reasonable to the client.” However, the procedural protections afforded under the Restatement are both stronger and weaker than under Rule 1.8(a). Thus, under the Restatement (but not Rule 1.8(a)), the lawyer must

Restatement of the Law Governing Lawyers, BUSINESS LAW SECTION NEWSLETTER 1-8 (Jan.
actively “encourage[ ]” the client to seek independent counsel regarding the wisdom of entering into the transaction, rather than merely provide the client a “reasonable opportunity” to seek such outside advice. And the Restatement (but not the Model Rule) requires the lawyer to provide adequate information about the risks presented by his or her involvement in the deal. However, under Rule 1.8(a) (but not the Restatement), the lawyer’s disclosure concerning the terms of the transaction must be in writing.  

SECTION III

PARTICULAR TRANSACTIONS BETWEEN LAWYERS AND CLIENTS THAT RAISE ISSUES UNDER THE LAW OF FIDUCIARY DUTY AND ETHICS

A. Lawyer’s Investment In Or Business Venture With A Client

1. The Nature Of The Beast

It’s happening everywhere. Though not a new phenomenon, there has been a tremendous increase in the last decade in lawyer investments in their clients. In today’s booming economy, clients regularly approach their lawyers with proposals for joint business ventures, and vice versa. Selling stock to counsel or trading stock for legal

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1997) (Colorado Bar Ass’n).

48 Comment g observes that “[w]hen required by [lawyer ethics codes], disclosure to the client of the terms of the transaction must also be in writing.” Surprisingly, Section 126 (which was numbered Section 207 in the various drafts that preceded the final Restatement) appears to have been cited in only two published decisions – Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C., 128 F.3d 10, 16-17 & n.6 (1st Cir. 1997), and In re Wade, 168 Ariz. 412, 814 P.2d 753, 759-60 (1991) – and those cases referenced the section in draft form, before its approval by the ALI.

49 See S. Nelson, Firms Reconsider Involvement in Client Investments, LEGAL TIMES 28 (Dec. 5, 1983) (“For 100 years, it’s been the case that smaller firms have invested in their [clients’] legal work.”); Maltz, supra n.29, 3 GEO. J. LEGAL ETHICS at 292 (“It has long been a common practice for lawyers representing a client in a business transaction to ‘take-a-piece’ when possible.”); id. at 293-94 & nn.13-16 (citing cases from late-1800s).
services is an attractive proposition for many companies and especially for small start-up corporations with significant growth potential but limited liquid financial resources. “The most difficult time for start-ups is raising capital and putting business plans into effect.” Small corporate clients frequently do not have in-house counsel and, therefore, outside counsel must work on matters that staff counsel typically would handle, e.g., non-disclosure, development and licensing agreements, and employment matters. From the company’s perspective, paying for these outside legal services through stock is attractive for several reasons. First, to the extent that the corporation’s product is not yet ready for market, the start-up would prefer to devote its financial resources to product research and development rather than to legal fees. Second, corporate clients – and new ventures, in particular – appreciate and derive confidence from their attorney’s investment in the business. For the attorney, getting in on the ground floor of the next great “dot com” may be an enticing financial proposition and “desirable in order to . . . attract and retain partners and associates.”

Accordingly, many attorneys and firms have posed these questions: Instead of merely ensuring the client’s legal success, why not also share directly in the client’s business success? Instead of or in addition to charging a fee, why not participate in the client’s business venture integrally rather than peripherally? Instead of accepting cash for a retainer, why not accept 10,000 shares at the pre-IPO offering price? In response, on July 7, 2000, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion entitled “Acquiring Ownership in a Client in

50 D. Fried, Law Firms Battle for Silicon Alley Clients, N.Y.L.J. (Feb. 18, 1999).
51 Id.
52 See ABA FORMAL OP. 00-418, supra n.1.
Connection with Performing Legal Services.”54 The Committee summarized its opinion as follows:

The Model Rules of Professional Conduct do not prohibit a lawyer from acquiring an ownership interest in a client, either in lieu of a cash fee for providing legal services or as an investment opportunity in connection with such services, as long as the lawyer complies with Rule 1.8(a) governing business transactions with clients, and, when applicable, with Rule 1.5 requiring that a fee for legal services be reasonable. To comply with Rule 1.8(a), the transaction by which the lawyer acquires the interest and its terms must be fair and reasonable to the client, and fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client. The client also must be given a reasonable opportunity to seek the advice of independent counsel in the transaction and must consent to the transaction in writing. In providing legal services to the client’s business while owning its stock, the lawyer must take care to avoid conflicts between the client’s interests and the lawyer’s personal economic interests as an owner, as required by Rule 1.7(b), and must exercise independent professional judgment in advising the client concerning legal matters as required by Rule 2.1.

The phrase “investment in a client’s business,” as used in this section, is intended to encompass a broad spectrum of business dealings, including (a) an attorney-client business venture or transaction in which the lawyer is an active participant (such as a loan from client to attorney, or vice versa, or a joint venture in which the attorney has an active role), (b) an attorney’s receipt of a passive investment interest in a client’s business in lieu of a fee (such as the payment of legal fees through stock), and (c) an attorney’s non-fee-related, yet passive, investment in a client’s business (such as the attorney’s purchase of a limited partnership interest or stock in the client’s business

53 Id.
54 See supra n.1.
venture). It is intended to cover both individual, personal attorney investments and firm investments (whether through stock in lieu of a fee, an organized firm investment vehicle, or some other means).

2. The Conflict Potential

The conflict issues in any attorney-client business transaction are largely the same: Will the lawyer’s personal interest (or his or her firm’s interest) interfere with the lawyer’s exercise of professional judgment on behalf of the client, diminish the lawyer’s loyalty, result in the improper disclosure or use of client information, or otherwise impair the representation? Though the conflicts issues are common to the various permutations of attorney-client business dealings, each situation must be examined on its unique facts.

Moreover, because the attorney’s and client’s relationship, respective power, personal interests, and other circumstances may change over time, because lawyer-client business investments often span long periods of time, and because Rule 1.7(b) imposes an ongoing obligation to avoid conflicts, the attorney regularly must reexamine the investment for potential conflicts. Like so many conflict situations, a lawyer who invests in a client’s business generally does so with good intentions. Too often, however, adversity develops over time from what began as an allowable lawyer-client investment relationship with an entirely mutual interest. Thus, it is not surprising that experts in malpractice defense have warned attorneys about the dangers of entering into

55 ABA Formal Opinion 00-418 fairly comprehensively addresses the ethical considerations when a lawyer receives stock in a client’s business in lieu of a fee for legal services.

56 For further background on firm investment entities, see ABA/BNA MANUAL CONFERENCE REPORT, Conflicts of Interest: Ethics Rules Permit Law Firms to Invest in Clients, But Panelists Urge Great Caution (June 7, 2000) (describing Wilson Sonsini Goodrich & Rosati pooled
entrepreneurial activities with their clients. All too often, “[l]awyers who start out as investors in clients’ businesses could find themselves winding up as insurers.”

Whether an investment in a client’s business creates a conflict requires careful analysis under Model Rules 1.7(b), 1.8(a), and 1.8(b), and the corresponding state rules. Due to their abstract nature, however, and the wide array of factors that may contribute to the possible conflicts, the ethics rules provide limited concrete guidance for addressing the actual and potential problems created when a lawyer either has an investment in a client’s business at the outset of the attorney-client relationship or enters into such an investment during the course of the representation. As a result, ethics opinions and case law are essential components in the conflict analysis.

Today’s volatile internet stocks illustrate the problems that may arise. Assume that a lawyer makes an investment at the client’s request merely to show confidence in a client’s business. Say that a lawyer buys from a sophisticated client 100 shares of its non-public stock at $25 per share, for a total investment of $2500. Also, assume that the lawyer’s net assets are $200,000 and that the client has issued 100,000 shares of stock. No one is likely to argue that this is a particularly significant transaction from either the client’s or the lawyer’s perspective, so there is no potential for a material conflict. Even in this situation, however, Rule 1.8(a) would mandate that the terms of

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59 The insider trading provisions of the Securities and Exchange Act also may apply to lawyer-client business transactions but those issues are beyond the scope of this discussion.
the transaction be substantively fair (i.e., that $25 per share be a fair price for the stock), and would require the lawyer, at least, to inform the client in writing of the terms of the transaction and to obtain the client’s informed written consent. (Since in our hypothetical the lawyer is making the investment to show confidence in the client, presumably wild horses could not keep the lawyer from informing the client of the investment.)

But what happens when the numbers start changing? Investments are, by definition, fluid propositions. Certainly, if the lawyer’s percentage of ownership of the client is significant – whatever “significant” means in a given case – a conflict could arise under Rule 1.7(b). And, suppose that what began as an investment representing a relatively small portion of the lawyer’s assets increased in value 20 times because the internet stock skyrocketed in price. Using the above example, and all other things staying equal, the lawyer’s $2500 investment representing 1.25% of his or her assets now is worth $50,000 or about one-fifth of the lawyer’s assets. Does the lawyer now have an interest adverse to that of the client, or at least one that might impact the representation? Of course, if the lawyer is considering a sale of the stock, insider trading provisions will be an issue, but what if the lawyer has no such intentions? Can the lawyer still give the same objective advice? What should the lawyer do? Obviously, the materiality of the attorney’s investment – in the distinct contexts of the lawyer’s own assets, the client’s assets, and the size of the business venture itself – is a critical factor in assessing conflicts.

60 In this hypothetical, Rule 1.8(a) would have applied only at the time of the initial transaction. Rule 1.7(b), by contrast, would have applied both at the time of the initial purchase, when the lawyer should have anticipated, analyzed and addressed with the client the possibility of future appreciation, and later, after the value of the stock in fact grew significantly.
But materiality is not the only factor. Imagine that a lawyer seeks advice on the following legal question: “One-third of my net wealth is invested in Company Q. May I do legal work for it?” Or assume the question is: “I own a third of Company Q. May I do legal work for it?” Neither question can be answered without asking in reply: “What kind of legal work were you thinking of doing?” For example, if the legal work were to apply for a waiver of a zoning restriction on Company Q’s headquarters, it would be highly unlikely that the lawyer would have a conflict; there would be nothing about the lawyer’s investment or ownership interest that would be likely to conflict with the company’s interest in obtaining the zoning waiver.

On the other hand, if the legal work required the attorney to recommend one course of conduct over others, where the value of the lawyer’s interest in the company is likely to fluctuate significantly depending on the course chosen, the conflict is manifest:

For example, the lawyer might have a duty when rendering an opinion on behalf of the corporation in a venture capital transaction to call upon corporate management to reveal material adverse financial information that is being withheld, even though the revelation might cause the venture capital investor to withdraw. . . . [T]he stock of the client might be the lawyer’s major asset so that the failure of the venture capital opportunity could create a serious financial loss to her.61

So the size and nature of a lawyer’s investment in a client do matter, and the greater the lawyer’s interest (especially relative to the lawyer’s net worth), the greater the need for care in assessing conflicts. But before we can say with confidence that a lawyer has a conflict requiring consent, or for which consent is no cure, we also must

61 ABA FORMAL Op. 00-418, supra n.1.
know the nature of the work the lawyer has been asked to perform and how the performance of that work may affect the lawyer’s professional interest.\textsuperscript{62}

Returning to the initial example, where the attorney has simply purchased a small amount of stock (of immaterial value to the lawyer, the client and the venture) and the lawyer is not involved in the day-to-day operations or long-term strategies of the business, does the passivity of the lawyer’s investment reduce the risk of conflicts? Certainly, yes, but not necessarily to the point of definitively defeating malpractice or disciplinary actions. Even a purely passive investment may permit the inference of a conflict. A jury, judge or disciplinary authority may assume, rightly or wrongly, that “the stock holdings will induce a lawyer to behave unethically or illegally in an effort to preserve his or her financial assets.”\textsuperscript{63} While the attorney-shareholder will have significantly diminished input into the company’s regular business operations, shareholders still have voting rights and their primary concern remains share value. If the shareholder also is serving as the company’s lawyer, and especially if the attorney is advising the company on matters that could affect the value of the stock, the potential for conflict – or, equally importantly, for the perception of a conflict – remains.

Turning from the high-stakes realm of dot coms to a mundane auto body shop, the Rhode Island Supreme Court’s recent decision in \textit{DiLuglio v. Providence Auto Body, Inc.}, 755 A.2d 757 (R.I. 2000), illustrates well the ethical traps for the unwary lawyer-investor – even one who acts in good faith. Attorney DiLuglio, while serving as Lieutenant Governor of Rhode Island, helped a former criminal defense client (Petrarca)

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\textsuperscript{62} As stated in a recent opinion, “[t]he determination of whether [a conflict] exists is factually driven and demands an analysis of the nature and relationship of the particular interest and the specific legal services to be rendered.” N.Y.C. FORMAL Op. 2000-3, \textit{supra} n.1 (emphasis added).
\textsuperscript{63} Baker, \textit{supra} n.1, A.B.A.J. at 38.
\end{flushright}
locate real property for his auto body shop, negotiated the purchase, loaned the former client $25,000 to complete the purchase, and set up the corporation that would own the property and the business, making himself a 20 percent shareholder. Petrarca paid DiLuglio (who was not involved in the day-to-day operations of the body shop) several hundred dollars each week, but DiLuglio sued for more money, inasmuch as the business was thriving and Petrarca was drawing a hefty annual salary. The Court held that DiLuglio had breached his fiduciary duties to Petrarca, whom the Court deemed a current client at the time that DiLuglio entered into the body shop business transactions, for the following reasons:

DeLuglio failed to provide the requisite information to PAB (through Petrarca) about the differing and potentially conflicting interests between Petrarca as majority shareholder . . . and DiLuglio as minority shareholder and lender – differences and conflicts that could have (and ultimately did) arise between them concerning the effect of DiLuglio’s acquiring and holding a 20 percent ownership equity interest . . . while at the same time acting as an attorney for these corporations. DiLuglio also failed to disclose the differing interests he would have as a minority shareholder compared with Petrarca’s interests as the controlling shareholder and how these differences might adversely impact upon the existing and future operations of [the auto shop business]. For example, as a minority shareholder seeking to maximize the return on his investment, DiLuglio might want to receive dividends from any net corporate revenues above expenses, whereas Petrarca, as the operator of the business and as controlling majority shareholder, might want to increase his salary or reinvest any profits by expanding the business.64

The Court confirmed that whenever a lawyer enters into a business deal with a client, he or she must advise the client of the actual and potential conflicts and adhere to the procedural requirements of written disclosure and a reasonable opportunity to seek the

64 DiLuglio, 755 A.2d at 770.
advice of independent counsel. Otherwise, at least where the client is a close corporation (and, presumably, also where the client is an individual), “the attorney’s self-interested transaction will be voidable at the election of the close-corporate client within a reasonable time after the client learns or should have learned of the material facts – even if the transaction is economically fair to all concerned.”

3. The Potential For Expanded Liability

When a client breaks the law, its lawyers generally are not held accountable for the client’s misdeeds. However, when an attorney enters into a business venture or partnership with a client, the role morphs from advocate, advisor and confidant, to potential defendant, co-conspirator, aider, abettor, and tortfeasor. Invoking theories of imputed conflicts, see infra at 110-17, and vicarious liability, aggrieved clients and third parties regularly sue the lawyer’s firm in addition to the individual attorney investor, thus increasing the firm’s exposure as well. In other words, while every conflict of interest exposes the attorney involved to the risk of civil liability, that risk increases significantly where the conflict arises out of the lawyer’s role in a business dealing with the client.

Compounding the heightened risk of liability, malpractice and other claims against attorneys who engage in business transactions with clients or take stock in lieu of fees may not be covered by the firms’ malpractice insurance policies. Malpractice

65 Id.

66 See ALAS LOSS PREVENTION MANUAL, Tab III.I at 1 (“The closer the business connections between lawyer and client prior to the lawsuit, the more difficult it is for the lawyer or law firm to distance themselves from the client in the malpractice case.”).

67 See, e.g., Maxwell, supra n.14, 709 A.2d at 101 (though individual attorney was “the primary actor,” . . . “his acts are imputed to the law firm and the remaining partner, Mr. Bear,” who, moreover, “had knowledge of the activities of Mr. Maxwell.”).
policies frequently include exclusions for attorneys’ activities as officers, directors, partners, managers, and employees of entities other than the insured firm.  

4. Fee-Related Issues When The Investment Is In Lieu Of A Fee

When a lawyer receives stock in a corporate client in lieu of attorneys’ fees, there are fee-related issues in addition to the conflict concerns discussed above. Most importantly, under Rule 1.5(a), “[a] lawyer’s fee shall be reasonable.” The authorities uniformly state that when assessing the reasonableness of a fee under Rule 1.5 (or the reasonableness of a transaction under Rule 1.8(a)), “only the circumstances reasonably ascertainable at the time of the transaction should be considered.” Rule 1.5(a) lists the factors to be considered in determining a fee’s reasonableness as including:

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

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

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

(4) the amount involved and the results obtained;

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

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68 See, e.g., Coregis Ins. Co. v. LaRocca, 80 F. Supp. 2d 452, 457 (E.D. Pa. 1999) (malpractice policy exclusions defeated coverage where attorney was partner in real estate development company, and “[t]he allegations involve overlap between LaRocca’s role as legal counsel and partner/trustee to [the client]. .”.

69 ABA Formal Op. 00-418, supra n.1 (footnote omitted). See, e.g., N.Y.C. Formal Op. 2003, supra n.1 (“[W]e conclude that a determination of whether a fee accepted in the form of securities is excessive requires a determination of value be made at the time the agreement is reached.”); RESTATEMENT § 126, Comment e (“Fairness is determined based on facts that reasonably could be known at the time of the transaction, not as the facts later develop.”); J. Klein, No Fool for a Client: The Finance and Incentives Behind Stock-Based Compensation for Corporate Lawyers, 1999 COLUM. BUS. L. REV. 329, 336 (1999).
(6) the nature and length of the professional relationship with the client;

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

(8) whether the fee is fixed or contingent.

Neither this list of factors nor the comments to Rule 1.5 suggests that the drafters contemplated the lawyer’s receipt of stock in lieu of fees. Nevertheless, several of the listed factors are arguably relevant when an attorney considers requesting or accepting such an alternative fee arrangement. For example, in the Silicon Valley, stock in lieu of fees in connection with an IPO may be “the fee customarily charged in the locality for similar legal services.” In addition, start-up companies may require intense and immediate legal services, thereby warranting a higher fee under Rule 1.5(a)(1) and (5), and they often will involve significant amounts of money under Rule 1.5(a)(4). Of course, if the lawyer or firm has profited handsomely from its receipt of stock as a fee, then the venture itself also has seen substantial results, which might warrant a larger fee under Rule 1.5(a)(4). Also, because many start-up companies never get off the ground, the value of the stock received may be contingent in nature; the attorney will profit handsomely in only a small minority of the matters that he or she handles and will receive no meaningful fees, i.e., only worthless stock, in the vast majority of engagements.\(^{70}\)

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\(^{70}\) See McAlpine, supra n.9, 47 U.C.L.A. L. Rev. at 554 n.10 (“[I]t is estimated that while ‘10% of new software products recoup the investment put into the launch,’ ‘the vast majority wither on the vine.’ . . . Nevertheless, the impetus to invest in start-up companies is that the investment return on a successful company will outweigh the money lost on failed companies.”) (citation omitted); see also ABA Formal Op. 00-418, supra n.1 (“Of course, instead of increasing in value, the stock may become worthless, as occurs frequently with start-up enterprises.”); N.Y.C. Formal Op. 2000-3, supra n.1 (recognizing “obvious elements of contingency” when a lawyer takes client securities as payment instead of a cash fee). This Report takes no position on
While most of the more recent ethics opinions assess the reasonableness of stock received in lieu of a fee under the factors listed in Rule 1.5, a recent Utah opinion states additional factors to be considered:

These other factors include: (a) the liquidity of the client’s stock, including whether the client’s stock trades publicly at the time of the fee agreement and, if the stock is not publicly traded, the risk that the client’s stock will not be publicly traded in the future; (b) the present and anticipated value of the client’s stock, including the risks that a proposed patent or trademark may not be granted, that necessary government approvals (such as FDA approvals) may not be received; (c) whether the stock is subject to restrictions after the law firm receives it, and which affect the value of the stock to the lawyer; (d) the quantity of stock owned by the lawyer and whether the lawyer may exercise voting control over the client after receipt of the stock; and (e) any restrictions placed by the lawyer on the consideration paid for the stock.

As an alternative to receipt of stock in lieu of fees, some lawyers are accepting interests in their clients’ patents or other intellectual properties, which the attorneys helped procure or protect. Again, while we are not aware of a per se ban on such a practice in any jurisdiction, all of the fee considerations that pertain to receipt of stock in lieu of fees apply equally in the patent context.

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whether or not the fee is a “contingent fee” as that phrase is used in Rule 1.5 and other applicable rules and law.

71 See ABA FORMAL OP. 00-418, supra n.1; KAN. BAR ASS’N OP. 98-06 (1998); MISS. BAR OP. 98-06 (1998); D.C. BAR ASS’N OP. 179 (1989); see generally P. Geraghty, Ask ETHICSearch, THE PROFESSIONAL LAWYER 21 (Fall 1999). These opinions make clear that there is no per se ban on acceptance of stock in lieu of monetary compensation, so long as the lawyer complies with the conflict and fee rules.


73 See, e.g., ARIZ. FORMAL OP. 94-15 (1994) (interest in patent is permissible if attorney complies with Rules 1.5, 1.7, and 1.8).
5. Minimizing The Risk

Despite the perils outlined above, attorneys and firms are entering into business transactions with their clients at a dizzying pace. Whether the pressure to invest is external (because the client seeks the lawyer’s capital or show of confidence) or self-imposed (because the lawyer seeks the financial opportunity), the trend toward increasing attorney-client business relationships continues unabated. There are steps that lawyers and firms can and should take to minimize their risks of professional discipline, civil liability, and personal anguish as they venture into the minefield of attorney-client business deals.

First, the lawyer must sit down, slow down, and fully consider the conflict and fee implications of any business transaction involving attorney and client. Second, in accordance with Rule 1.8(a) (or the relevant state counterpart to that rule), the deal must be substantively fair to the client, the lawyer must make full, written, and understandable disclosure of the terms of the transaction, the lawyer should advise the client of the wisdom of obtaining the views of independent counsel concerning the transaction and should afford a reasonable opportunity to obtain such advice, and the lawyer must have the client’s written consent before entering into the deal. Third, if the investment may materially limit the lawyer’s representation of the client, then under Rule 1.7(b), the attorney’s disclosures must include a full explanation of the conflict, and the lawyer must obtain the client’s separate informed consent to the conflict. Appendix E includes sample language for use in complying with these disclosure obligations.

We cannot overemphasize the disclosure obligation. Case after case – in both the discipline and malpractice realms – focuses primarily on the lawyer’s failure to
disclose the conflict at all, or failure to provide an adequate disclosure. It is plainly not sufficient to provide a perfunctory suggestion that the client receive independent legal or investment advice. Rather,

“[w]hen a lawyer has a personal stake in a business deal, he must see to it that his client understands that his objectivity and his ability to give his client his undivided loyalty may be affected.” Nor will a passing suggestion that the client consult a second attorney discharge the lawyer’s duty when he and his client have differing interests. In view of the trust placed in an attorney by his clients and the attorney’s often superior expertise in complicated financial transactions, a lawyer must take every possible precaution in ensuring that his client is fully aware of the risks inherent in the proposed transaction and of the need for independent and objective advice.

The lawyer and firm also can minimize their risks by remaining aware of the potential for conflicts throughout the course of the representation, and by acting promptly in response to changed circumstances. The lawyer’s duties under Rule 1.7(b)  

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74 See, e.g., In re Humen, 123 N.J. 289, 586 A.2d 237, 241-42 (1991) (lawyer failed to tell elderly and dependent client that he was the “nameless” lender who provided her with an unnecessary and unduly costly mortgage to purchase her home) (per curiam); State ex rel. Oklahoma Bar Ass’n v. Perry, 936 P.2d 897, 899-900 (Okla. 1997) (lawyer failed to tell clients that he was president of one entity and trustee of another entity that made loans to clients).

75 In re Smyzer, supra n.24, 527 A.2d at 862 (citations omitted); see also, e.g., Comm. on Prof. Ethics & Conduct v. Mershon, 316 N.W.2d 895, 899 (Iowa 1982) (although attorney hid nothing from the client concerning the terms of the transaction, “[f]ull disclosure, however, means more than this. . . . ‘An informed consent requires disclosure which details not only the attorney’s adverse interest, but also the effect it will have on the exercise of his professional judgment.’”) (citation omitted); Sikma, supra n.27, 533 N.W.2d at 537 (suspending lawyer even though the client approached the lawyer about the deal, and the lawyer repeatedly told the client that he could not talk with her about his separate business because he was her attorney, and told her to consult with another adviser, broker or lawyer: “[S]uch a statement falls short of the full disclosure and knowing consent required by disciplinary rules 4-101(B)(3) and 5-104(A). Respondent had a duty to disclose his adverse interests and the effect they would have on the exercise of his professional judgment.”) (citations omitted); ARIZ. FORMAL OP. 94-15, supra n.73 (“‘The lawyer must give the client that information which he would have been obliged to give if he had been counsel rather than interested party, and the transaction must be as beneficial to the client as it would have been had the client been dealing with a stranger rather than his lawyer.’”) (citation omitted).
continue throughout the representation. The appropriate response to a conflict that did not exist at the outset may be as simple as isolating an individual attorney who has invested in a firm’s client, so that the firm as a whole (hopefully) will not be tainted. *See infra* at 110-17. Or the correct course may be for the firm as a whole to decline to represent the client in a particular matter, or an aspect of a larger matter, so that the firm’s investment in the client does not have any chance of materially limiting the representation. Ultimately, an investment that was conflict-free at the outset may have developed to the point that it requires the attorney or firm to stop performing legal work for the client altogether or, if feasible, to dispose of the investment. 76

**B. Equity Compensation Of In-House Counsel**

Stock options, restricted stock and other equity-based financial incentives have become commonplace as part of compensation and benefits packages for corporate employees, including in-house legal counsel. For example, more than half of all companies reportedly offer stock options or some other type of long-term financial incentives to their legal staff. 77 A PricewaterhouseCoopers survey found that in 1998 the median earnings for general counsel from their corporate equity-based compensation was $236,000. 78

Notwithstanding the popularity and growing use of these forms of compensation, ethical rules, while urging caution in attorney-client business transactions generally, provide little specific guidance as to any ethical issues that may arise when an in-house

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76 Whether divestiture is feasible would turn in part on the impact of the divestiture on both the client and the lawyer.


78 *Id.*
attorney is also a shareholder in the employer corporation. Applying general ethics rules and principles, it is clear that such a relationship is generally permissible, even where there may be a potential conflict, so long as certain precautions are taken. The very limited case law on point generally has approved of such a relationship for public corporations but, in one reported case, has disapproved of such a relationship in a closely-held corporation under the special facts presented.


Nothing in the Model Rules or Model Code precludes an in-house attorney from receiving equity-based compensation. To the extent, however, that the receipt of such compensation or the ownership of equity in the employer company might raise a question as to a potential conflict of interest or impairment of the representation, Rule 1.7 would govern.\(^79\)

Rule 1.7(b) states that “a lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer’s own interests.” However, the rule allows a lawyer to represent a client in a matter in which the lawyer has a personal interest if “the lawyer reasonably believes the representation will not be adversely affected” and “the client consents after consultation.” Thus, in-house counsel’s receipt or ownership of equity or equity-based compensation is not problematic as long as the lawyer reasonably believes that the representation of the client will not be materially limited by the lawyer’s own interest. Given the relatively limited equity stake of corporate counsel in most cases, the lawyer’s ownership interest usually would not materially limit the representation. Indeed, equity-based

\(^{79}\) In Model Rules states, the corresponding provisions are EC 5-2 and 5-3. \textit{See supra} at 22-24. For the reasons discussed in the text, in ordinary circumstances, the receipt of equity-based compensation should not present a conflict under these provisions.
compensation grants generally are made in small increments over time and, at the time made, are restricted in ways that give them only contingent, future value. In most circumstances, the lawyer’s equity interest, even over time, is but a small facet of his or her general employment interest which, like an outside attorney’s general interest in retaining a good corporate client, normally would not be viewed as raising a Rule 1.7 issue. In the unusual case, however, where the magnitude of the in-house counsel’s stock ownership is great, such an equity interest could be sufficiently substantial to require consent under Rule 1.7(b). In those cases, it would be the lawyer’s obligation to advise the corporation on the implications of the lawyer’s equity interest on the rendering of legal advice to the entity, and to obtain an informed client consent.

As an example, the lawyer’s own interests could be a material limitation if the lawyer has a large personal equity interest and is asked to advise his or her employer, a publicly-held company, on the timing of public announcements required under the securities laws. Depending, again, on the magnitude of the lawyer’s ownership interest in the company, it might be difficult for the attorney to recommend fully meeting the company’s disclosure requirements, if doing so might result in an adverse effect on the value of the lawyer’s own equity holdings. The difficulty lies in determining the ownership level and other circumstances that render the conflict potential significant enough to warrant client consent under Rule 1.7(b). After all, any attorney – whether in-house or outside – would experience some difficulty in recommending public

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disclosures that would have a substantially adverse impact on his or her client’s share price, regardless of whether the lawyer owned stock in the client company.\textsuperscript{81}

In the usual case, the receipt of equity-based compensation by in-house counsel would not appear to be the type of “business transaction with a client” contemplated by Rule 1.8. Option or restricted stock grants (the usual forms of equity compensation paid to in-house attorneys) are merely a form of compensation and, like cash, are a facet of the general employment relationship rather than part of or related to any particular transaction or undertaking. The timing, size, and conditions placed on the grants are determined unilaterally by the corporate employer as part of company-wide, formal compensation plans. The grants normally are made by way of a written agreement and the plans normally are adopted upon the advice of outside advisors and counsel and with required stockholder approval. And, as noted above, the grants generally are made in small increments over time and usually are restricted in ways that give them contingent, future value only. Moreover, the grants are made for the express purpose of aligning the employee’s interests with those of the corporation and its stockholders; as such, under normal circumstances, they should not create interests that are “adverse” to the company’s interests under Rule 1.8(a).

\textsuperscript{81} As a practical matter, such situations are seldom encountered. The number of inside counsel dealing with disclosure issues at all is very small and disclosure issues of this nature do not occur frequently; those lawyers who would be responsible for rendering advice on such disclosure questions normally would be subject to restrictions and reporting requirements as to any trading in the company’s stock. Moreover, the best interests of all shareholders, including the employee-attorney, ultimately are served by proper and timely disclosures under the securities laws. Not only would contrary advice disserve the interests of both the company and its shareholders, but the only plausible reason for doing so would be to trade out of the stock before the inevitable disclosure – conduct that in itself would give rise to criminal liability and ethical concerns well beyond Rule 1.7.
2. The Few Decisions On The Issue

There is little decisional authority on this subject. While one case has approved the representation of a publicly-held company by in-house counsel who are also shareholders, another case has reached a contrary result in the case of a closely-held company with limited shareholders.

In *Syscon Corp. v. United States*, 10 Cl. Ct. 200 (1986), the court held that a lawyer who was a founder of a company, its general counsel, on the board of directors, and a stockholder was not a “disinterested” advocate. However, the court also found that neither the lawyer nor his firm should be disqualified from representing the company because the attorney’s interests were not likely to “materially interfere” with the representation.\(^{82}\) The court also refused to consider stock ownership as a proprietary interest mandating disqualification. As a policy justification for this holding, the court specifically drew from the professional world of in-house counsel and cited the problems that would be caused by a contrary holding. If courts were to deem stock ownership as a proprietary interest, then in-house counsel never could serve as their employers’ litigation counsel. This court found that such a restriction would be “overly stringent and inconsistent with present reality.”\(^{83}\)

By contrast, in *Simms v. Exeter Architectural Prod.*, 868 F. Supp. 668 (M.D. Pa. 1994), the court held that an attorney and a shareholder of a closely-held corporation could be disqualified from representing the corporation, finding that “in this situation where [the attorney] is both an advocate and owner of Exeter, it appears to be extremely

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\(^{82}\) *Syscon*, 10 Cl. Ct. at 203.

\(^{83}\) *Id.* at 204.
difficult, if not impossible, for the attorney to give advice as a non-interested party.”

The court also expressed its concern with the appearance of impropriety in the situation. The court did, however, distinguish ownership in a public corporation, where there are more shareholders.

**C. Provision Of “Ancillary” Or “Law-Related” Services**

In recent years, in an effort to increase revenue services and to enhance their legal practices, attorneys and their firms have begun to engage in activities beyond (but related to) their legal practice. In the late-1980’s and early-1990s, one of the most contentious issues facing the Bar in connection with lawyer-client business relations involved the provision by lawyers, firms or their affiliates of such so-called non-legal but “ancillary” or “law-related services.” As detailed below, the provision of these law-related services raises concerns comparable to those implicated when lawyers enter into direct business transactions with clients. The Model Rules now permit the provision of such services, subject to certain provisos, and the history of and commentaries to Rule 5.7 provide considerable guidance and warnings to practitioners.

Not every non-legal business implicates the ethics rules governing lawyers; only certain businesses do. Accordingly, at the outset, it is important to try to identify what are and are not “law-related” or “ancillary services.” The Comment to the original version of Rule 5.7 described “non-legal services ancillary to the practice of law” and summarized the principal concerns raised by those services as follows:

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84 *Simms*, 868 F. Supp. at 676.

85 *Id.*

86 More recently, the debate has focused most intensely on the growing international practice of multidisciplinary practice (MDP). *See infra* n.117.
The term “non-legal services which are ancillary to the practice of law” refers to those services which satisfy all or most of the following indicia: (1) are provided to clients of a law firm (or customers of a business owned or controlled by a law firm); (2) clearly do not constitute the practice of law; (3) are readily available from those not licensed to practice law; (4) are functionally connected to the provision of legal services, i.e., services which are often sought or needed in connection with (and in addition to) legal services; (5) involve intellectual ability or learning; and (6) have the potential for creating serious ethical problems in the lawyer-client relationship, such as compromising the independent professional judgment of lawyers; creating conflicts of interest; threatening the clients’ (or customers’) expectations of confidentiality and/or causing confusion on the part of clients or customers.

The current version of Rule 5.7 utilizes the term “law-related services,” which are defined in Rule 5.7(b) as follows:

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

Comment [9] gives a host of examples:

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

The financial bases for the provision of ancillary services are obvious: It increases the lawyer’s or firm’s revenue-producing businesses available to both existing clients and non-clients; it can act as a “feeder” of legal business from potential new sources; and it perhaps can increase the lawyer’s expertise and judgment in dealing with legal matters in particular fields of business or commerce. However, as discussed in
detail below, the practice raises a number of serious issues – including those sometimes referred to as “the three C’s” (conflicts, confidentiality and confusion) – that the Bar has addressed in different ways. Any prudent practitioner who also provides ancillary services must be aware of and address these issues, both at the outset and on an ongoing basis: (1) Will the lawyer’s loyalty and zeal in representing clients be adversely affected by concern for a customer of the lawyer’s non-legal business? (2) Will the attorney-client privilege or other protections of client confidences be lost where ancillary services (or non-lawyer providers of same) are involved? (3) Will clients or customers be confused as to whether and, if yes, to what extent the lawyer is governed, and the client/customer is protected, by ethical rules or other principles applicable to lawyers and clients? In addition, the attorney must examine carefully his or her professional liability insurance policy, to see whether (and if so, to what extent) coverage extends to or is jeopardized by the provision of “law-related” services.

1. History

Because of the relatively recent development of and rapid changes to the governing ethics rules, a brief recap of the history of Model Rule 5.7 is helpful. For many years, the practice of providing ancillary services was sufficiently limited that it did not appear to have been on the Bar’s “radar screen” at all. To the extent that lawyers provided such services, they tended to be limited to a small number of services (e.g., writing title insurance or providing fiduciary estate services) in particular geographic areas. Perhaps not surprisingly, no specific provision in the original Canons, the Model Code, or the original Model Rules addressed the subject.

87 For a more detailed history, see generally Block, supra n.3, 5 GEO. J. LEGAL ETHICS at 739.
88 See id. at 745-46.
The provision of ancillary services by lawyers became more widespread and the subject of scrutiny in the mid-1980’s, as certain large, well-known firms sought to increase their revenue base by offering and actively promoting “one-stop shopping” to current or potential clients.\textsuperscript{89} The Stanley Commission’s report, issued in August 1986, reported that it saw a disturbing increase in lawyers’ participation in business activities and recommended that “[t]he Bar should study the issue of the participation of law firms and individual lawyers in business activities, certainly where either actual or potential conflicts of interest may be involved.”\textsuperscript{90}

In response, the organized Bar (and particularly the Litigation Section of the ABA) studied the issue extensively; and the ABA (and certain jurisdictions) enacted different versions of Model Rule 5.7 in response to the perceived problem. Specifically, in 1991, different segments of the ABA presented two different proposals to the ABA House of Delegates. The ABA Standing Committee on Ethics and Professional Responsibility offered a “regulatory” proposal that would have allowed law firm subsidiaries to provide law-related services to non-clients subject to a regulatory system designed to ensure that lawyers met their professional obligations toward their clients: The person receiving any service (including an ancillary service) from a law firm – albeit not from a separate entity owned by the firm – would be treated as a client of the firm, and the Model Rules would apply to that relationship.\textsuperscript{91} In contrast, in an effort to preclude attorneys from making end-runs around the ethics rules by establishing subsidiaries or affiliates, the ABA Litigation Section proposed the

\textsuperscript{89} Id. at 749-54.

\textsuperscript{90} Stanley Report, 112 F.R.D. at 264.

“prohibitory” rule, which the House of Delegates ultimately adopted by a narrow margin. This rule, the original Model Rule 5.7, prohibited a law firm’s provision of law-related services unless the firm provided those services in connection with the provision of legal services to the firm’s clients, thus assuring that the ethics rules and client protections would apply to such services. 92 Many lawyers viewed this rule as too restrictive, however; and one year later, without having been adopted by any jurisdiction, the original Model Rule 5.7 was repealed. 93

2. Current Rule 5.7

Perhaps out of concern that legislatures might step in to begin regulating legal and related ancillary business practice, the ABA adopted a new version of Model Rule 5.7 in 1994. The second (and current) version of the rule is far less restrictive than the original and short-lived prohibitory version. It essentially establishes a rebuttable presumption “that lawyers are subject to professional regulation and must treat their clientele as ‘clients.’” Lawyers may negate that presumption by explaining fully that the law-related services are not legal services and that even where lawyers help provide some of those services, they will not be governed by the Rules of Professional Conduct as they affect the client-lawyer relationship. 94 Specifically, Rule 5.7 provides:

Provision Of Ancillary Services

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

94 Id., § 5.7:201, at 826.15-16.
(1) by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or

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

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

Thus, rather than regulating the provision of ancillary services, Rule 5.7 allows lawyers to exempt their provision of law-related services from the Model Rules, through either the use of separate entities and disclosure to the customer, or the provision of such services directly but “distinct from” the legal services. The effect of the exception provided by Rule 5.7 is to allow the lawyer to be treated as a non-lawyer under certain circumstances in the provision of law-related services.\footnote{Id., § 5.7:201, at 826.16.} The Rules remain applicable, however, in two situations: (1) When the services are provided by the lawyer and such services are not distinct from the provision of legal services to the client; and (2) when the services are provided by a separate entity and the lawyer fails to inform the customer adequately that the services are not legal services and that, therefore, the usual protections associated with the lawyer-client relationship are not applicable. Conversely, if services provided by a lawyer are distinct from the provision of legal services or if law-related services are provided by a separate entity with
adequate disclosure, the Model Rules do not apply.\textsuperscript{96} However, Comment [8] makes clear that circumstances may exist where the legal and law-related services are so entwined that the lawyer cannot invoke Rule 5.7’s safe harbor, and the Model Rules will apply.

Under Rule 5.7, the lawyer bears the burden of proving that the Model Rules did not apply to the ancillary services rendered.\textsuperscript{97} The lawyer’s main responsibility thus is to explain clearly to the customer of such services when a lawyer-client relationship and its associated client protections under the Rules do not exist in the purely “law-related services” context. The lawyer’s explanation to the person receiving law-related services should be adequate to ensure that the recipient understands that the arrangement is not subject to the attorney-client protections, and it should be made in writing before entry into any agreement for the provision of ancillary services. The more sophisticated the customer, the lower the burden likely will be on the lawyer to prove that the he or she made the requisite communications in a manner that the customer understood.\textsuperscript{98}

Regardless of the customer’s sophistication, where that customer is also a legal services client, albeit on different matters, the lawyer should take great pains to keep the delivery of legal services and law-related services distinct.\textsuperscript{99} If the legal and law-related services involve the same matter, the attorney must walk a fine line between the two arenas, cognizant that his or her conduct in rendering the purely legal services is

\textsuperscript{96} See A. Mostafavipour, Mixing Law and Other Business Services – Law Firms: Should They Mind Their Own Business?, 11 GEO. J. LEGAL ETHICS 435 (1998).

\textsuperscript{97} MODEL RULE 5.7, Comment [7].

\textsuperscript{98} Id., Comments [1], [6].

\textsuperscript{99} Id., Comment [8].
subject to the Rules, while the Rules might not apply to the lawyer’s conduct in rendering the ancillary services (depending on how well the attorney satisfies the exemption requirements set forth in Rule 5.7). The lawyer must remember that when the customer in the law-related services context is also a legal services client, Rules 1.7 and 1.8(a) will apply to the transaction, regardless of Rule 5.7 and regardless of whether the legal and law-related services involve entirely distinct matters.100

Finally, the attorney must be diligent to consider, recognize and meet his or her obligations to clients that may be adverse to a “non-client customer” of the lawyer’s ancillary services. The lawyer’s other clients are entitled to the protections of the Rules, including loyalty, zealous representation, avoidance of conflicts, and non-disclosure of information and confidences relating to their representation, even vis-à-vis non-client customers. In short, even under the exemption supplied by Rule 5.7, lawyers and firms continue to face significant hurdles if they elect to provide ancillary services.

The current version of Rule 5.7 has not been widely adopted. Only seven jurisdictions – Indiana, Maine, Massachusetts, North Dakota, Pennsylvania, Vermont and the Virgin Islands – have adopted a version of Rule 5.7.101 Other jurisdictions, however, have referred to the concepts discussed and regulated by the new rule in issuing ethics opinions and disciplinary decisions.102 In addition, a handful of states have court rules that restrict the activities of law firms to the “practice of law,” thereby

100 Id., Comment [5].
101 Six of these seven jurisdictions adopted the Model Rule virtually verbatim. Pennsylvania made significant changes to the language of the Rule. See PA. R. PROF. CONDUCT 5.7.
102 See, e.g., In re Unnamed Attorney, 138 N.H. 729, 645 A.2d 69 (1994) (applying principles stated in Model Rule 5.7 to lawyer’s ancillary business practices); COLO. BAR ASS’N FORMAL OP. 98 (1996) (applying Model Rule 5.7 to a lawyer’s “dual practice” of law and another profession).
arguably precluding lawyers from offering ancillary services through their firms under any circumstances.\textsuperscript{103}

The Ethics 2000 Commission has not proposed any revisions to Rule 5.7. Comment g to Section 10 of the Restatement indicates that it is permissible for lawyers to own, run and participate in ancillary businesses: “[S]o long as the ancillary enterprise does not engage in the practice of law, involvement of both the lawyer’s law practice and the lawyer’s ancillary business enterprise in the same matter does not constitute impermissible fee-splitting with a non-lawyer.”\textsuperscript{104} However, the Restatement does recognize that there may be inherent dangers and conflicts when a lawyer’s law practice and his or her ancillary business are involved in the same matter. For example, Comment g specifically notes that the lawyer’s self-interest in promoting the ancillary business must not distort the lawyer’s judgment. In addition, the lawyer must avoid representing the client in a matter in which the ancillary business is adverse to such client. Moreover, consistent with Rule 5.7, the Restatement comment states that if the lawyer wishes to avoid the applicability of the Model Rules to the ancillary business, he or she must ensure that the client and/or customer of such business is

\textsuperscript{103} See, e.g., COLO.R.CIV.P. 265(I)(A)(2) (permitting lawyers to practice law in any one of several “professional companies” listed in the rule provided that the company is “established solely for the purpose of conducting the practice of law”); IND. ATT’Y DISC. R. 27(b) (“permitted entities” shall be organized solely for the purpose of conducting the practice of law, . . .”); NEB. CT. R. PROF. SERV. CORP. I(A) (professional service corporation “shall be organized solely for the purpose of conducting the practice of law”); see also Network Affiliates, Inc. v. Robert E. Schack, P.A., 682 P.2d 1244 (Colo. App. 1984) (law firm violated Colorado Rule 265 when it entered into a contract to provide services that did not constitute the practice of law, and the contract was illegal and unenforceable).

\textsuperscript{104} Rule 5.4(a) prohibits (with a few exceptions) a lawyer from sharing legal fees with non-lawyers. Under Rule 5.4(c), if a lawyer’s fees are paid by someone other than the lawyer’s client, the lawyer may not permit that person to interfere with the exercise of his or her independent professional judgment. Consistent with these prohibitions, Rules 5.4(b) and 5.4(d) preclude non-lawyers from being partners or directors in firms that deliver legal services.
aware and understands the distinction between the law practice and the ancillary business. The appropriate test is: “the client’s reasonably apparent understanding concerning . . . the nature of the respective ancillary business and legal services, the physical location at which the services are provided, and the identities and affiliations of lawyer and non-lawyer personnel working on the matter.” The same test applies to the availability of the attorney-client privilege.

3. Ethics And Professionalism Concerns

Over the course of the debate over ancillary services, “[e]very ABA entity which undertook . . . a study concluded that lawyers’ ancillary business activities implicated significant ethical concerns, including conflicts of interest, possible loss of confidentiality, and confusion on the part of clients and non-client customers . . .”105 Whether under Rule 5.7 or any other ethical regime under which an attorney operates, these concerns must be kept in mind by any attorney who intends to provide or is providing ancillary services. Indeed, as a practical matter, the prudent attorney wishing to comply with the letter and spirit of Rule 5.7 should use these ethical and professionalism concerns as a checklist in deciding whether to provide particular ancillary services in specific situations (or generally), and in making disclosures to and obtaining consents from customers and clients alike.106

a. Conflicts Of Interest And Adverse Impact On The Attorney’s Exercise Of Independent Professional Judgment

Model Rule 1.7(a) provides that a lawyer may not represent a client whose interests are directly adverse to the interests of another client, unless the lawyer

105 Block, supra n.3, 5 GEO. J. LEGAL ETHICS at 743; see also id. at 757.
106 Id.
determines that the representation is appropriate and both of the clients give informed consent. The Rules will not apply to the provision of law-related services if the lawyer can bring the provision of law-related services within the exemption stated in Rule 5.7. However, the lawyer still may confront conflicts under Rule 1.7(b) and his or her independent professional judgment may be hampered with respect to the provision of legal services to a client if there is a conflict of interest between the customer for law-related services and a legal services client of the law firm; the Rules will continue to apply with respect to the client, even if the lawyer is exempt with respect to the customer (to whom the Rules might not apply). Indeed, it is possible that a lawyer’s independent professional judgment may be clouded when he or she is advising a client of the firm that also is a customer of its ancillary business. The lawyer therefore must consider – and disclose to his or her client – the potential impacts of the ancillary business relationship on the lawyer’s ability to represent the client; and this should be an ongoing concern for the lawyer. In addition, the lawyer should make clear to the customer that the ethical rules on conflicts, confidentiality, etc. do not apply to such person, and that the attorney indeed may represent clients (or other ancillary business customers) who are adverse to the customer.

Examples of such potential conflicts readily come to mind. For example, a lawyer, as a practical matter, may find it difficult to give objective advice to a legal

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107 See also Model Code EC 5-14 (maintaining independent professional judgment); DR 5-101 (refusing employment when the interests of the lawyer may impair his independent professional judgment); DR 5-103 (avoiding acquisition of interest in litigation); DR 5-104 (limiting business relations with a client); DR 5-105 (refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer); DR 5-107 (avoiding influence by others than the client).

108 Of course, in particular situations the customer may have other protections, derived by statute or common law (e.g., where a relationship is deemed fiduciary in nature).
services client when that advice (a) would put the client at odds with the interests of an ancillary business customer of the firm or its affiliate, (b) would contradict or call into question elements of the business (or other non-legal) advice being given to that client by the firm’s affiliate, or (c) would suggest that it might not be in the client’s best interest to use the firm’s law-related services.

The issue of “holding back” (i.e., avoiding contradictory or inconsistent advice) may occur both where different clients or customers have potentially differing interests; and also where two different professionals advise the same clients or customers. Under Rules 1.7 and 1.8, the client always should have the benefit of the lawyer’s independent advice. That advice should not be tempered by the interests of the lawyer, his or her law-related business, or its customers. In addition, the client is the final decision maker; yet, if a single entity is providing both legal advice and financial, consulting or accounting services, the client may lose the benefit of hearing the different approaches (and even debate) that unaffiliated professionals otherwise might provide. From the standpoint of a lawyer’s professionalism, the circumstances are worst when the firm’s affiliate has given advice (or has rendered charges for its non-legal services), and the lawyer must decide whether to criticize the advice (or the charges) of his or her own affiliate. In some cases, the lawyer may need to decide whether to advise the client to seek recourse against the affiliate. Will the lawyer’s criticism or counseling likely be tempered materially by a desire to protect the affiliate? If the answer to this question is yes, then the lawyer has a conflict and cannot exercise independent professional judgment.

The prudent practitioner should take the conflict issues into account in proceeding to provide law-related services. Consider at the outset if, at present or in
the foreseeable future, the customers of law-related services will have interests that would materially differ from or conflict with those of the lawyer’s clients or that would adversely impact the nature and zeal of the legal representation of such clients. In order to avoid future disputes, it may be advisable for the engagement letters to provide the lawyer with the right to withdraw from either the client or the customer engagement in the event of a future conflict, and the circumstances in which the withdrawal may occur.

b. Confidentiality

Rule 1.6(a) prohibits lawyers from revealing client confidences or other information relating to representation of a client unless the client consents after consultation, the disclosure is implicitly authorized, or other conditions apply. If the lawyer providing law-related services meets the requirements for the “carve-out” specified in Rule 5.7, however, an attorney-client relationship is not formed with the customer. Indeed, (assuming full disclosure) a client purchasing law-related services from the lawyer or his or her affiliate will not have the benefits of the attorney-client privilege or (absent fiduciary or other such relationships) any of the confidentiality protections that would exist in the context of an attorney-client relationship. Therefore, the attorney should make clear in his or her disclosure at the outset that the customer of non-legal services is not entitled to any privilege with respect to communications with the firm or its affiliate, and that the information may be disclosed or subject to discovery. This warning should be particularly unambiguous to the client of legal services who thereafter or simultaneously receives ancillary services, and who therefore must understand precisely what communications are and are not subject to Rule 1.6 and the protections of the attorney-client privilege. The lawyer should make

\[109\] See Model Rule 5.7, Comment [10].
clear to the customer of law-related services – particularly if such person also is a client of the law firm, whether on the same or unrelated matters – the circumstances in which attorney-client or other privileges may not apply. In addition, throughout the course of the engagement, the lawyer should consider carefully the availability (or risk of loss) of privileges as the lawyer makes staffing decisions and renders advice.

c. Confusion

The foregoing concerns – particularly as to the availability of the attorney-client privilege – may well prove confusing, or at least uncertain, for legal practitioners. As a practical matter, they also may be quite confusing (or even beyond comprehension) for clients who are not sophisticated and receive both law-related and legal services from the same firm, or from a firm and its affiliate, in connection with the same or different matters over an extended period of time. As noted in Comment [8] to Rule 5.7:

The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer’s conduct and, to the extent required by Rule 5.3, that of the non-lawyer employees in the distinct entity which the lawyer controls complies in all respects with the Rules of Professional Conduct.

In other words, the lawyer bears the onus of ensuring that the client understands when legal services are being supplied and the attorney-client relationship exists, and when law-related services are being supplied and there is no attorney-client relationship. If the lawyer fails to carry this burden, then the Model Rules will apply to all of the lawyer’s conduct in connection with the provision of the ancillary services. Moreover, if the legal and ancillary services are so “closely entwined that they cannot
be distinguished from each other,” the lawyer should not even attempt to take advantage of the “opt-out” provisions of Rule 5.7. Again, the lawyer also should make clear which individuals are providing legal services and which are providing only law-related services; and the lawyer should try to ensure that at any particular point in time, the client/customer understands what kind of services and advice are being provided, in what capacity the person giving the advice is acting, and what protections (privilege, common law fiduciary duty, contract confidentiality provisions, etc.) are and are not available.

d. Miscellaneous Considerations

Attorneys who provide law-related services should keep in mind several other issues:

First, lawyers engaging in providing law-related services should be sensitive to Rule 7.3, which restricts lawyers from directly contacting prospective clients in an attempt to obtain their business. Where affiliates are providing ancillary services, may they be used as feeder operations for the parent law firm? The answer appears to be “no.” Rule 5.3(c)(1) renders the lawyer responsible for ethical rules violations by “a nonlawyer employed or retained by or associated with” the lawyer if the lawyer “orders or, with the knowledge of the specific conduct, ratifies the conduct involved.”

110 See, e.g., In re Pappas, 159 Ariz. 516, 768 P.2d 1161, 1166 (1988) (rejecting lawyer’s argument that he was advising complainants only as their accountant and investment adviser and not as their attorney: “[H]ow is any client to know when a lawyer cum accountant cum investment adviser removes one hat and puts on another?”).


112 Model Rule 5.3(c)(2) also renders a lawyer liable for a non-lawyer employee’s ethical rules violations, if the lawyer is a partner or has direct supervisory authority over the non-lawyer, and “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”
Note, however, that the Model Rules would not apply to the affiliate’s conduct if it satisfied the exemption requirements under Rule 5.7.

Second, unauthorized practice of law issues arise if employees of the affiliate hold themselves out as lawyers.\(^{113}\) Clients of both the affiliate and the law firm may seek legal advice from non-lawyers, whether due to personal preference, convenience (where attorneys are unavailable), or confusion or inadvertence (either because the person providing the ancillary service is an attorney, or because the law firm affiliation confuses the customer or client).\(^{114}\) If this occurs, and if a lawyer has assisted a non-member of the Bar in the provision of legal services, the lawyer may be in violation of Rule 5.5. Accordingly, the lawyer should take reasonable steps to assure that only lawyers provide legal advice.

Third, at the risk of stating the obvious, a lawyer should consider whether his or her role in the operation of an ancillary business may distract the attorney from his or her duties to clients and the legal profession. The ABA Commission on Professionalism warned of this potential hazard: “It seems clear to the Commission that the greater the participation by lawyers in activities other than the practice of law, the less likely it is that the lawyer can capably discharge the obligations which our profession demands.”\(^{115}\) ALAS also has warned that attorneys who seek to practice law

\(^{113}\) See, e.g., M. Gilbert, Some Firms Hire Non-Lawyers as Their Lobbying Arm on Capitol Hill, 15 NAT’L L. J. 1899 (Sept. 17, 1983) (reporting that non-lawyer lobbyists employed by law firms were suggesting they were lawyers).

\(^{114}\) See ABA Litigation Section Report to the House of Delegates on Ancillary Business Activities of Lawyers 32-33 (June 5, 1991).

\(^{115}\) Stanley Report, supra n.2, 112 F.R.D. at 281.
and engage in business activities may be unable to fulfill their professional obligations.\textsuperscript{116}

e. Non-Lawyer Partners

The expansion and increasing importance of law firm affiliates has increased the pressure to permit non-lawyers to obtain equity stakes in law firms – witness the current debate over MDP, which, if permitted, would enable accounting firms and other entities owned and controlled by non-lawyers to acquire or to be law firms.\textsuperscript{117} To succeed, law firm affiliates will need to employ talented non-lawyer professionals, who, in turn, will demand increasing control over their futures and the fruits of their labor. It can be expected that to retain non-lawyer professionals at law firm affiliates, these individuals will need to be rewarded with both the status and managerial control that are associated with being partners in the enterprise. In March 1990, the District of Columbia Court of Appeals approved a version of Rule 5.4 that permitted non-lawyers to become partners in law firms.\textsuperscript{118} Under the District of Columbia rule, a non-lawyer may hold an ownership interest in a law firm if the firm has set forth in writing that its sole purpose is to provide legal services to its clients, that all non-lawyer managers or owners will undertake to abide by the rules of professional conduct, and that the firm’s lawyers will


\textsuperscript{117} The executive committee of the New York State Bar Association recently approved a report that supports permitting lawyers to share expenses, but not fees, with non-lawyer professionals. See M. Jacobs, \textit{New York Bar Moves Toward Letting Lawyers Share Fees With Accountants}, WALL ST. J. B-8 (May 3, 2000). However, in July 2000, the ABA House of Delegates voted in favor of a recommendation that disapproved of MDP and disbanded the commission that had been studying the issue for several years. For the full text of that recommendation, see www.abanet.org/cpr/mdprecom10F.html.

\textsuperscript{118} \textit{Non-Lawyer Partners Rule Release}, NAT’L L. J. 7 (March 12, 1990).
undertake to be responsible for the non-lawyer owners to the same extent that they would be responsible for another lawyer’s actions under Rule 5.1. Note, however, that to date no other jurisdiction has adopted such a rule.

D. Negotiation Or Renegotiation Of Fee Agreement During The Professional Relationship

The one business relationship that every private attorney necessarily has with his or her client is the attorney’s fee agreement. The courts scrutinize or regulate attorney fee agreements more closely than the general run of commercial contracts. But the scrutiny is far more intense if the fee agreement is negotiated or renegotiated after the attorney already is representing the client on the matter. Even at the outset of the relationship, the attorney’s superior professional knowledge may confer superior bargaining power, but that superiority is offset by the attorney’s anxiety to get the business and the client’s freedom to shop the matter to many lawyers. Once the relationship is substantially under way, however, the balance of bargaining power shifts markedly in the attorney’s favor. The client has developed confidence in the attorney. Selection of new counsel may delay the progress of litigation, and it certainly will impose the cost of bringing the new attorney up to speed. If a change in circumstances has changed the economic risks and rewards of the case to the attorney, the client is much less able to judge whether a new fee is reasonable in the situation. Because of the lawyer’s superior knowledge and superior leverage, the courts regard the attorney as a fiduciary with respect to the post hoc negotiation or renegotiation of fee agreements in a particular matter, and they place upon the attorney the burden of justifying the substantial fairness of any new or belated agreement.

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D.C. R. PROF. CONDUCT 5.4(b).
Although no ethics rule directly addresses the renegotiation of fee agreements, Section 18 of the Restatement states that a lawyer or client may enforce a contract between them, including one modifying an existing fee agreement, except that “if the contract or modification is made beyond a reasonable time after the lawyer has begun to represent the client in the matter . . . , the client may avoid it unless the lawyer shows that the contract and the circumstances of its formation were fair and reasonable to the client.” That section also states that a court should construe a contract between lawyer and client “as a reasonable person in the circumstances of the client would have construed it.”

There are numerous reported decisions on the renegotiation or amendment of fee agreements. Virtually all involve either the change from another arrangement to a contingent fee, an increase in the contingent fee percentage, or an increase in a fixed or capped fee for a specific matter. Few cases involve a change in hourly fees. However, the general principles governing belated or revised fee agreements should apply equally to hourly fees.

Based on the potential for attorney overreaching or fraud, some older cases held that fee agreements entered or revised during the course of the attorney-client relationship were either void or voidable at the client’s option, in order to rule out even the possibility of wrongful conduct by the attorney. In those cases, the courts ordered

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120 Contingent fee agreements pose particular problems in this area for several reasons. First, contingent fee agreements are often entered in matters where the client is not sophisticated, is not accustomed to negotiating about legal fees, and thus is vulnerable to overreaching. Second, since the attorney bears the economic risks that the litigation will not succeed, the temptation to revise the agreement as risks change may be greater. Third, in the clear light of hindsight, the client may decide that the risks of failure were not as great as they appeared and that the attorney’s reward for success is too great. For these reasons even initial contingent fee agreements are often subject to regulation, and that scrutiny will apply even more strongly when a contingent fee is adopted or increased once a matter is in progress.
payment of what they found to be a reasonable fee for the work under a quantum meruit theory.\textsuperscript{121}

The modern general rule, while somewhat less draconian, still holds lawyers to a high standard: Based on the confidential nature of the attorney-client relationship and the potential for abuse or overreaching, belated or revised fee agreements will be construed most strongly against the attorney and will not be enforced unless the attorney demonstrates that the agreement is fair in the circumstances.\textsuperscript{122} The rule has sometimes been stated in terms of a presumption of invalidity, fraud, undue influence, or lack of consideration.\textsuperscript{123} However it is phrased, there is a presumption that the contract is unenforceable until the attorney proves otherwise.\textsuperscript{124} Since the purpose of


\textsuperscript{124} The presumption does not apply to a fee arrangement entered for an entirely new and distinct matter while the attorney already is representing the client on another matter. \textit{See}, e.g., Powell \textit{v.} Wandel, 188 Pa. Super. 57, 146 A.2d 61, 66 (1958) (prior representation in unrelated matters did not affect validity of agreement to handle all patent-related matters for client). In a completely distinct matter, the client would appear to be in the same bargaining position as for an initial engagement. Whether a new matter or a change in the scope of an existing matter is involved will depend on the interrelation of the underlying facts in the two matters.
the presumption is to protect the client, the attorney’s good faith belief that the agreement was fair, standing alone, will not rebut the presumption.125

An attorney can rebut the presumption by establishing that the new fee agreement is fair and that the client entered it freely and with a full understanding of the nature and extent of the client’s rights and of the new agreement’s scope and effect.126 The courts will consider, first of all, whether the attorney has advised the client as to the new agreement’s implications as a “disinterested attorney” (i.e., an attorney advising the client with respect to an agreement with a third person) and, if so, whether a disinterested attorney would reasonably advise the client to enter the agreement.127 It is prudent for the attorney to reduce his advice with respect to the fee agreement to writing.128 The court also will take into account the age, education, business experience and general sophistication of the client.129 As part of the surrounding circumstances, the court also will consider whether the client had time to

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125 Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964) (contingent fee agreement held unreasonable despite assumption that attorney acted in good faith).

126 Rock v. Ballou, 286 N.C. 99, 209 S.E.2d 476, 479 (1974). Under Illinois law, the attorney must demonstrate that there has been no fraud or unfairness in the revised agreement by clear and convincing proof, which is the standard attorneys must meet to demonstrate no undue influence or fraud in disciplinary proceedings. See Durr v. Beatty, 142 Ill. App. 3d 443, 491 N.E.2d 902, 907-08, 96 Ill. Dec. 623 (1986); Neville v. Davinroy, 41 Ill. App. 3d 706, 355 N.E.2d 86, 88-89 (1976).

127 Lawrence, supra n.122, 57 N.W.2d at 48-50; Ridge, supra n.123, 251 F. at 805 ("whether an outside, disinterested attorney, having full knowledge of the surrounding facts and circumstances, would have advised the client to enter into the contract"); cf. Bryant, supra n.122, 404 P.2d at 523 (agreement valid where full disclosure to client of facts and client’s rights).


129 Compare Lawrence, supra n.122, 57 N.W.2d at 48-50 (working class client in estate matter) with Cline, supra n.128, 281 P.2d at 37 (experienced businessman in commercial real estate litigation).
consider the agreement and the opportunity to obtain the advice of independent counsel.¹³⁰

Like any other contract, the modification of a fee agreement must be supported by new consideration.¹³¹ Common motives for revising the fee arrangement part way through a matter are that the scope of the work or the risks of the matter have changed. On the one hand, the attorney may demonstrate that a revised fee agreement is fair by showing that the issues to be litigated changed in a way that affected the fairness of the original compensation agreement. Thus, in Denton v. Mitchell, 262 S.W.2d 639, 645 (Mo. 1953), the attorney originally undertook to defend a condemnation action for a contingent fee of 40% of the award. The client subsequently asked him to try to persuade the government to exclude 12 acres from the parcel to be condemned. The parties agreed to an additional $500 fee contingent on exclusion of the 12 acres. The agreement was upheld as reasonable, both because of the change in the nature of the attorney’s task and because the exclusion of the land from the condemned parcel decreased the award on which the original contingency was based.

On the other hand, a fee agreement is ordinarily expected to cover all of the foreseeable risks involved in the litigation, including the foreseeable risk that, because litigation is an adversary process, there will be unexpected developments. That such developments lead to additional work for the attorney does not, in itself, justify changing from an hourly to a contingent fee or increasing the percentage of the

¹³⁰ See Hendricks v. Sefton, 180 Cal. App. 2d 526, 4 Cal. Rptr. 218, 221 (1960) (opportunity to review contingent fee contract and obtain independent advice); Albert v. Munter, 136 Wash. 164, 239 P. 210, 213 (1925) (revised fee agreement with immigrant client approved where client had time to and did consult other counsel as to reasonableness of fee).

contingent fee. Unless the agreement provides otherwise, the need to take an appeal is not itself grounds to modify a fee agreement. The original agreement’s language as to the scope of the work, including the contemplation of any appeals, will be construed against the attorney.

Another circumstance that can constitute consideration for a revised fee agreement is the client’s inability to continue paying previously-agreed-upon hourly fees. The consideration for the enhancement to the fee is that the attorney has assumed an economic risk of non-payment that was not known to the parties when they made their original agreement. As described in one decision involving a shift from hourly fee to contingency after a client’s resources were exhausted, “the law firm effectively became [the client’s] lender of last resort.” However, the attorney still must fully explain to the client the ramifications of the new contingent fee agreement, at a point in the case when the client can realistically assess the impact of the change. Even if the client no longer can pay the previously-agreed hourly rate, if the shift to a contingent

132 See Chase v. Gilbert, supra n.123, 499 A.2d at 1209.
133 See In re Laughlin, supra n.131, 265 F.2d at 378; Bouonogias v. Peters, 49 Ill. App. 2d 138, 198 N.E.2d 142, 149 (1964); Ward, supra n.131, 754 P.2d at 125; but cf., Noland v. Cuddy, 42 Wash. 2d 174, 254 P.2d 761 (1953) (renegotiation fair when attorney engaged for appeal did not learn until after engagement that appeal had not been perfected, requiring substantial additional work).
134 To-Am Equipment Co. v. Mitsubishi Caterpillar Forklift America, Inc., 953 F. Supp. 987, 999 (N.D. Ill. 1997), aff’d on other grounds, 152 F.3d 658 (7th Cir. 1998). In To-Am, the contract at issue provided for recovery of plaintiff’s attorneys’ fees. The trial court held that under Illinois law, recovery would be based on the value of counsel’s time at the originally-agreed-upon hourly rates, rather than the enhanced contingency fee. “Difficulties unique to a particular plaintiff or case do not justify imposing extra costs on defendants,” the trial court concluded. “MCFA’s responsibility is not increased by the difficulties To-Am encountered in financing the litigation.” Id.
fee comes at a “critical stage of the proceedings,” there is a risk that the court will find that the change was coerced by the lawyer rather than freely negotiated.\textsuperscript{135}

Since the attorney has far more expertise in evaluating litigation risk, the client is especially vulnerable to overreaching when the risks of litigation change. This probably explains the result in \textit{In re Kindy’s Estate}, 310 So. 2d 349 (Fla. App. 1975). In that case, a wife who was having marital difficulties retained the attorney on an hourly basis. When the husband died, she asked the attorney to represent her in probate proceedings. The lawyer later learned that the client had signed an ante-nuptial agreement that arguably forfeited her dower rights. Because the agreement significantly affected the risks of the widow’s position, the parties agreed to change the hourly fee agreement to one providing for a 20% contingency. Shortly after the amendment, but before the widow filed her dower election, the attorney learned that the husband had destroyed the ante-nuptial agreement. Without telling the widow of this fortunate turn of events, he reached a quick settlement securing her full dower rights. The Florida court refused to enforce the 20% contingent fee, on the ground that the attorney should have informed the client of the favorable change in circumstances before she filed her dower election. The opinion appears to go too far. Neither the attorney nor the client knew, when they adopted the contingent fee agreement, that the case would be much easier than it then appeared. The court seems to hold that the attorney should have given the client the chance to go back to the hourly agreement

\textsuperscript{135} \textit{E.g.}, \textit{Eagle Industries, Inc. v. Thompson}, 127 Or. App. 595, 873 P.2d 479, 485 (1994); \textit{see also infra} at 84 & n.138.
when things changed for the better. Nevertheless, *Kindy* underscores the importance, when adopting or amending a contingent fee agreement, of the most complete disclosure to the client of facts material to litigation risk.

Finally, the attorney cannot overcome the presumption of invalidity if the timing and circumstances of the new fee agreement show actual or apparent coercion of the client. There is an implicit threat of withdrawal whenever an attorney proposes a new fee agreement in midstream, particularly if the attorney has not advised the client of the limits on the attorney’s right to withdraw under the applicable ethics rules. Anything tending to make the threat explicit negates the fairness of the amended agreement. *Spilker v. Hankin*, 188 F.2d 35, 38 (D.C. Cir. 1951), in which the attorney refused to proceed in a divorce until the client signed seven installment notes for the fee, demonstrates the tainting effect of duress. When the client raised her defense of duress in a suit on the remaining five notes, the attorney was denied recovery notwithstanding the doctrines of *res judicata* or collateral estoppel. In short, lawyers should take great care to avoid the appearance, much less the reality, of procuring an amended fee agreement by threatening to leave the client high and dry.

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136 For authorities recognizing that a contingent fee agreement that is reasonable when made does not become unreasonable simply because, as it happens, the case is easily resolved, see ABA FORMAL OP. 94-389, § H (1994); RESTATEMENT § 35, Comment c.

137 Under Model Rule 1.16(b)(4), an attorney may withdraw if the client “fails substantially to fulfill an obligation to the lawyer regarding a lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.” Under subsection (c) of the rule, however, the right to withdraw from a matter in litigation, including withdrawal for unpaid fees, is subject to the court’s direction that representation continue. See LAW OF LAWYERING §1.16:402, at 486.6 (1998 Supp.).

The above discussion has addressed fee agreements amended during the course of a matter. When the initial fee agreement is deferred until well into the litigation, the client has become committed to the representation and the attorney holds the same advantage in negotiations that he or she would hold in amending an existing agreement. The foregoing principles therefore apply equally well in the case where the attorney takes the case but puts off discussion of fee arrangements until a later date.\textsuperscript{139}

Procrastination over the initial fee agreement also may violate Model Rule 1.5(b), which requires that when the attorney has not previously represented the client, the basis of the fee must be communicated, preferably in writing, within a reasonable time after the representation commences. Some states mandate that the basis of the fee be communicated promptly in writing.\textsuperscript{140}

E. **Lawyer’s Or Firm’s Acceptance Of A Security Interest In A Client’s Property**

What happens when a client comes in with a good case and sufficient assets to pay your fees, but cannot afford to pay on a current basis? May you take a security interest in the client’s property to protect your fees? What if the client agrees to pay monthly, but after a period of time, falls substantially behind in fee payments? May you take a security interest at that time to secure the outstanding balance and future fees to be incurred? Does it matter if the property offered for security is the subject matter of the lawsuit? This section provides guidance on how to deal with these problems.

An attorney generally may take a security interest in a client’s property to protect the lawyer’s fee. However, because the acquisition of a security interest creates a business relationship with the client, because the attorney has a fiduciary relationship

\textsuperscript{139} *Lady, supra* n.123, 135 P.2d at 207.
with the client, and because that business relationship implicates a number of ethical
issues, the security transaction must meet a variety of procedural and substantive
safeguards. The courts and ethics rules circumscribe conduct that is not permitted by
an attorney engaged as a fiduciary, although that same conduct would be perfectly
acceptable if the attorney were acting as an individual pursuing a personal, commercial
venture. Security interests taken during the course of representation are particularly
suspect, and some jurisdictions will not permit security interests in the property that is
the subject matter of a litigation.

The taking of a security interest implicates Rule 1.8(j) in addition to Rules 1.7(b)
and 1.8(a), discussed supra at 25-31. Rule 1.8(j) addresses transactions in which the
attorney acquires an interest in the cause of action or the subject matter of a litigation,
as follows:

**Rule 1.8 Conflict of Interest: Prohibited Transactions**

. . .

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

(1) acquire a lien granted by law to secure the
lawyer’s fee or expenses; and

(2) contract with a client for a reasonable
contingent fee in a civil case.

The Ethics 2000 Commission has recommended only a minor change to Rule 1.8(j):

The substitution of “authorized” for “granted” in subparagraph 1.8(j)(1), in order to
clarify that the exemption applies to all liens authorized by substantive law, including
those liens that are contractual in nature.

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\(^{140}\) *E.g. COLO. R. PROF. CONDUCT 1.5(b); N.J. R. PROF. CONDUCT 1.5(b).*
DR 5-103(A) is the predecessor to Rule 1.8(j):

**DR 5-103 Avoiding Acquisition of Interest in Litigation.**

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

(1) Acquire a lien granted by law to secure his fee or expenses. . . .

The Restatement addresses the lawyer’s acquisition of security interests as well:

With respect to property neither in the lawyer’s possession nor recovered by the client through the lawyer’s efforts, the lawyer may obtain a security interest on property of a client only as provided by other law and consistent with §§ 18 [Client-Lawyer Contracts] and 126 [Business Transactions Between a Lawyer and a Client]. Acquisition of such a security interest is a business or financial transaction with a client within the meaning of § 126. 141

The comment makes clear that the property in which the lawyer takes the security interest must not be “otherwise involved in the representation.”

The general prohibition stated in Rule 1.8(j) has a basis in common law champerty and maintenance, which, respectively, prohibited a non-party (a stranger) to pursue a litigant’s claim in exchange for a piece of the judgment, and made it unlawful to promote another’s litigation. 142 Although Rule 1.8(j) also begins with a general ban on an attorney’s acquisition of a proprietary interest in the subject matter of a litigation, the rule then states two exceptions to the general rule that were developed in decisional law. 143 One of those exceptions permits an attorney to take a security interest in a client’s property to protect his or her fee.

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141 Restatement § 43(4).

142 Black’s Law Dictionary, supra n.19, at 224 ("champerty") and 965 ("maintenance").

143 Model Rule 1.8, Comment [7]; see also DR 5-103(A).
The ABA – through Rule 1.8(j) and DR 5-103(a) – and a number of state courts and ethics advisory committees have determined that an attorney may accept a mortgage or promissory note from a client to secure the payment of fees without any impropriety because granting a security interest may be the client’s only means of obtaining representation.\textsuperscript{144} Although Rule 1.8(j) appears to permit a lawyer to take an interest in the subject matter of the litigation, the authority applying various states’ versions of the rule is mixed.\textsuperscript{145} Because all of these security arrangements have the potential for abuse, courts will examine the circumstances in which the interest was taken to insure that the attorney complies with the controlling ethical rules by meeting the procedural (disclosure) and substantive (fairness) requirements of those rules. In addition, a security interest taken after litigation has commenced is likely to be closely scrutinized, and in some states, is presumptively invalid. In those cases, the attorney will bear the burden of showing by clear and convincing evidence that the transaction was procedurally and substantively fair.\textsuperscript{146}

Accordingly, an attorney contemplating taking a security interest in a client’s property as security for his fees is best served by doing so at the outset of the representation – before the creation of a fiduciary relationship. It is preferable that the security interest not be in the subject matter of the litigation, although this is permitted

\textsuperscript{144} See \textsc{Restatement} § 43, Comment i (“Typically [security interests] are used when the client’s ability or willingness to pay is questionable, and they thus aid such a client (for example, a criminal defendant with nonliquid assets but no money) to obtain counsel.”); see also, e.g., \textit{Droeger v. Friedman, Sloan & Ross}, 54 Cal. 3d 26, 812 P.2d 931, 945 (1991) (“[R]etaining counsel by executing a promissory note secured by a deed of trust on the spouse’s interest in community real property is desirable primarily for those spouses who do not have access to substantial sums of money,” and who otherwise would “not be represented by a lawyer in dissolution proceedings.”) (Kennard, J., dissenting).

\textsuperscript{145} See \textit{infra} at 93-95.

\textsuperscript{146} See \textit{infra} at 95-98.
in those states that follow the explicit language of Rule 1.8(j). In addition, any interest
taken should be only to secure the attorney’s fee and not to obtain a separate investment
with the client in a profit-making enterprise. In all cases, the lawyer should set out the
terms of the transaction in writing, the client should be given the opportunity to seek
independent counsel, and the security interest should be acknowledged and signed by
the client.

1. The Business Transaction Analysis

As discussed earlier, courts will scrutinize closely any business transactions
between attorney and client where the lawyer has the ability to profit from superior
knowledge and the fiduciary relationship between them. Thus, cases and ethics
opinions that analyze security interests under Rule 1.8(a), using a “business transaction
analysis,” examine the attorney’s conduct and the lawyer’s interest in the client’s
property to determine if the taking of the security interest is substantively and
procedurally fair to the client.147 Generally, where the attorney’s conduct comports
with the procedural protections of the rule and the interest obtained resembles a fee
agreement, the cases find no impropriety.148 But where the interaction between the
attorney and client resembles a commercial transaction in which the lawyer is likely to
profit beyond his or her fee,149 the cases find that 1.8(a) has been violated. In these

147 See supra at 30-31.
(“Taking a contractual security interest to secure payment of attorney fees does not constitute
entering into a business transaction in violation of DR5-104(A).”) (citation omitted).
149 A commercial transaction is, for example, a “commercial venture in which lawyers and
clients might engage with a view to making a profit.” Comm. On Prof. Ethics & Conduct v.
circumstances courts have difficulty reconciling the attorney’s interest in profiting with his or her fiduciary obligation to the client.

For example, in *Hawk v. State Bar of California*, 45 Cal. 3d 589, 754 P.2d 1096, 247 Cal. Rptr. 599 (1988), the California Supreme Court determined that an attorney who receives a promissory note secured by a deed of trust on a client’s property to secure payment of legal fees takes an interest adverse to a client, requiring full compliance with the California equivalent of Rule 1.8(a). The Court found the transaction substantively fair, yet it upheld the discipline of an attorney who did not comply with the rule’s procedural requirements. There the attorney had agreed to represent his clients through trial for a flat fee. The clients did not have the funds so the attorney obtained a promissory note secured by a deed of trust with a power of sale on their real property. The property was immediately listed for sale and the clients believed their note would be paid out of the proceeds when the property was sold. Rather than waiting for the sale, the attorney immediately assigned the note and deed of trust. The assignee made a demand for payment on the clients and then assigned the notes to a third-party who foreclosed.

While the hearing panel found the transaction fair and reasonable, it also found that the attorney did not fully disclose and transmit in writing to the clients the terms of the security arrangement, did not advise and give them an opportunity to have the transaction reviewed by independent counsel, and did not provide them with copies of the promissory note and deed of trust; it further found that the clients did not understand how the fee was secured or how the attorney could foreclose on their property.\(^{150}\)

\(^{150}\) *Hawk*, 247 Cal. Rptr. at 606.
The Supreme Court initially rejected “the argument that failure to give the clients time to seek independent counsel is a mere technical violation . . .,” citing the fiduciary nature of the relationship.\footnote{Id. at 604 (citing Ritter, supra n.26); see also Sugarman v. State Bar, 51 Cal. 3d 609, 798 P.2d 843, 274 Cal. Rptr. 246 (1990) (attorney who took loan from corporate principal to secure corporate payment of fees owed should have allowed client to seek independent legal advice).} Turning to the nature of the interest obtained by the attorney, the Court noted its prior disapproval of attorneys taking confessions of judgment from their clients, and indicated its disapproval of “fee arrangements which allow the attorney to collect disputed fees without judicial scrutiny . . .”\footnote{Hawk, 247 Cal. Rpr. at 605; see also Brockway v. State Bar, 53 Cal.3d 51, 806 P.2d 308, 278 Cal. Rptr. 836, 843 (1991) (“As explained in Hawk, the cases have long held that the safeguards imposed by rule 5-101 apply to any transaction permitting the attorney to ‘summarily extinguish’ a client’s property interest and ‘collect disputed fees’ without prior ‘judicial scrutiny.’”); N.Y. STATE BAR ASS’N OP. 550 [1983 WL 31514] (1983) (permitting lawyers to take a mortgage but not a deed: “With a mortgage, the law gives the mortgagor important protections in the event of foreclosure. Where a deed is received by the lawyer as security, the client is not only deprived of the legal protections that accompany foreclosure, but is also potentially more subject to the latter overreaching.”).} It found that a note secured by a deed of trust with power of sale was such a method of payment. In contrast, the Court explained that a promissory note not secured by a deed of trust would provide an attorney with a right to seek a judgment and proceed against the client’s assets without giving the attorney a present interest in the client’s property which the attorney could realize summarily without judicial scrutiny. Nevertheless, although the securing of fees through a note secured by a deed of trust sidestepped judicial scrutiny, the Court found it permissible so long as the attorney fully complied with the California version of Rule 1.8(a).

Similarly, the Connecticut Bar Association Committee on Professional Ethics has stated, “[w]e believe that Rule 1.8(a) is applicable to a lawyer’s acquisition of a
security interest taken in a client’s property to secure payment of a fee.”

According to that committee’s opinion, “[a] lawyer taking a note together with a security interest in client property is required to comply with the fairness and disclosure standards of Rule 1.8(a)(1), (2), and (3). The transaction should be ‘characterized by the utmost fairness and good faith . . .’” Discussing DR 5-104(A), “which addresses the same concerns as those underlying” Rule 1.8(a), the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics determined that a mortgage on a client’s home should be treated as a business transaction, noting that the mortgage transaction “presents the attorney with a marked opportunity for overreaching . . .”

These opinions demonstrate that an attorney guided by Rule 1.8(a) may take a security interest in a client’s property, provided it is done in strict compliance with the procedural requirements of the rule and also can withstand strict judicial scrutiny on its substantive fairness. In effect, Rule 1.8(a) protects the client, but also serves to prevent the attorney from compromising his or her independent judgment.

2. The Proprietary Interest Analysis

The second ethical consideration commonly raised in these cases is whether taking a security interest grants the attorney a proprietary interest in the client’s property and thereby creates an impermissible conflict of interest. As the foregoing

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154 Id. (citation omitted).

155 N.Y.C. FORMAL OP. 1988-7 (1988) [1988 WL 490017] (citing Hawk, supra at 90). Even if there is procedural fairness, in matrimonial situations New York has a special rule that does not permit foreclosure (though the security interest may be taken): “[A]n attorney shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse’s primary residence.” 22 N.Y.C.R.R. § 1400.5(b).
discussion indicates, numerous ethics opinions advise that when an attorney complies with Rule 1.8(a), “there is nothing improper about an attorney taking a real estate mortgage in property to secure his fee . . .” Conflicts of interest arise, however, when the lien or security interest is more than security for fees and is more akin to a proprietary or ownership interest. Rule 1.8(j) prohibits a lawyer from acquiring a proprietary interest in the subject matter of the litigation except to acquire a lien to secure a fee or in connection with a reasonable contingent fee arrangement.

Some state ethics committees apply their states’ versions of Rule 1.8(j) as flatly prohibiting an attorney from obtaining a security interest in property that is the subject of litigation. This reasoning recognizes the tensions between the attorney’s desire to recover a fee and the obligation to act solely in the best interest of the client. But Rule 1.8(j) seems to expressly allow for such security interests. The rule states that “a lawyer shall not acquire a proprietary interest in the . . . subject matter of litigation . . . except that the lawyer may: (1) acquire a lien . . . to secure the lawyer’s fee . . .” (Emphasis added). Therefore, the rule cautions against a potentially troublesome practice, but also recognizes that a security interest in the subject matter of the litigation may provide the client the only means of obtaining representation and the attorney his or her only means of collecting a fee.

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156 OKLA. ADV. OP. 297 (1980) [1980 WL 140952] (citing ABA INFORMAL OP. 593 (1962)).
157 See, e.g., People v. Mason, 938 P.2d 133, 136 (Colo. 1997) (lawyer violated Rule 1.8(j) when he took conveyance of client’s property in satisfaction of outstanding fees despite his knowledge that ownership was disputed or likely to become disputed).
158 S.C. OP. 96-25 (1996) (“A lawyer may not obtain a security interest in a property as long as title to the property is a subject matter of litigation.”).
159 But see LAW OF LAWYERING § 1.8:1100, at 286 n.1 (1993 Supp.) (suggesting that Rules 1.7(b) and 1.8(a) are sufficient and Rule 1.8(j) is outdated).
The Arizona Court of Appeals squarely addressed this problem in *Skarecky & Horenstein, P.A. v. 3605 North 36th Street Co.*, 170 Ariz. 424, 825 P.2d 949 (Ariz. App. 1991), which permitted the taking of a lien in the subject matter of the litigation to secure an attorney’s fee in accordance with Rule 1.8(j). There, while the rule prohibited attorneys from acquiring property interests in the subject matter of the litigation, a security interest was proper if it was acquired at the inception of the case, and if it was not absolute but was limited solely to securing fees. By negative implication, *Skarecky* casts doubt upon, but does not resolve the question of whether an attorney may acquire a contractual security interest in the subject matter of litigation after the inception of the case.

Relying on *Skarecky* and cases cited therein, the Connecticut Bar Association Committee on Professional Ethics has held that “a lawyer may take a consensual security interest in property subject to litigation ...” However, in a recent decision applying New York DR 5-103(A), a federal district court held that a lawyer could not define his fee as a one-third ownership interest in his client’s equipment that was the subject of the litigation; the court ordered the attorney either to divest himself of that interest or be disqualified.

3. The Altered Fee Arrangement: Taking A Security Interest During The Course Of Representation

As discussed above, a security interest taken prior to representation commencing is analogous to a conventional fee arrangement and is likely permissible provided the

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160 *Skarecky*, 825 P.2d at 952 (citing *In re May*, 96 Idaho 858, 538 P.2d 787 (1975); *McCullough, supra* n.149, 465 N.W.2d 878; *John Burk, P.C. v. Burzynski*, 672 P.2d 419 (Wyo. 1983)).

161 *CONN. INFORMAL OP. 97-4, supra* n.153.

substantive and procedural requirements of Rule 1.8(a) are satisfied. A security interest obtained after representation has commenced, however, is subject to greater scrutiny and, in some jurisdictions, is presumptively invalid.163

Because the dynamic between attorney and client is fundamentally different before and during their professional relationship, a security interest in property taken after representation has commenced warrants even closer review than is applied to a security interest acquired in a written fee arrangement executed before the start of the fiduciary relationship. After the attorney-client relationship has begun, the fiduciary relationship exists and cannot be shelved temporarily; thus, the lawyer is limited in his or her negotiation of a security agreement. On the assumption that, once the representation has begun, the client’s trust in and reliance on the attorney has increased, the client will be more susceptible to the attorney’s influence if the security agreement is acquired during the course of the representation. In addition, at that juncture, the attorney typically has more information about the client and the case than he or she had at the outset of the relationship and is consequently in a better (and presumptively unfair) bargaining position to negotiate the security interest.164

163 See, e.g., Halstead v. Florence Citrus Growers’ Ass’n, 104 Fla. 21, 139 So. 132 (1932) (although not presumptively void, attorney bears the burden of showing the fairness of an agreement entered between the client and the attorney during the course of the relationship; there was a presumption of undue influence when the interest taken was in the property involved in the litigation); Lossman v. Lossman, 274 Ill. App. 3d 1, 653 N.E.2d 1280, 210 Ill. Dec. 818 (1995) (attorney was unable to overcome the presumption of undue influence for a promissory note executed to secure fees after the attorney-client relationship existed); Lutz v. Belli, 516 N.E.2d 95 (Ind. App. 1987) (attorney was unable to overcome presumption that promissory note executed after fiduciary relationship existed was presumptively invalid and the fee was excessive); McCullough, supra n.149, 465 N.W.2d at 885 (attorney’s execution of mortgage that violated a court order and contained material misstatements of fact resulted in one-year suspension from practice).

164 See supra at 77-85 for a fuller discussion of renegotiation of fee agreements during the representation.
Nevertheless, Rule 1.8 does not categorically prohibit the acquisition of a security interest during the course of representation. Instead, courts give greater scrutiny to the fairness of the transaction and the circumstances surrounding how the interest was obtained, many presuming the interest invalid and requiring the attorney to bear the burden of showing the fairness of the transaction.

*Lossman, see supra* n.163, involving a mortgage transaction between the attorney (Zagoras) and his clients, is illustrative. At the outset of the representation Zagoras and the Lossmans established an hourly fee arrangement for an upcoming trial concerning a real estate contract. After losing in the trial court, Zagoras explained that he would handle an appeal for a flat rate of $7,000, plus a $10,000 bonus if he won. About a month later, after the clients indicated that they were unable to pay the outstanding balance for the trial fees, Zagoras had them execute a promissory note, a letter, and a mortgage on the litigation property to secure payment for fees incurred for the trial and anticipated for the appeal. Zagoras was successful on appeal and sought to foreclose on the property to recover $22,631.71, representing unpaid trial fees, the flat fee for the appeal, the bonus for winning, interest, and post-appeal services related to the mortgage.

The court began its analysis by emphasizing the fiduciary nature of the lawyer’s relationship with his clients and the strict scrutiny to be applied to their transaction: “An attorney fee contract entered into after the attorney has been retained requires a showing of clear and convincing evidence in order to rebut the presumption of undue
influence.” The court then highlighted the following factors by which to evaluate the fairness of the transaction:

(1) the attorney made a full and frank disclosure of all relevant information; (2) the client’s agreement was based on adequate consideration; (3) the client had independent advice before completing the transaction; (4) the agreement was offered by the lawyer with unquestionable good faith and with complete disclosure; (5) the client entered into the agreement with a full understanding of all facts and their legal importance.

Based on these factors, the court held that Zagoras could overcome the presumption of undue influence with respect to the fee arrangement, which the clients understood and to which they had agreed, but the presumption applied to – and invalidated – the note and mortgage. Specifically, the lawyer failed to disclose all relevant information and did not give the Lossmans an opportunity to seek independent counsel with respect to the note and mortgage; unlike the flat fee arrangement, the clients could not be expected to understand the significance of signing an interest-bearing note and granting a mortgage. Because the execution of the note and mortgage lacked procedural and substantive fairness, and even though the lawyer’s services benefited the clients, the court denied Zagoras interest on the note and ordered Zagoras to release the mortgage that was obtained through undue influence. Implicit in the Lossman analysis is that a security interest may be taken in property that is the subject of litigation to protect fees even after the fiduciary relationship exists, so long as the lawyer fully complies with the applicable ethics rules.

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165 Lossman, 653 N.E.2d at 1286 (citations omitted). The court rejected the attorney’s argument that no fiduciary relationship existed since the trial was over and no arrangement had yet been made for the appeal.

166 Id.

167 Accord Hawk, supra at 90-91 & nn.150-52, 247 Cal.Rptr. at 606.
F. Lawyer’s Or Firm’s Receipt Of Valuable Gift From A Client, Or Designation As Beneficiary Or Fiduciary In A Testamentary Document

When a lawyer receives a significant gift from a client, or when a lawyer drafts a dispositive instrument in which he or she is named a beneficiary or a fiduciary, the rules governing lawyer-client relationships are immediately invoked. Whether the transaction is fair to the client is a principal issue. And whether the client made an independent and informed decision is almost always subject to challenge. Allegations of overreaching or of undue influence by the lawyer are common in these situations. The opportunity for fraud is often present. While such arrangements always have been suspect, both updated ethical rules and recent case law have placed even more stringent limitations on the lawyer who would benefit from such transactions.

1. A Valuable Gift From A Client

Substantial gifts from clients to lawyers always have been viewed with suspicion, frequently have been attacked, and often have been set aside. Malpractice claims and disciplinary sanctions are common bedfellows of client gifts to lawyers. The reasons are several. Most of them are grounded in notions of undue influence and conflict of interest.

By the nature of most lawyer-client relationships, the parties do not stand on a level playing field. The lawyer is privy to the client’s confidences – resources, attitudes, needs, and options. The reverse is seldom true. In many instances, the lawyer will have a higher education or greater degree of business experience and sophistication than does the client. In a high percentage of the reported cases involving

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client gifts to lawyers, the client is elderly or physically debilitated. Often the gift is contained in a testamentary instrument drawn by the lawyer and not made public until after the client’s death. Such circumstances are ripe with the possibility of overreaching or undue influence by the lawyer – a condition that courts and disciplinary authorities are quick to recognize.

Similarly, a lawyer who arranges or receives a significant gift from a client is subject to a conflict of interest. The lawyer’s obligation is to represent the client’s interest and the client’s interest alone. Almost by definition, a lawyer who would benefit meaningfully from a client gift is unable to give the client independent and objective advice concerning the gift. Not surprisingly, the Model Rules specifically recognize the potential impropriety inherent in client gifts to lawyers and impose significant limitations on the making of such gifts.

While Canon 6 of the old Canons of Professional Ethics dealt in a general way with conflicts of interest, neither that Canon nor any other made specific reference to client gifts to lawyers.\(^{169}\) By 1953, however, the leading text on legal ethics noted:

> A question is sometimes raised as to the propriety of a lawyer’s inserting in the will a legacy to himself, or a provision appointing him executor or trustee, or one directing his executors to employ him as counsel for the estate. This, of course, depends on the surrounding circumstances. If they are such that the lawyer might reasonably be accused of using undue influence, he will be wise to have the provision inserted in a codicil drawn by another lawyer. Where, however, a testator is entirely competent and the relation has been a long-standing one, and where the suggestion originates with [the] testator, there is no necessity of having another lawyer in the case of a reasonable legacy, or of a provision appointing the

\(^{169}\) See supra at 20-21. Canon 11, as amended September 30, 1937, provided: “The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.”
draftsman executor, or of a direction that he be retained by the executors.\textsuperscript{170}

The Code of Professional Responsibility, while not stating the point as a disciplinary rule, said in EC 5-5:

A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

Thus by 1969 the pertinent ethical standard prevented a lawyer from soliciting a client gift, but contained no outright prohibition against a gift voluntarily tendered.

The Model Rules effectively follow the concept stated in the last sentence of EC 5-5. Rule 1.8(c) provides:

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.\textsuperscript{171}

Interestingly, the prohibition in Rule 1.8(c) is against the preparation of an instrument conveying a gift, implying that a gift not accompanied by a written conveyance is not subject to ethical constraints. That omission has been strongly

\textsuperscript{170} H. Drinker, LEGAL ETHICS 94 (1953).

\textsuperscript{171} Rule 1.10(a) specifically extends the prohibitions of Rule 1.8(c) to all lawyers in the firm of the lawyer whose client would make a substantial gift. See infra at 111.
criticized, but the loophole it appears to create has been largely ignored by the courts. Indeed, conduct that would run afoul of Rule 1.8(c) almost certainly violates the general conflict of interest rule in Rule 1.7(b) whether or not the gift is accompanied by a writing.

Note the two specific limitations in Rule 1.8(c). For the rule to apply, the gift must be “substantial.” As the comment to the rule explains, holiday gifts, tokens of appreciation, and similar insubstantial gifts are not covered. Neither does the rule apply where the client is related to the lawyer-recipient of the gift. The latter exception recognizes the family relationship and the potential awkwardness when a lawyer-recipient is obliged to refer his or her parent or other family member to a non-family-member-lawyer if the relative wishes to make a gift to the lawyer-family-member.

Because the articulated standards relating to client gifts to lawyers are evolving, a look at the current reformulation of the rule in two forums is instructive. The Ethics 2000 Commission’s redraft of Rule 1.8(c) reads:

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


173 But see In re Gillingham, 126 Wash. 2d 454, 896 P.2d 656, 662 n.7 (1995) (noting that Rule 1.8(c) does not specifically prohibit cash gifts from clients).

174 See In re Bales, 608 N.E.2d 987 (Ind. 1993) (finding a violation of Rule 1.7(b) and preceding DR 5-101(A) where attorney drafted will giving himself a portion of the client’s estate despite fact that Rule 1.8(c) had not been adopted by Indiana at time of drafting); see also WOLFRAM § 8.12.2, at n.27 (collecting cases where violations of EC 5-5 also were thought to be violations of the Code’s general conflict of interest rules).
The only change of substance from present Rule 1.8(c) is the specific prohibition against the solicitation by the lawyer of a substantial gift from a client. The present comment to Rule 1.8(c) states: “A lawyer may accept a gift from a client, if the transaction meets general standards of fairness.” An addition to the comment proposed by the Ethics 2000 Commission states: “If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although the gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent.” The Reporter’s Explanation of Changes states that the Ethics 2000 Commission revised the comment to Rule 1.8(c) to reflect the Commission’s decision to prohibit lawyer solicitation of non-testamentary gifts except when such gifts are insubstantial. It also reminds lawyers that, while the Rule does not prohibit lawyers from accepting substantial gifts not solicited by the lawyer, such gifts may be voidable by the client under the doctrine of undue influence.

Section 127 of the Restatement addresses the subject of client gifts to lawyers:

§ 127 A Client Gift to a Lawyer

(1) A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object of the client’s generosity and the gift is not significantly disproportionate to those given other donees similarly related to the donor.

(2) A lawyer may not accept a gift from a client, including a testamentary gift, unless:

(a) the lawyer is a relative or other natural object of the client’s generosity;

(b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or

(c) the client, before making the gift, has received independent advice or has been encouraged,
and given a reasonable opportunity, to seek such advice.

While this rule is similar to current Rule 1.8(c), its scope is broader. Unlike Rule 1.8(c), it specifically addresses the circumstances under which a lawyer may accept a gift from a client. It prohibits the acceptance of a substantial gift, other than from a relative, unless the client has received independent advice or has been encouraged and given a reasonable opportunity to do so. According to the accompanying comment, the general prohibition applies even if the lawyer has not engaged in undue influence.

Applying the above rules and principles along with the common law of fiduciary duty, courts have viewed lawyers’ acceptance of gifts from clients with profound suspicion. Although the legal principles pertinent to such transactions apply to both inter vivos and testamentary gifts, most of the cases involve legacies or bequests that are revealed after the client’s death in an instrument drafted by the lawyer. In such cases, of course, the client is not available to testify as to the circumstances surrounding the making of the gift. And frequently, if not usually, the testator was elderly at the time the gift purportedly was made.

Not surprisingly, courts have not hesitated to invalidate gifts made under these circumstances. Some cases are grounded upon a presumption of fraud or undue influence. In others, the courts impose on the lawyer the burden of proving by clear

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176 See, e.g., In re Schuyler, 91 Ill. 2d 6, 434 N.E.2d 1137, 61 Ill. Dec. 540 (1982).
178 In re Smith, 572 N.E.2d 1280, 1284 (Ind. 1991); Klaskin v. Klepak, 126 Ill. 2d 376, 534 N.E.2d 971, 128 Ill. Dec. 526 (1989); In re Estate of Mapes, 738 S.W.2d 853 (Mo. 1987).
and convincing evidence that the gift was fair and not the result of overreaching.\textsuperscript{179} In virtually all cases, the courts cite the fiduciary role of the lawyer, and many cases emphasize the inherent conflict of interest when a lawyer, obligated to provide independent advice and judgment, solicits or arranges a gift from the client.\textsuperscript{180}

When a lawyer is found to have improperly received a gift from a client – the usual outcome – the gift invariably is set aside.\textsuperscript{181} In many cases, disciplinary action, including disbarment, follows.\textsuperscript{182}

As Rule 1.8(c) makes explicit, the prohibition cannot be evaded by arranging a client gift to a relative of the lawyer. The best way – perhaps the only proper way – for a lawyer to receive a substantial gift from a client is for the client first to receive independent professional advice regarding the gift.\textsuperscript{183} To be effective, however, that advice must be both substantive and truly independent.\textsuperscript{184}

\begin{footnotesize}
\begin{enumerate}
\item[180] \textit{In re Gillingham}, supra n.173, 896 P.2d at 663.
\item[181] See, \textit{e.g.}, Smith \textit{v.} McMahon, 236 Or. 310, 388 P.2d 280, 281 (1964); Cuthbert \textit{v.} Heidsieck, 364 S.W.2d 583 (Mo. 1963).
\item[183] \textit{Cf. Iowa Supreme Court Bd. of Prof. Ethics \& Conduct v. Winkel}, 541 N.W.2d 862, 864 (Iowa 1995) (all professional advice and legal work in connection with a bequest to a lawyer must be rendered by independent counsel); \textit{State v. Beaudry}, 53 Wis. 2d 148, 191 N.W.2d 842, 844 (1972) (disciplining attorney who received gift from client where attorney did not ensure that client obtained independent legal advice).
\item[184] See People \textit{v.} Berge, 620 P.2d 23, 27 (Colo. 1980) (finding advice from attorney with whom attorney Berge had shared an office was not independent and that the attorney rendered no substantive advice); Beaudry, supra n.183, 191 N.W.2d at 844-45 (finding that the drafting attorney who was “a young lawyer of limited legal experience who [had] also represented [the disciplined attorney] in some minor matters” was not independent); \textit{see also} McGovern, supra n.168, 28 REAL PROP. PROBATE \& TR. J. at 655-56 (discussing quality of advice provided).
\end{enumerate}
\end{footnotesize}
2. The Lawyer As Fiduciary Of A Client’s Estate

It is not uncommon for a lawyer to be named as executor or other fiduciary in the will of the lawyer’s client. Occasionally, a lawyer will be designated in a client’s will to represent the fiduciary appointed under the will. In either case, difficult issues arise, again primarily involving conflicts of interest.\textsuperscript{185}

There are good reasons why a client might want her lawyer to be the executor of her estate. A long and trusting relationship may have existed between the client and the lawyer. The lawyer may be more familiar than anyone else with the client’s business affairs, assets, and desires as to how they should be handled. There may not be appropriate family members or other persons who are able and willing to serve and in whom the client has trust and confidence. Corporate fiduciaries are becoming more expensive and more selective as to the kinds of clients for whom they will act and the size or the nature of estate assets they are willing to handle. In such cases, a lawyer can perform a valuable service by continuing to serve the client’s wishes as an estate fiduciary.

On the other hand, the preparation of a will often involves clients who are vulnerable as the result of age or infirmity. The client often will be unfamiliar with the process and the costs of estate administration. A drafting attorney usually will have an economic interest in being named a fiduciary for the estate, which may implicate appearance of impropriety concerns. Although less prevalent today, historically the fee lawyers charged for the preparation of a will often was kept low on the assumption the drafting attorney would receive significant fees in connection with the probate of the decedent’s estate.

\textsuperscript{185} Cf. WOLFRAM, § 8.12.4 (discussing inherent conflicts in attorney self-nomination).
While these situations can involve overreaching, undue influence, and the like, conflict of interest issues most often predominate. Because a lawyer’s own interest is furthered upon being named as executor or other fiduciary under a will, the independence of advice and judgment owed the client is immediately in question. As just one example, the lawyer may consciously or even subconsciously fail to advise the testator of the availability of alternative means of disposing or transferring property.

Although drafting attorneys have named themselves as fiduciaries in the wills of their clients for many years, the ethical standards for measuring such practice have been somewhat slow to develop. The most pertinent provisions in the Model Code are Canon 9 (a lawyer should avoid even the appearance of professional impropriety), and DR 5-101(A), the general conflict rule, which prohibits a lawyer, except with the client’s consent after full disclosure, from accepting employment if the exercise of the attorney’s professional judgment may be affected by his or her own financial or other personal interests. Neither provision speaks directly to whether a lawyer can be appointed a fiduciary under his or her client’s will. EC 5-6, however, attempts to fill the gap. It states: “A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.” This provision actually raises as many questions as it answers. The phrase “consciously influence” is sufficiently ambiguous as to be of little assistance to the drafting lawyer. The concept of an “appearance of impropriety” was thought to be so vague that it was omitted entirely from the Model Rules.
The most relevant Model Rules are Rules 1.7(b) and 1.8(a). Under Rule 1.7(b), the critical question is whether the designation of a fiduciary position in the client’s estate would adversely impact the independence of the lawyer’s professional advice to the client in planning that estate. Rule 1.8(a) establishes a higher standard. The lawyer who would enter into a business transaction with a client, or acquire a pecuniary interest adverse to a client, may do so only if (1) the transaction and its terms are fair and reasonable, and are fully disclosed in writing to the client, (2) the client has a reasonable opportunity to seek the advice of independent counsel, and (3) the client consents in writing.

The end result of these provisions with respect to the conscientious draftsman who would become his client’s estate fiduciary is far from clear. Difficult questions remain as to which of these provisions applies to such a transaction and what steps the drafting lawyer must take to achieve compliance. While most commentators agree that the language of Rule 1.7(b) applies more directly to the lawyer-fiduciary situation than does the terminology of Rule 1.8(a), a reasonable argument can be made that the more stringent standards of Rule 1.8(a) also apply.  

The changes to the Model Rules and accompanying comments currently proposed by the Ethics 2000 Commission speak more directly. Although the proposed changes to the Rules themselves do not address the lawyer as an estate fiduciary, proposed Comment 7 to Rule 1.8(c) is explicit:

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[7] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer’s interest in obtaining the appointment will materially limit the lawyer’s independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client’s informed written consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer’s financial interest in the appointment, as well as the availability of alternative candidates for the position.

The Reporter’s Explanation Of Changes in discussing new comment [7] goes further:

[7] This new Comment clarifies a present ambiguity by addressing the question of whether the appointment of the lawyer or the lawyer’s firm as executor constitutes a “substantial gift” within the meaning of this Rule. The Commission believes that such appointments are not “gifts” but that they may create a conflict of interest between the client and the lawyer that would be governed by Rule 1.7.

The changes to Rule 1.8(c) recommended by the Ethics 2000 Commission, and especially Comment [7] and the Reporter’s Explanation noted above, if adopted, will go a good way toward clarifying when and under what circumstances a lawyer-draftsman
may be appointed a fiduciary for his or her client’s estate. At present, a lawyer is
generally free to accept appointment as a testamentary fiduciary provided the client, after having been fully advised as to the nature of the duties of the fiduciary, directs that the appointment be made. Of course, the appointment must not be the result of improper solicitation or undue influence by the lawyer and it should be consistent with the provisions of Rule 1.7(b). For a client to be properly informed, the lawyer should explain the fiduciary’s duties and responsibilities, the availability of other persons or institutions to serve in that capacity, and the costs likely to be incurred, depending on the person or institution appointed as the fiduciary.

In summary, of the many possible relationships between clients and their lawyers, those involving significant client gifts to the lawyer, and the appointment of the lawyer as a testamentary fiduciary, are particularly sensitive and are among the most commonly attacked. In many such instances the client is elderly, relatively unsophisticated, and alone. By definition, a fiduciary appointment under a will takes effect after the client’s death. Most client gifts that are suspect are contained in a testamentary instrument. A deceased client cannot testify to the motives that led to the gift or the appointment. Almost always the lawyer will have benefited financially. Small wonder that such transactions are often challenged, and that such challenges frequently find a receptive forum in the courts.

The ethical rules applicable to these situations have developed gradually. But the trend is clear – both in the newer rules of ethics and in the courts. The lawyer who receives a personal benefit from his client under circumstances in which overreaching could have occurred, or where the lawyer’s advice to the client may have been compromised, is at very serious risk. The cure for that risk usually is not difficult. It rests on two propositions: (1) Full disclosure to the client of all relevant facts and
circumstances, with an adequate record of the disclosure and of the client’s response to it; and (2) where the slightest doubt exists, insistence that the client receive advice from an independent professional. Both the individual lawyer involved and the reputation of lawyers generally will benefit as a result.

SECTION IV

Imputation of Conflicts Arising From An Individual Attorney’s Business Relationship With A Client

The preceding section of this Report reviewed various fact patterns involving individual attorney business transactions with clients and investments made by a firm as a whole. The focus in that section was on whether the business transaction creates a conflict for the individual attorney doing business with his or her client or, in the case of firm investments, whether the transaction results in a conflict for the firm as a whole. Here, we consider a distinct issue: Whether, where an individual lawyer does have a conflict, that conflict is imputed to all lawyers in his or her firm or, instead, is limited to the particular lawyer engaged in the transaction with the client.

The Code and the Rules address this issue through their respective provisions regarding imputation of conflicts; but ethics opinions and cases applying these imputation rules in the context of attorney-client business transactions are few and far between. Moreover, if the common law of fiduciary duty also addresses the issue – as one would assume that it does – we have not found the decisions applying that law to the business dealings of a lawyer/principal with his or her client/fiduciary.
A. Imputation Provisions

The Rules. The drafters of the Rules concluded that a Rule 1.7(b) conflict is so serious that it is imputed to all lawyers in the personally-conflicted attorney’s firm, regardless of the size or structure of the firm. Rule 1.10(a) states:

Rule 1.10 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

Comment [6] explains that the rule of imputed disqualification, including of conflicts under Rule 1.7(b), “can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.”

Thus, under Rule 1.10(a), if an individual attorney has an unconsentable or unconsented-to conflict under Rule 1.7(b), which precludes the lawyer from entering into an attorney-client relationship with an existing business associate or which precludes the lawyer from entering into a business relationship with a client, then that conflict is imputed to the lawyer’s entire firm; none of the firm’s attorneys may enter into an attorney-client relationship with the business associate of the individually-conflicted lawyer; nor may other lawyers in the firm enter into that business transaction with the firm client. The few published decisions on this issue consistently have imputed business-transaction-based Rule 1.7(b) conflicts to all attorneys in the individually-tainted attorney’s firm, absent valid client consent.

By contrast, a violation of Rule 1.8(a) is not expressly imputed to all members of a lawyer’s firm under Rule 1.10(a). This difference makes sense. The Rules do not
provide for imputation of conflicts under Rule 1.8(a) because that rule is not drafted so as to preclude representation of clients; rather, it starts with the premise that a lawyer (and his or her firm) is representing a client and determines instead whether the lawyer may enter into a business relationship with the represented client. Therefore, Rule 1.10(a), which prohibits a firm’s lawyers from “knowingly represent[ing] a client when any one of them practicing alone would be prohibited from doing so . . . ,” logically does not apply to Rule 1.8(a) conflicts. However, as a practical matter, if a transaction violates Rule 1.8(a), it often will violate Rule 1.7(b), resulting in a de facto rule of imputed disqualification.

The Code. The Code’s imputation provision appears at DR 5-105(D), which provides that “[i]f a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.” Thus, the Code imputes an individually-disqualified lawyer’s conflict to the lawyer’s entire firm under both the general rule regarding conflicts based on a lawyer’s financial interests (DR 5-101(A)), and the specific rule addressing differing interests in financial dealings in which the lawyer is advising the client (DR 5-104(A)).191

The Restatement. Section 123 is the Restatement’s imputation provision. That section provides that absent effective consent, “the restrictions upon a lawyer imposed by §§ 125-135 also restrict other affiliated lawyers” who are associated in a single firm, in-house legal department, legal services organization, or by sharing office facilities without taking adequate steps to protect the disclosure of confidential information. Thus, like Rule 1.10(a), which applies to conflicts arising from the lawyer’s personal
interests under Rule 1.7(b), Section 123 of the Restatement expressly imputes Section 125 conflicts\textsuperscript{192} to all attorneys with whom the lawyer is affiliated.

However, Comment g to Section 125 appears to dilute the rule of imputation to a rebuttable presumption:

The stated rule of the lawyer codes, followed in this Section and in § 123, is that personal-interest conflicts of a lawyer such as those described in this Section are imputed to affiliated lawyers. It may be appropriate not to impose any sanction if the personal-interest conflict was not known to the lawyer handling the matter and could not have been determined by use of a reasonable conflict-checking system. In addition, personal interests of a lawyer may be idiosyncratic or otherwise of such a kind that it is improbable that affiliated lawyers would be impaired in their representation of clients due to such interests. Consequently, one affiliated lawyer’s personal interests that produce personal prohibition disable an affiliated lawyer from representing the same client only when there is a significant risk that the interests of the first lawyer would materially and adversely impair the second lawyer’s representation. Whether such a risk exists requires examination of such facts as the magnitude of the interest of the personally prohibited lawyer, the extent to which pursuing the client’s interests would threaten that interest, and the other circumstances that might indicate the described significant risk.

(Emphasis added.)

Like Section 125 conflicts, conflicts under Section 126\textsuperscript{193} are imputed to all affiliated lawyers under Section 123, discussed above. Comment a to Section 126 states in relevant part:

The prohibition in this Section is imputed to affiliated lawyers pursuant to § 123. . . . In all jurisdictions, a lawyer who enters into a business transaction – other than a standard commercial transaction in which the lawyer does not render legal services – with a client of an affiliated lawyer without complying with this Section does so at the risk that the transaction is voidable by the client and subject to other appropriate remedies (see § 121, Comment f).
The Reporter’s Note to Comment b to Section 126 provides further guidance:

Section 123 extends the provisions of this Section to all lawyers affiliated with a lawyer who is personally rendering legal services to the client. The effect of this approach is to prohibit all lawyers associated in a practice from entering into business dealings with any firm clients, except as otherwise provided in the Section. Such imputation is required in jurisdictions following the [Code]. It is not required by the [Rules], see Rule 1.10(a), but some states, including New Jersey (Rule 1.10(a)), North Carolina (Rule 5.11(a)), and Oregon (Rule 5-105(D)), have adopted the position taken in this Section.¹⁹⁴

The complexities of the Restatement’s approach to imputation may be irrelevant, at least for the present. We have not discovered any opinion applying these provisions of the Restatement to resolve an imputation issue in any conflict situation, including one involving a lawyer’s business relationship with a client.

**Ethics 2000 Commission’s Proposed Changes.** The Ethics 2000 Commission is proposing amendments to Rule 1.10 and its comment that would exempt from imputation certain “personal interest conflicts”:

**Rule 1.10 Imputed Disqualification: General Rule**

(a) While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8, or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Proposed new Comment [6] explains the suggested exemption for personal interest conflicts:

The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will...
do no work on the case, the firm should not be disqualified. Likewise, if a firm that employs one lawyer represents a client in a matter adverse to a party represented by a firm employing the lawyer’s spouse, paragraph (a) ordinarily would not prohibit representation of the clients by the lawyers’ firms so long as neither spouse participates in the representation. See Rule 1.8(i). On the other hand, if an opposing party in a case were owned by a lawyer in the law firm and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

The commentary does not address attorney business dealings with or investments in clients. However, it suggests that whether an individual lawyer’s business relationship with a firm client creates a conflict that will be imputed to the firm as a whole will be a highly fact-specific question, dependent on whether the investing attorney’s personal interest would “materially limit[] the representation of the client by the remaining lawyers in the firm.”

**B. The Question Of Screening**

An unresolved question is whether a law firm can resolve a conflict arising out of an individual lawyer’s business relationship with a client, and which otherwise would be imputed to the firm as a whole, simply by screening the tainted lawyer from other attorneys in the firm.

Rule 1.10(a) does not recognize screening as an effective way to avoid otherwise imputable conflicts under Rule 1.7. Nevertheless, some courts, ethics committees, and commentators have held or recommended that screening may effectively limit imputation, at least when the conflict develops due to the movement of a tainted lawyer to a new firm. Section 124 of the Restatement endorses screening to remove imputation in specific situations, but not where the individual attorney’s conflict arises from a business relationship with the client.
Whether screening may be effective or not to limit imputation of transaction-based conflicts from one lawyer to the firm as a whole, the challenge for law firms is to detect such conflicts. Detection is critical in order to know (a) when screening is necessary (if screening will avoid imputation), or (b) when the conflict taints the entire firm (if screening is ineffective). Most conflict-detection systems in medium- and larger-sized law firms rely on a computerized database that catalogues the names of firm clients, their adversaries, and related parties, e.g., a client’s parent, wholly-owned subsidiary, or controlling principal. Typically, those databases do not also include the names of entities and individuals with whom individual firm attorneys are engaged in business transactions. It is easy to imagine the flood of data (and potential conflicts that would be generated in a conflicts search) if firms included all such information in their repositories of conflicts information. It is also likely that some lawyers would bristle at the prospect of sharing information about their personal investments with the firm as a whole. Yet, absent such procedures, imputed conflicts based on individual lawyers’ business dealings – particularly in larger firms – appear to be accidents waiting to happen.

SECTION V

CONCLUSIONS AND RECOMMENDATIONS

The lessons of our study are easy to state but sometimes difficult to implement. Careful attention is necessary. The precautions lawyers must take to protect their clients and, not incidentally, themselves will not succeed unless law offices institute procedures to insure that conflicts and other ethical and legal hazards are identified and addressed. That ordinarily will mean that a person or (preferably) persons within a law office – even small ones – will be responsible for reviewing all proposed arrangements
with clients, following formation of the attorney-client relationship, if those arrangements have financial consequences to the lawyer, client or both. This is not a task for amateurs. The responsible firm members must keep abreast of doctrinal developments in the areas of fiduciary duty and ethics. If they do not, they will not be able to identify danger zones at a time when correction and avoidance can be readily accomplished. A law firm must bring to its responsibilities in performing this task the same high level of competence and devotion that lawyers are expected to exhibit in performing traditional client work.

We begin with the irrefutable proposition that lawyers, as fiduciaries, must not take advantage of clients or tolerate a level of temptation (or conflict) that applicable ethics codes forbid. Sometimes conflict risks can be addressed with informed consent; at other times even consent will not be a cure. A law firm must be able to identify when consent is required and when it will be insufficient under the rules of its jurisdiction.

The first place where lawyers may err is in failing to identify a conflict when one exists. Avoiding that problem requires not only knowledgeable monitoring of the professional relationship, but also the ability to look at potential issues objectively, as though the firm were not itself a party to a financial event with a current client, but were rather an outsider advising the client on the wisdom of the proposal. This is not easy to do; neither is it impossible. It requires sound knowledge of the applicable doctrines, constant vigilance, and absolute integrity.

These same qualities will enable lawyers to avoid a second danger zone. That is the danger that having identified a need for client consent, the law firm then provides inadequate information to the client, or fails to advise consultation with separate
counsel where that is required, or fails to have a written record of the transaction or
written client consent where that is required. Indeed, even where a writing or separate
counsel (or the advice to get it) is not required, firms should seriously consider these
safeguards anyway because in the end they provide procedural protections that will
benefit the lawyer and the client.

There can be no defense for a lawyer who gives a client an inadequate
explanation of the terms of a particular transaction. Explanations for such a failure can
be many, of course. But all will likely prove to be inadequate. Ignorance of the
lawyer’s responsibility is not a defense. Neither is forgetfulness. And, certainly, a
decision to withhold complete information for fear that a client will opt out of a
proposal the lawyer wishes to consummate is an unacceptable justification; indeed, it is
contrary to the lawyer’s highest responsibility, which is to protect the client without
regard to the effect on the lawyer’s own interests.

If recent experience is any indication, we will see a greater volume of financial
matters in which lawyers participate with clients and in which interests of the two are
potentially inconsistent. This report identifies certain circumstances in which that can
happen, but the creativity of lawyers and clients will surely devise others. The
particular situation is of no moment to the required precautions. Those principles can
be summarized with remarkable brevity: Candor and complete information to the
client; advice to seek independent counsel and, if the stakes are high enough, insistence
on it; written memorialization of the terms of the transaction; and scrupulous fairness to
the client. But brief though this list is, implementation of its precepts demands constant
policing. That is an obligation lawyers owe their clients and also themselves.
APPENDIX A

RELEVANT RULES, PROPOSED RULES, AND RESTATEMENT SECTIONS

1. Model Code of Professional Responsibility

Canon 5: A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5-103(A) Avoiding Acquisition of Interest in Litigation.

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

(1) Acquire a lien granted by law to secure his fee or expenses.

DR 5-104 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into business transactions with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

DR 5-105(D) Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

If a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.
2. Model Rules of Professional Conduct

Rule 1.5 Fees

(a) A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

Rule 1.7 Conflict of Interest: General Rule

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

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.
Rule 1.8 Conflict of Interest: Prohibited Transactions

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

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

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

(3) the client consents in writing thereto.

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

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

... 

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

(1) acquire a lien granted by law to secure the lawyer’s fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

...

Rule 1.10 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of
them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

Rule 5.7 Provision Of Ancillary Services

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

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

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

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


Rule 1.7 Concurrent Conflict of Interest: General Rule

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

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s duties to another client or to a former client or by the lawyer’s own interests or duties to a third person.

(b) Notwithstanding the existence of a conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent in writing and
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation.

**Rule 1.8 Concurrent Conflict of Interest: Specific Rules**

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

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

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent in writing to the essential terms of the transaction and the lawyer’s role in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by Rule 1.6 . . .

(c) A lawyer shall not solicit any substantial gift from a client or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client.

**Rule 1.10 Imputed Disqualification: General Rule**

(a) While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or
reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8, or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

4. **Restatement of the Law Governing Lawyers**

   § 43 - Lawyer Liens

   (4) With respect to property neither in the lawyer’s possession nor recovered by the client through the lawyer’s efforts, the lawyer may obtain a security interest on property of a client only as provided by other law and consistent with §§ 18 [Client-Lawyer Contracts] and 126 [Business Transactions Between a Lawyer and a Client]. Acquisition of such a security interest is a business or financial transaction with a client within the meaning of § 126.

   § 123 Imputation of a Conflict of Interest to an Affiliated Lawyer

   Unless all affected clients consent to the representation under the limitations and conditions provided in § 122 or unless imputation hereunder is removed as provided in § 124, the restrictions upon a lawyer imposed by §§ 125-135 also restrict other lawyers who:

   (1) are associated with that lawyer in rendering legal services to others through a law partnership, professional corporation, sole proprietorship, or similar association;

   (2) are employed with that lawyer by an organization to render legal services either to that organization or to others to advance the interests or objectives of the organization; or

   (3) share office facilities without reasonably adequate measures to protect confidential client information so that it will not be available to other lawyers in the shared office.

   § 125 A Lawyer’s Personal Interest Affecting the Representation of a Client

   Unless the affected client consents to the representation under the limitations and conditions provided
in § 122, a lawyer may not represent a client if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s financial or other personal interests.

§ 126. Business Transactions Between a Lawyer and a Client

A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:

(1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer’s involvement in it;

(2) the terms and circumstances of the transaction are fair and reasonable to the client; and

(3) the client consents to the lawyer’s role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

§ 127 A Client Gift to a Lawyer

(1) A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object of the client’s generosity and the gift is not significantly disproportionate to those given other donees similarly related to the donor.

(2) A lawyer may not accept a gift from a client, including a testamentary gift, unless:

(a) the lawyer is a relative or other natural object of the client’s generosity;

(b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or

(c) the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice.
APPENDIX B

DRAFTING HISTORY OF MODEL RULE 1.8(a)

This summary of the drafting history of Model Rule 1.8(a) is based on materials from the Kutak Commission archives which were provided in 1998 by George Kuhlman, Ethics Counsel to the ABA Standing Committee on Ethics and Professional Responsibility, and Eileen Libby, Associate Ethics Counsel to the Standing Committee. The materials included copies of original reports, correspondence and transcripts, as well as excerpts from The Legislative History of the Model Rules of Professional Conduct, published by the ABA Center for Professional Responsibility.

DRAFTING HISTORY OF RULE 1.8(a)

August 10, 1979. Portion of letter from Chairman Kutak, presenting the Commission’s first complete pre-circulation draft of the proposed Rules. The proposed rule that became current Rule 1.8(a) was numbered then as Rule 1.12(a):

A lawyer shall not enter into a business, financial, or property transaction with a client unless the transaction is fair and equitable to the client.

This version of the draft rule, renumbered as Rule 1.9(a), appeared in the January 1980 Discussion Draft.

1980 Comments from State, Local and Specialty Bar Associations, and ABA Standing Committees. The Commission received the following comments on the Discussion Draft version of Rule 1.9(a):

The Indiana State Bar Association recommended revisions to the rule that (a) retained the “fair and equitable” standard, but (b) also incorporated the DR 5-104 requirement of consent “after full disclosure” for transactions where the lawyer and
client “have differing interests” and “the client expects the lawyer to exercise his professional judgment therein for the protection of the client.”

The ABA Standing Committee on Ethics and Professional Responsibility, after disagreeing with the overall format, composition and substance of the Discussion Draft, had no specific objection to Rule 1.9(a).

The National Organization of Bar Counsel recommended against adoption of Rule 1.9(a) on the basis that it duplicated existing DRs.

The ABA Standing Committee on Professional Discipline recommended the addition of the following language: “The lawyer has the burden to prove the fairness and equity of the transaction.”

The San Francisco Bar Association Legal Ethics Committee observed that (a) proposed Rule 1.9(a) did not have a precise analog under the California Rules of Professional Conduct, (b) some transactions that might be permitted under the proposed rule are absolutely prohibited under the California rule, and (c) the California rule “is far more explicit in terms of the degree of protection afforded clients if attorneys enter into business transactions with them, by prohibiting a member of the State Bar from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to a client unless specific prerequisites are fulfilled.”

The Cuyahoga County (Ohio) Bar Association had no objection to proposed Rule 1.9(a).

The Florida Bar “disapproved” proposed Rule 1.9(a) because the “fair and equitable” standard was vague and inferior to the standards set forth under DR 5-104.
The State Bar of California criticized the proposed rule for failing to include the “additional minimal client protections” set forth in the corresponding California rule, specifically, requirements that (a) “the terms of the transaction in which the attorney has an interest be fully disclosed in writing to the client in a manner which can reasonably be understood by the client,” (b) the client be given an opportunity to seek the advice of independent counsel, and (c) the client consent, orally or in writing, to the lawyer’s entry into a transaction with the client. The comments noted the California legal standard for attorneys in their dealings with clients – that “an attorney owes the highest duty of fidelity and good faith to the client” – and stated that the ethics rule should “promote adherence to this highest duty.”

May 1981 Proposed Final Draft of Rules. Rule 1.9(a) was renumbered as Rule 1.8(a), but otherwise read the same as it did in the January 1980 Discussion Draft, quoted above. The Final Draft included a “Legal Background” section that set forth several paragraphs of cases supporting the following propositions: (1) ”’There are no transactions which courts will scrutinize with more jealousy than dealings between attorneys and their clients.’” (Case citation omitted.) (2) ”’In dealings with a client, the lawyer must show that the relationship was not exploited, that the client was fully and fairly informed of all material facts and that full and fair price was given.” (3) ”’Discipline has been imposed where a client-lawyer transaction involved an element of fraud, overreaching or duress.” (4) ”’The lawyer bears the burden to explain questionable transactions.”

Transcript of January 26, 1982 Midyear Meeting of the House of Delegates. This transcript contains the debate on the format issue – whether to amend the old Code
or change to the Commission’s proposed Restatement format. There was no discussion of particular rules.

1982 Proposed Amendments to the Commission’s Draft Rules, from State, Local and Specialty Bar Associations, and ABA Standing Committees, for Consideration at the 1982 Annual Meeting. The Commission received comments from a number of groups, but only one related to Rule 1.8(a). The New York State Bar Association proposed an amendment that would track the requirements of DR 5-104 by prohibiting even a “fair and equitable” transaction if the client expects the lawyer to serve as the client’s lawyer in the deal, except after “full disclosure” to the client.

February 1983 Midyear Meeting of the House of Delegates. The House of Delegates discussed the proposed rule and a number of amendments during the February 7, 1983 afternoon session:

The Pennsylvania Bar Association proposed deleting the requirement that the transaction be “fair and equitable” and substituting the admonition that the client is advised to seek other counsel. Bill Allen, apparently speaking for the Commission, opposed the amendment on the bases that it effectively would remove a standard from the rule and would insulate the lawyer so long as the lawyer has recommended that the client seek advice from independent counsel. Bob Hetlage echoed Bill Allen’s position and further described the “fair and equitable” standard as stating the legal standard for a fiduciary’s conduct. The amendment was defeated.

The Florida Bar Association proposed to replace the “fair and equitable” standard for lawyer-client transactions with the standard set forth in DR 5-104: A lawyer “shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional
judgment therein for the protection of the client, unless the client has consented after full disclosure.” Bob Hetlage opposed the amendment on the ground that the DR 5-104 standard provides no standard at all because (a) it will apply to virtually every transaction between a lawyer and client, and (b) the fact that the client is entering into the transaction will be viewed as an implied consent. The amendment was defeated.

The Section of General Practice proposed changes (not specifically delineated) in the debate that “itemize with greater specificity the types of potentially prohibited transactions and provide what [the Section] think[s] are significantly tighter controls on when they will be permitted.” Bob Hetlage indicated that the Commission had no objection to these proposed changes and they were approved. It appears that these changes resulted in the substantial revision to the rule from the Discussion Draft version, set forth below.

The New York State Bar Association proposed an amendment that was not clearly explained in the debate, but which appeared to relate to the need for consent if the client reasonably expects the lawyer to serve as the client’s lawyer in the transaction. Bob Hetlage indicated that the Commission had no objection to the proposed change, though it viewed it as surplusage. The amendment was defeated.

Amendments approved at the February 1983 meeting (based on the materials I received, limited to the changes proposed by the Section of General Practice), resulted in substantially different language in the proposed Rule 1.8(a):

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

(1) the transaction and terms in [sic] which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to
the client in manner and terms which should have reasonably
been understood by the client;

(2) the client is given a reasonable opportunity to
seek the advice of independent counsel of the client’s choice
on the transaction; and

(3) the client consents in writing thereto.

The Commission’s Discussion accompanying these amendments to the proposed
rule stated:

With regard to paragraph (a), the amendment itemized
with greater specificity the types of potentially prohibited
transactions between a lawyer and a client. Also, the “fair
and equitable” standard of the proposed rule was replaced by
a stricter three-part standard detailing the circumstances
under which such transactions may be entered. In addition
to requiring that the terms of the transaction be “fair and
reasonable” to the client, the terms must be “fully disclosed
and transmitted in writing to the client” in a manner
understandable by the client. Further, the client must be
given a reasonable opportunity to seek the advice of
independent counsel of the client’s choice and must consent
to the transaction in writing.

March 11, 1983 Draft. The Commission made the following editorial changes:

Paragraph (a)(1) was changed from “in manner and terms which should have
reasonably been understood by the client” to “in a manner which can be reasonably
understood by the client.”

The words “of the client’s choice” modifying “independent counsel” were
deleted from paragraph (a)(2).

The phrase “on the transaction” was changed to “in the transaction” in paragraph
(a)(2).

May 1983 Meeting of the House of Delegates Committees on Drafting and Rules.
The word “in” in the first line of Rule 1.8(a)(1) was changed to “on”.

August 1983. The rule was adopted in its current form.
APPENDIX C

STATE VARIATIONS OF MODEL RULE 1.8(a)

This appendix identifies state variations from Model Rule 1.8(a). It does not identify discrepancies between the Comment to Model Rule 1.8(a) and the comments to the corresponding state rules.

Alabama

Alabama Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Alaska

Alaska Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Arizona

Arizona Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Arkansas

Arkansas Disciplinary Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

California

California Rule of Professional Conduct 3-300 is largely comparable to Model Rule 1.8(a), but also requires written notification to the client that independent counsel may be consulted.

Colorado

Colorado Rule of Professional Conduct 1.8(a) requires the lawyer to inform the client that use of independent counsel “may be advisable,” in addition to giving the client a reasonable chance to consult with independent counsel. The remainder of the rule is identical to the Model Rule.

Connecticut

Connecticut Rule of Professional Conduct 1.8(a) applies to business transactions with former as well as current clients. Connecticut attorneys must advise the current or former client in writing of the wisdom of seeking the advice of outside counsel. Connecticut added Rule 1.8(a)(4), which requires the lawyer to advise the client whether the attorney will provide legal services in connection with the transaction or is participating in the deal only as a business person and not in a representational capacity.
Delaware

Delaware Lawyers’ Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

District of Columbia

District of Columbia Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Florida

Florida Rule of Professional Conduct 4-1.8(a) makes clear that the rule does not apply to “a lien granted by law to secure a lawyer's fee or expenses.” The remainder of the rule is virtually identical to the Model Rule.

Georgia

DR 5-104(a) of the Georgia Canons of Ethics is virtually identical to DR 5-104(A) of the Model Code.

Hawaii

Hawaii Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Idaho

Idaho Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Illinois

Illinois. Illinois Rule of Professional Conduct 1.8(a) bears little resemblance to the Model Rule. It omits the substantive protection of the “fair and reasonable” standard, as well as the procedural protections of written disclosure of the transaction and its terms, the mandatory opportunity to seek the advice of independent counsel, and the requirement of written consent. Instead, the Illinois rule bars attorney-client business transactions if the lawyer knows or should know that he or she has conflicting interests with the client or if the client expects the lawyer to exercise his or her professional judgment for the protection of the client, absent the client's informed consent.

Indiana

Indiana Rule of Professional Conduct 1.8(a) is identical to the Model Rule.
Iowa

DR 5-104(a) of the Iowa Code of Professional Responsibility is virtually identical to DR 5-104(A) of the Model Code.

Kansas

Kansas Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Kentucky

Kentucky Rule of Professional Conduct SCR 3.130(1.8) is identical to the Model Rule.

Louisiana

Louisiana Rule of Professional Conduct 1.8(a) is identical to the Model Rule. However, Louisiana has included a preface to Rule 1.8, which states that “[a]s a general principle, all transactions between client and lawyer should be fair and reasonable to the client. Furthermore, a lawyer may not exploit his representation of a client or information relating to the representation to the client's disadvantage.”

Maine

Rule 3.4(f)(2) of the Maine Code of Professional Responsibility includes much of the language of Model Rule 1.8(a), but varies the organization of the rule. In addition, under the Maine rule, (a) disclosure of the transaction and its terms need not be in writing; (b) in addition to business transactions, the rule applies to acquisition of a property or pecuniary interest, but not a possessory or security interest, adverse to a client; and (c) the client is advised to seek independent counsel’s advice.

Maryland

Maryland Rule of Professional Conduct 1.8(a) varies significantly from the Model Rule. It applies only to “business, financial or property transaction[s]” with clients and not necessarily to a lawyer’s acquisition of an ownership, possessory, security or other pecuniary interest adverse to a client. Its substantive standard is that the transaction must be “fair and equitable,” rather than “fair and reasonable,” to the client. The Maryland rule adds the requirement that the client be advised to seek the advice of independent counsel, but it omits the requirement of signed client consent.

Massachusetts

Massachusetts Rule of Professional Conduct 1.8(a) is identical to the Model Rule.
Michigan

Michigan Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Minnesota

Minnesota Disciplinary Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Mississippi

Mississippi Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Missouri

Missouri Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Montana

Montana Rule of Professional Conduct adds a new subparagraph 1.8(a)(2), which addresses retaining liens. The remainder of the rule is virtually identical to the Model Rule.

Nebraska

DR 5-104(A) of the Nebraska Code of Professional Responsibility is virtually identical to DR 5-104(A) of the Model Code.

Nevada

Rule 158(a) of the Nevada Rules of Professional Conduct is identical to Model Rule 1.8(a).

New Hampshire

New Hampshire Rule of Professional Conduct 1.8(a) replaces the requirement that the transaction and terms must be fully disclosed and transmitted to the client in writing and in a manner that can be reasonably understood by the client, with a requirement that the client agree to the terms after consultation (although this change creates a redundancy with the consent language that appears in New Hampshire Rule 1.8(a)(3)). The remainder of the New Hampshire rule is identical to Model Rule 1.8(a).

New Jersey

Beyond affording the client a reasonable opportunity to seek the advice of outside counsel, New Jersey Disciplinary Rule of Professional Conduct 1.8(a) requires lawyers to advise clients of “the desirability” of seeking such independent guidance and
specifically refers to independent counsel “of the client’s choice.” The remainder of the rule is identical to the Model Rule.

**New Mexico**

New Mexico Rule of Professional Conduct 16-108(a) is identical to Model Rule 1.8(a).

**New York**

DR 5-104(A) of the New York Code of Professional Responsibility requires attorneys to advise clients to seek independent counsel’s advice, and to specify that the client must consent to both “the terms of the transaction and to the lawyer’s inherent conflict of interest in the transaction.” The remainder of the rule is identical to DR 5-104(A) of the Model Code.

**North Carolina**

North Carolina Rule of Professional Conduct 1.8(a) substantially revises the scope language of the Model Rule. The North Carolina rule applies to any business transaction with a client “in which the lawyer and the client have differing interests and wherein the client expects the lawyer to exercise his or her independent professional judgment for the protection of the client” rather than to all business transactions with clients and to all acquisitions of an ownership, possessory, security or other pecuniary interest adverse to the client. The North Carolina rule also states that all lawyer-client business transactions must be “fair to the client.” The remainder of the rule is virtually identical to the Model Rule.

**North Dakota**

North Dakota Rule of Professional Conduct 1.8(a) makes clear that it does not apply to “standard commercial transactions involving products or services that the client generally markets to others.” The remainder of the rule uses distinct language but largely tracks the provisions of the Model Rule.

**Ohio**

DR 5-14(A) of the Ohio Disciplinary Code of Professional Responsibility is identical to DR 5-104(A) of the Model Code.

**Oklahoma**

Oklahoma Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

**Oregon**

DR 5-104(A) of the Oregon Code of Professional Responsibility is identical to DR 5-104(A) of the Model Code.
Pennsylvania

Pennsylvania Disciplinary Rule of Professional Conduct 1.8(a) requires lawyers to advise clients to seek the advice of independent counsel. The remainder of the rule is identical to the Model Rule.

Rhode Island

Rhode Island Disciplinary Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

South Carolina

South Carolina Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

South Dakota

South Dakota Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Tennessee

DR 5-104(A) of the Tennessee Code of Professional Responsibility is virtually identical to DR 5-104(A) of the Model Code.

Texas

Texas Rule of Professional Conduct 1.8(a) applies only to business transactions with clients, and not also to the lawyer’s acquisition of an ownership, possessory, security or other pecuniary interest adverse to a client. The remainder of the Texas rule is identical to Model Rule 1.8(a).

Utah

Utah Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Vermont

Vermont Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Virginia

Virginia Rule of Professional Conduct 1.8(a) is identical to the Model Rule.
Washington

Washington Disciplinary Rule of Professional Conduct 1.8(a) is virtually identical to the Model Rule.

West Virginia

West Virginia Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Wisconsin

Wisconsin Disciplinary Rule of Professional Conduct 1.8(a) is identical to the Model Rule.

Wyoming

Wyoming Rule of Professional Conduct 1.8(a) is identical to the Model Rule.
APPENDIX D

ATTORNEYS’ LIABILITY ASSURANCE SOCIETY, INC.
MATERIALS
Investing in Clients—Some Issues to Consider

Brian J. Redding*

INTRODUCTION
If you are a typical ALAS Member Firm and you represent, or desire to represent, start-ups, you may be receiving pressure to accept stock in lieu of fees, or to invest in start-up clients. This has, in many ALAS Firms, caused considerable internal debate. This article will discuss some of the issues common to such debates.

In the September 1999 issue of the ALAS Journal we discussed (p. 1) liability and ethics concerns arising out of lawyers doing business with or investing in clients. We noted there that ALAS’ Loss Prevention Counsel had been receiving an increasing number of inquiries on this subject. If those inquiries were a "stream" last fall, they have become a torrent. The author received more calls on the subject during March and April 2000, than he received in the past 10 years.

In our September article, we indicated that we would be speaking again on this subject following the ABA Litigation Section's report on the same subject. That report, previously scheduled for publication late last year, has been delayed. So, too, has a similar report due from a task force of the ABA's Business Law Section. When those reports arrive, we'll comment on them. We have decided, however, that because of the number of ALAS firms that are actively considering implementing a change in their firm policies on investing in clients, so as to permit either lawyers or the firm to do so, we should comment further at this time, primarily to share with all ALAS Members a brief discussion of some of the issues raised with us by lawyers dealing with this process for their Firms.

DISCLAIMER
Before proceeding, however, we need to make a disclaimer. We are not technical securities lawyers, nor investment counselors. We raise some issues below for you to evaluate if your firm is considering a program to allow investment in

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I. See Brian J. Redding, Investing In or Doing Business with Clients: Some Thoughts on Lawyer Liability and Legal Ethics Issues, THE PROFESSIONAL LAWYER SYMPOSIUM ISSUE. 2000. at 113

clients. Most of these issues have been raised by ALAS lawyers with whom we've
recently discussed the subject of "investing in clients." We will, in most cases, not attempt to suggest how to resolve those issues. Solving those problems is the province of expert securities lawyers, and you need the counsel of such a lawyer if you plan to implement a program of investing in client securities.

**LIABILITY AND ETHICS CONCERNS**

Before discussing some of the "nitty-gritty" issues relating to implementation of a firm investment program, let's briefly review the bottom line on the ethics and liability issues we discussed in the September 1999 article (see that article for details). First, investing in clients raises issues under Rules 1.5, 1.7(b) and 1.8(a) of the ABA Model Rules of Professional Conduct (and their state counterparts). It is important that firms doing business with clients comply with those rules and that your Loss Prevention Partner or a member of your firm's ethics committee oversee the compliance effort.

Second, investing in clients can contribute to liability concerns. Such claims are not frequent. They can, however, contribute to the severity of a claim and have done so (see the September 1999 article at p. 2 for a more detailed discussion). While ALAS recognizes that, particularly in certain areas of the country, law firms are under pressure to invest in clients, we remain concerned that doing so will contribute to isolated instances of large verdicts and settlements. Remember, when a deal craters it is not necessarily your friendly client that will make the decision as to whether you'll be a defendant. It may be another investor, a party on the opposite side of the deal, a bankruptcy trustee, or your client's new CEO who makes that decision. Thus, some ALAS Members, in some parts of the country, may decide that, in light of these risks, they will exercise restraint and avoid the potential entanglement of investing in clients. For those firms that decide to do otherwise, we discuss below some of the issues they will have to confront.

**SHOULD YOU INVEST THROUGH THE FIRM OR CREATE AN INVESTMENT VEHICLE?**

Firms considering an investment program must make a fundamental decision. Should they invest in clients through the firm or should they do so through an investment vehicle, normally a partnership or LLC that is owned by partners of the law firm. A common predicate to making that decision is a decision on the frequency of investment contemplated by your firm. That is, do you intend to invest in a continuing, frequent, and systematic way or do you intend to invest in an infrequent, only-when-absolutely-necessary, way? If the latter, you may be able to invest through the firm. If you intend, however, to invest relatively frequently, some believe an investment vehicle is preferable. Some believe that frequent investments through the firm may, in some firms, distort the firm's capital structure in a way that creates logistical problems for the firm and incoming partners. There may be solutions to those problems (e.g., distrib-
ution or sale of stock), but they may be at odds with other investment or firm goals. On the other hand, if a firm investment vehicle is chosen, a number of problems need to be confronted.

FIRM INVESTMENT VEHICLES
Obviously, in choosing an investment vehicle the usual form of organization issues arise (e.g., partnership, limited partnership, LLC). We will not comment on those issues. There are, however, some basic securities law issues that Members may want to consider. For example, we know of firms that have been concerned about creating a separate investment vehicle because the firm has more than 100 partners and might be considered an investment company under the Investment Company Act of 1940. 15 U.S.C. §80a-l et seq. (2000). Most firms that have considered the issue believe that compliance with all of the requirements of the Investment Company Act would be burdensome to the firm. A partial answer to that may be suggested in petitions filed on behalf of two law-firm related investment vehicles for exemptions, pursuant to Sections 6(b) and 6(e) of the Investment Company Act, from the requirements of various sections of the Investment Company Act.

In addition to these authorities, we are informed that two well known non-ALAS firms have recently filed applications with the SEC for exemptions from the Investment Company Act of 1940 for their firm investment vehicle. Hopefully, the SEC will act on these petitions in the near future, affording additional insight into these problems and possible solutions to them.

How OFTEN SHOULD YOU CREATE AN INVESTMENT VEHICLE?
Today, most law firms have several changes in the constituency of their ownership each year. "Partners" come and go. That raises an issue as to how to determine when, and how long, a partner may participate in a firm-related investment vehicle. This question may take on increasing importance if your firm is relying on a letter ruling (to you or someone else) that the fund is exempt from Investment Company Act requirements because it is an "employees only" fund. Some firms create a new partnership or LLC each year. We know of one Silicon Valley firm that has been investing in clients for many years that histor-


ically created a new partnership each time a partner joined or left the firm. The
burden imposed by the frequency of partner changes has caused the firm to cease that practice, but in recent years they have created two investment vehicles each year. Thus, partners joining the Firm may typically participate in an investment vehicle within a few months of their arrival.

REGISTRATION AND ACCREDITED INVESTOR ISSUES
Presumably, when a law firm decides to implement a system to facilitate the purchase of stock in clients, particularly start-up clients, it will not want to force the client to register the stock. Often the client will be raising money through the sale of unregistered stock, e.g., through an offering arguably exempt as a private offering. The typical law-firm related investment vehicle can present a problem in this regard. While we are not securities lawyers, we understand that with a single use entity, the SEC frequently looks through the entity co the individual investors to see if the accredited investor test is met. This may require that each investor have a net worth of $1,000,000 or a per annum income of $200,000. Some firms have partners who have incomes below $200,000. Virtually all firms have associates that make less than $200,000. Many of those lawyers will have a net worth below $1,000,000. What, then, does a firm do to deal with this problem?
Some firms we have discussed this problem with have decided to keep the investment function within the firm, declining to create a separate investment vehicle, to avoid dealing with accredited investor problems. Others have simply decided to exclude as investors those lawyers who do not qualify as accredited investors. Their thinking is that only young partners will be excluded and that, after a period of time, those partners will be able to participate. This seems to us to be sensible, assuming that it is acceptable to the firm and its constituents.

ASSOCIATE FUNDS
Some firms that have, or are contemplating, a separate investment vehicle wish to allow associates to participate in some way in the investment activity of the firm. We are informed that some of these firms have dealt with the accredited investor problem by creating a "shadow fund." This fund is created by allocating a certain amount of money each year (paid by the firm) to a fund (owned by the firm) that invests exactly as the investment vehicle does (e.g., the budget might be 10 percent of the investment vehicle's budget). The profits from the fund are then used to pay special bonuses to associates. Some lawyers using this kind of arrangement have opined to us that, although the shadow fund's profits are income attributable to the firm, the bonuses are a business expense that essentially washes out those profits."

4. See Rule 501 (a) of Regulation D of the Securities Ac: of 1933. 17 C.P.R. 230.501 (aj
5. See Disclaimer, supra p. 125. since were not tax lawyers either.

SHOULD INDIVIDUAL LAWYERS INVEST?
A controversial issue that law firms considering an expanded investment program must deal with is whether individual lawyers should be allowed to invest in clients. From a pure loss prevention perspective, we prefer not to see individual investment. Why? It is simple. We believe it's better for all of a firm's partners to each have a $1,000 stake in 100 different investments than for individual partners to invest, say, $100,000 in their client. It is possible that a jury will believe a lawyer's judgment could not have been impaired because of an indirect $1,000 investment in a client. It is less likely that a jury will form that opinion if a direct investment of $1,000,000 is involved. Individual investing can also present fairness issues among partners, since some partners receive more opportunities to invest, while all will be affected by a malpractice suit.

If, contrary to our instincts, a firm decides to allow lawyers to invest in clients, we believe that the firm ought to require approval by someone (e.g., investment committee, or professional responsibility committee) prior to allowing a particular individual investment. Additionally, there ought to be a limit on the amount of such investments (e.g., $10,000. Above that, a separate level of approval ought to be required (e.g., the management committee). If the Firm allows individual investment, it should only be after heightened scrutiny of the company involved. That is, just as in investments by the firm, investing in a company by individual lawyers should require a higher degree of knowledge about the client's management, its honesty, and its competence than is required to pass the minimum threshold of the company's new business intake procedure. This heightened scrutiny ought to come from a neutral source, i.e., the investment committee) and not from the billing lawyer. Finally, the firm ought to prohibit individual lawyers from "soliciting" others in the firm to purchase stock from their clients. Some fear that excessive conduct by such a partner might make the partner, or the firm, a "seller" of the stock under §12 (2) of the Securities Act of 1933, 15 U.S.C. §771 (2) (2000).

THE VOLUNTARY FUND CONCEPT

There is an alternative to individual investments in clients that is available to firms who have individual partners who want to invest more than their normal share of the firm's investment partnership. Some firms have created two funds within their investment partnership. The first fund is sometimes mandatory, or could be a "regular" fund for regular participants who have a set amount withdrawn monthly (to make up the fund's total budget). The second fund is a voluntary fund into which partners may make additional voluntary contributions. The benefit of this procedure over individual investment by lawyers in specific clients is that the participant in the voluntary fund makes additional contributions to the fund as a whole, and is not investing heavily in a particular stock, e.g., the stock of her client. Obviously, the whole fund could be

...
process and heightened scrutiny of the client, its management (their honesty and competence) and their prospects for success.

CONCLUSION

As we noted, this article doesn't attempt to solve all the complex issues associated with investing in clients and is not an endorsement of investing in clients. Rather it raises issues that many ALAS Members are facing, or will face in the near future. Our goal here is merely to help firms starting this process to focus on the issues they'll have to resolve. In doing so, we believe it's critical that Member Firms attack the problem with a balanced study team. Of course, partners who represent start-ups and are familiar with the technology practice are important. So too are loss prevention/ethics lawyers, and litigators to bring real life perspective on the risks involved. Absolutely critical, in our view, is that you have a top-notch technical securities lawyer on your team. If you don't have one, you'll need to hire one.

Some Member Firms have already adopted a system for investing in clients. Others may not be in that position. We caution against changing your historical practice just because others are doing so. Indeed, we recently spoke with an ALAS Firm that has begun investing in clients, and frequently competes with Silicon Valley firms for representation of high-tech start-ups. That firm recently obtained several representations, in competition with Silicon Valley firms, because the ALAS Firm did not insist on receiving stock in connection with the representation, it is the author's view (or at least his fear) that several years down the road, after a portion of all the e-commerce start-ups have gone "belly-up," a number of law firms in this country will be facing lawyer liability suits by disappointed investors, vulture capitalists, and others. The defense of some of those suits may be made more difficult because of investments made by lawyers or law firms. Study the situation, and act with caution and prudence.

If you are still struggling with these issues, ALAS will try to help. On Friday, June 23, at the Annual General Meeting in Vancouver, ALAS will have a panel discussion on this topic that we hope, will assist those Members considering an investment program. In addition, our Fall 2000 Regional Loss Prevention Conferences will focus on this topic. In the meantime, (recognizing that we are not securities, tax or technology lawyers), if we can be of assistance, don't hesitate to contact ALAS' Loss Prevention Counsel.
APPENDIX E

SAMPLE FIRM POLICIES AND DISCLOSURE LANGUAGE

Mr. John Entrepreneur

Re: Proposed Business Venture Between YourCorp. and LawFirm, L.L.C.

Dear Mr. Entrepreneur:

We understand that you have at least tentatively concluded you would like _________, an associate/partner of our firm, to enter into a business venture with your company. As you are aware, we represent your corporation with regard to various business dealings. We do not express an opinion on the financial aspects of your proposal. We write to alert you to conflicts of interest that could develop between our law firm and your corporation if _________ becomes an investor in your company.

The rules of professional conduct governing lawyers preclude us from representing clients if the representation may be materially limited by our own interests (including the interests of any of our individual partners) or the interests of another client or some third party, without the written consent of the client, after a full disclosure of the material facts. The purpose of this letter is to set forth those facts as best they can now be anticipated, so that you can confirm your intentions regarding our representation. You may wish to consult with independent counsel regarding this important matter.

[Describe potential conflicts].

We would be glad to meet with you to discuss anything in this letter in more detail.

Very truly yours,

[Signature]

The undersigned, on behalf of YourCorp (the Corporation), consents to Law Firm, L.L.C. serving as counsel to the Corporation despite the fact that _________, a member of Law Firm, L.L.C., has entered into a business venture with the Corporation. On behalf of the Corporation, the undersigned states that he has read this letter, including in particular its description of actual or potential conflicts of interest as a result of _________’s investment in the Corporation, that the Corporation has had an opportunity to consult with independent counsel, and that the Corporation accepts and waives any conflicts arising out of _________’s business relationship with the Corporation.
Mr. John Entrepreneur

Re: Proposed Stock Interest of LawFirm, L.L.C., in YourCorp.

Dear John:

We understand that you have at least tentatively concluded you would like our firm to take an equity interest in your corporation. As you are aware, we represent your corporation with regard to various business dealings. We write to alert you to conflicts of interest that could develop between our law firm and your corporation if the firm acquires an equity stake in your company.

The rules of professional conduct governing lawyers preclude us from representing clients if the representation may be materially limited by our own interests (including the interests of any of our individual partners) or the interests of another client or some third party, without the written consent of the client, after a full disclosure of the material facts. The purpose of this letter is to set forth those facts as best they can now be anticipated, so that you can confirm your intentions regarding our representation. You may wish to consult with independent counsel regarding this important matter.

[Describe potential conflicts].

In the event that litigation arises, you understand that the possibility exists that as shareholders in YourCorp., members of our firm may be disqualified from representing your corporation due to the fact that members may be potential witnesses in that matter.

We would be glad to meet with you to discuss anything in this letter in more detail.

Very truly yours,

The undersigned, on behalf of YourCorp (the Corporation), consents to Law Firm, L.L.C. serving as counsel to the Corporation despite the fact that the Law Firm, L.L.C., has acquired an equity interest in the Corporation. On behalf of the
Corporation, the undersigned states that he has read this letter, including in particular its description of actual or potential conflicts of interest as a result of Law Firm L.L.C.’s investment in the Corporation, that the Corporation has had an opportunity to consult with independent counsel, and that the Corporation accepts and waives any conflicts arising out of Law Firm, L.L.C.’s business relationship with the Corporation.

DATED this _____ day of __________, 2000.

__________________________________________
John Entrepreneur, on behalf of
YourCorp
PERSONAL DEALINGS WITH CLIENTS

A Lawyer’s personal relationship with Firm clients is essentially a matter of individual discretion with respect to matters outside the ambit of professional representation. However, certain policies have been adopted which should guide the exercise of such discretion.

Lawyers should not engage in personal financial transactions or any business dealings with Firm clients or any employee of any client except those in which they engage in the ordinary course of business (e.g. accounts with an investment firm). See “Practice of Law, Outside Business Ventures, Directorships and Holding Corporate Office” and “Investments”.

...
PRACTICE OF LAW, OUTSIDE BUSINESS VENTURES,
DIRECTORSHIPS AND HOLDING CORPORATE OFFICE

It is the Policy of the Firm that lawyers devote their full business time to the practice of law as conducted by the Firm and avoid potential conflicts of interest with respect thereto. To this end, the Firm has established the following policy guidelines which apply to all lawyers unless an exception is made in writing by the Management Committee:

(a) No lawyer shall, directly or indirectly, have (i) any interest in, or participate in, the conduct of any business, other than an interest in securities in an amount not material to the control of such business, or (ii) any interest in a business which is in competition with a business conducted by any client of the Firm, other than an interest in securities which is not material.

(b) No lawyer shall be or become a director, officer or partner (other than through the acquisition of limited business, or (except for any such limited partnership interest) have any partnership relationship or profit sharing arrangement with any person with respect to a business.

(c) No lawyer shall purchase any security of any issuer in a distribution of securities as to which the Firm is providing legal representation in any capacity until the distribution, including the closing of any stabilization account, has been terminated.
INVESTMENTS

The prohibitions against trading in securities on the basis of material non-public information have received detailed scrutiny by the Securities and Exchange Commission and other administrative and judicial bodies. Lawyers are expected to be aware of these prohibitions and the interpretations and to abide by them. A violation of this policy will result in immediate dismissal and potential legal action.

If the Firm participates in the on-going representation of a client whose securities are publicly traded, purchases or sales of such securities by a Lawyer or immediate family members should be made only if such transactions are clearly permissible under existing law and will not lend themselves to any appearance of impropriety and after consultation with the Partner-in-Charge of that client. If in doubt the Lawyer shall consult with a member of the Management Committee. See “Conflicts of Interest”.

In addition, no Lawyer shall purchase any security of any issuer in a distribution of securities as to which the Firm is providing legal representation in any capacity until the distribution, including the closing of any stabilization account, has been terminated. For purposes of this section, a distribution should be deemed to have commenced if a potential issuer is seriously considering an offering of securities.
POLICY ON INVESTMENTS IN OR WITH CLIENTS

POLICY: Except as expressly permitted by this Policy, the Management Committee or its designee must expressly approve any (1) proposed investment by the Firm, or by any Firm attorney or staff member (whether full or part time, and including any relatives thereof living in the same household) (each, an “Individual Investor”) in a client, (2) any business relationship (including without limitation investments in client transactions) between the Firm or an Individual Investor and a client, or (3) the disposition by the Firm or an Individual Investor of an investment in a client. For purposes hereof, an “investment” includes any financial interest, direct or indirect, equity or creditor.

RATIONALE: Historically, for avoidance of conflict of interest and insider trading purposes, the Firm has discouraged investments in or business transactions with its clients but, with limited exceptions, has not prohibited such investments or transactions entirely. Based in part on the need to gain or maintain a competitive advantage for client work, to respond to client demands, to align the interests of the Firm with those of its clients, and to establish additional attorney and staff hiring and retention incentives, the Firm has decided, with certain exceptions, to eliminate that presumption and, at the same time, to subject investment proposals to rigorous and impartial scrutiny under a more clearly defined set of guidelines.

This Policy is an effort to balance loss prevention and the ethical constraints under which the Firm and each of its lawyers operates, and the entrepreneurial instincts, and business development and client retention desires of the Firm and its attorneys. The Policy prohibits only certain types of investments and transactions with clients, expressly permits certain types of investments to be undertaken without the need for prior review, and acknowledges that certain other types of investments and transactions may be reasonable if not desirable for one or more of the following reasons, and may present ethical and malpractice risks which are manageable. It acknowledges that the determination of reasonableness and risk level can only be made by a decision-maker who is knowledgeable about applicable ethics and lawyer liability risks, and who is without a direct interest in the investment or transaction. In recognition of the fact that investments and transactions can take any number of forms, and the circumstances of each proposal are unique, this Policy does not attempt to define and address all forms of investments and transactions; rather the Policy is designed to permit an independent and critical evaluation of each investment or transaction proposal against a set of guidelines and principles which are designed to ensure that the interests of the client are not compromised, that the Firm’s and individual lawyer’s independent professional judgment are not compromised, that the ethical and malpractice risks to the Firm are carefully managed, and that the decision of whether to permit the investment or transaction is based on sound business principles.

PERMITTED INVESTMENTS FOR WHICH APPROVAL IS NOT NECESSARY AND OTHER ARRANGEMENTS NOT PROHIBITED BY THIS POLICY:

1. Contingent fee arrangements with clients.
2. Investments existing and reported to the Management Committee on or before ________________.

3. Investments by Individual Investors in small businesses owned by members of the Individual Investor’s family that are or may become clients of the Firm; provided that such investments are disclosed in writing to the Management Committee.

4. Representation of family members in estate planning or similar matters in which the Individual Investor may have a prospective financial interest.

5. Acquisition or disposition of investments in publicly traded securities of clients for which the Firm is not, and has no reasonable expectation of, performing securities work.

6. Investments in funds of mutual fund companies for which the Firm is not, and has no reasonable expectation of, performing securities work.

**PROHIBITED INVESTMENTS AND RELATIONSHIPS:**

1. No investment by the Firm or an Individual Investor shall be made or permitted which would violate the Firm’s Insider Trading Policy.

2. Neither the Firm nor an Individual Investor shall lend money to or borrow money from a client, other than:

   A. Transactions which are expressly permitted by the Management Committee or its designee;

   B. Deferral or other compromise of fee collections in the ordinary course of the Firm’s business;

   C. Borrowings from client financial institutions in the ordinary course of the Firm’s business; or

   D. Maintenance of routine accounts and borrowing from client financial institutions in the ordinary course of such client’s business.

3. No investment shall be made by the Firm or any Individual Investor which, with or without the investments of others, could lead to a change in control of a client.

**NEW CLIENTS IN WHICH AN INDIVIDUAL INVESTOR HAS EXISTING INVESTMENT:**

The Firm will not attempt to maintain a record of all investments made by Individual Investors, but Individual Investors must remain alert, through examination of new and potential new client lists and otherwise, to the Firm’s undertaking work for a client,
person or entity in which they have an existing investment or with which they have an existing business relationship.

Where an Individual Investor becomes aware that the Firm has undertaken, or proposes to undertake, work for a person or entity in or with which, she, he or another investor has an investment or business relationship, the Individual Investor must promptly report the matter to the designee of the Management Committee or the responsible attorney for the client or proposed client.

When so notified, the Management Committee’s designee, in consultation with the responsible attorney and the Individual Investor, must consider whether (1) the investment or business relationship might give rise to the appearance of a conflict of interest presently or in the future, (2) it is appropriate to discontinue the work for the client or, alternatively, to require that the Individual Investor dispose of the interest in the client or terminate the business relationship, and (3) if it is determined that work for the client may proceed and the investment or business relationship retained, it is appropriate to notify the client of the investment, insulate the Individual Investor from the client’s work, periodically review the propriety and the risks of the investment or relationship, or take other protective actions.

The responsible attorney and the Individual Investor shall promptly implement all recommendations of the Management Committee’s designee (subject to review by the Management Committee) with respect to the rejection or discontinuance of the work for the client, the disposition or termination by the Individual Investor of the investment or business relationship, and other protective actions.

If it is determined that work for the client can proceed and the investment or business relationship retained, the Individual Investor should be advised in writing to consult with both the responsible attorney and the Management Committee’s designee before acquiring any additional investment, or disposing of an investment or terminating the business relationship, so as to minimize the risk of trading on the basis of inside information.

**APPROVAL GUIDELINES AND REQUIREMENTS:** The designee of the Management Committee shall consider the following guidelines and requirements in evaluating any proposal for an investment in or transaction with a client (which is not otherwise expressly permitted hereunder).

1. Whether the proponent of the investment or transaction has met the burden of establishing that this is an appropriate situation for the Firm or the Individual Investor to make or dispose of the investment, or enter into the transaction.

2. Whether the terms of the acquisition or disposition of the investment, or the transaction, are fair and reasonable to the client.

3. The terms of the acquisition or disposition of the investment or the transaction must be fully disclosed in writing to the client clearly and in a manner which otherwise satisfies ABA Model Rule 1.8 and its analogues and which has been
approved by either a member of the Firm’s Ethics Committee or the Loss Prevention Counsel (an “Approved Disclosure”). Among other matters, the Approved Disclosure must:

A. Must inform the client of its right to seek independent counsel on the proposed investment or transaction.

B. Must disclose the differing interests of the Firm or individual lawyer and the client which may result from the investment or transaction, including the potential consequences to the attorney-client relationship.

C. Explain the terms of the investment in easily understandable language.

D. Provide a context for the investment.

4. The client must have consented to the investment or transaction, and to the Firm’s future representation of the client in the light of the interest created by the investment or the transaction.

5. Whether the Firm’s representation of the client will be materially limited by the interests of the Firm or individual lawyer arising out of the investment or transaction.

6. Whether the client is honest, trustworthy, sophisticated and competent.

7. Whether any special precautions (e.g., work to be performed by other than the proponent; scope of work limited; size of investment limited; etc.) should be implemented.

8. Whether the staffing of the work is commensurate with the risk.

9. Where the proposed investment is stock in lieu of legal fees (especially if the Firm is acting as securities counsel to issuer or underwriter), the presumption shall be against the investment. In considering whether to permit such an investment, the Management Committee designee shall take into account, among other factors:

A. Whether the Firm is acting or intends to act as securities counsel for the issuer or underwriter;

B. In the case of stock received from a privately held company, the likelihood the Firm will be disqualified from later acting as the client’s or underwriter’s securities counsel in connection with a public offering;

C. The windfall profit potential and consequent subversion of the Firm’s or Individual Investor’s independence and objectivity;
D. Whether the stock will be “locked up” for a reasonable period after the offering, or redeemed prior to the offering.

10. Where the Firm is acting as securities counsel to an issuer or underwriter in connection with an initial public offering, whether the investment is in the original allotment or in aftermarket shares.

11. Whether, in the case of a proposed investment by an Individual Investor, the proponent should be required to indemnify the Firm for any liability incurred as a result of the investment.

12. Whether a proposed investment or transaction will impair or otherwise adversely affect the Firm’s malpractice coverage, and whether other insurance is available to protect the firm from liabilities arising out of the investment.

13. The extent to which the lack of scienter defense would be undercut by the investment or the transaction.

MANAGEMENT COMMITTEE DESIGNEES: The Management Committee’s designees under this Policy are the Managing Partner, the Firm’s Loss Prevention Counsel, and the Chair of the Business Department.

REMINDERS: On a quarterly basis, the Firm’s Loss Prevention Counsel shall circulate to all Individual Investors a reminder of this Policy, together with a list of clients for which the Firm has performed securities work during the previous 12 months.

EFFECTIVE DATE: The effective date of this Policy is ____________.
Taking Equity for Fees

[ALTERNATIVE PARAGRAPH FOR NON-STANDARD BILLING OF START-UP CLIENTS:] Although we generally charge for legal services based on our guideline hourly rates, for legal services provided to you prior to the closing of your initial equity financing, [describe alternative billing arrangement regarding cash fees].

[ADDITIONAL PARAGRAPHS WHERE FIRM PROPOSES TO TAKE EQUITY INTEREST IN CLIENT:] In addition to the payment in cash of the fees described in the preceding paragraphs, we have discussed with you our obtaining an equity interest in [Name of Client] as follows: [describe in clear and concise detail the securities to be obtained (e.g., the specific class of security and number of shares, or percentage of initial equity in the form of founder’s stock, or percentages of equity at the time of financing, either in founder’s stock or the security issued in financing)] (the “transaction”).

Under Rule 3-300 of the California Rules of Professional Conduct (“the Rules”), we can enter into this transaction with you only after obtaining your informed written consent and only after providing you with a reasonable opportunity to seek the advice of an attorney outside of our firm about whether you should agree to this transaction with us. In addition, under the Rules, any rights granted to us in this transaction will not be enforceable by us unless the terms of the transaction are reasonable and fair to you. In considering whether to consent to this transaction, you should evaluate whether this transaction is fair and reasonable to you.

Before consenting to this transaction, you should also understand the possible adverse consequences that can occur whenever attorneys enter into a transaction such as this one with a client. For example, clients often rely on their attorney’s advice regarding whether to enter into a business transaction like this one. Here, since we are entering into this transaction with you, we are not in a position to give you such advice. Also, attorneys often have confidential information of their clients which other parties typically doing business with those clients probably would not have. You should consider whether you have provided us with any confidential information that might somehow give us an unfair advantage over you regarding the transaction described above. If so, you should consider how that affects your willingness to enter into this transaction.

Another possible adverse consequence that might occur when attorneys enter into a business transaction such as this one with a client is that the attorney’s judgment regarding the client’s other legal affairs might be affected by the attorney’s business relationship with the client. As our client, you are entitled to expect that we will represent your interests fully and vigorously without regard to our participation in the transaction described above, and we intend to provide you with such objective, disinterested representation on your other legal matters in which we represent you. If you have any concern that our objectivity in representing you will be affected in any way by the transaction described above, then you should not enter into this transaction with us.
[If there are any other relevant circumstances and/or actual or reasonably foreseeable adverse consequences that the client could suffer as a result of doing this transaction, include specific description. For example, if the transaction involves issuing to the firm Series A Preferred Stock at the time of a financing, discuss conflict of interest in negotiating terms of the Series A Preferred Stock with investors.]

You are free, of course, to seek the advice of a lawyer of your choice other than an attorney at our firm, both regarding this transaction and whether you should give the consent we are seeking, and we encourage you to seek that advice.

If you have any concern that the terms of this transaction are not fair and reasonable to you, or that entering into the transaction might be unfair to you because you have given, or might give us, confidential information, or because the transaction might compromise the independence of our professional judgment, or it might interfere with our attorney-client relationship or otherwise affect our representation of you in any way, please raise your concerns with your independent counsel and with us at this time. Otherwise, we will rely on your signature below as evidencing your agreement and confirmation that our representation of you will not be affected adversely by entering into the transaction described above, that the transaction is fair and reasonable to you and that you are giving us your informed consent to enter into this transaction with you despite the potential for adverse consequences.
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