

Note: Where Rules were changed on the floor of the House or conforming amendments were necessary (Rules 1.2, 1.5, 1.6, 1.10, 1.17, 4.2 and 6.1), the Memos do not reflect these changes.

Preamble and Scope Reporter's Explanation of Changes

PREAMBLE:

[1] This addition reflects the resolution that was adopted by the ABA House of Delegates at its Annual Meeting in New York in August 2000.

[2] The reference to the lawyer as intermediary was deleted in accordance with the Commission's decision to delete Rule 2.2. The change in the last sentence is stylistic only and conforms the style of this sentence to that of the preceding sentences.

[3] This is an entirely new paragraph. It addresses the lawyer's role as third-party neutral, a role that is now addressed in Rules 1.12 and 2.4. In addition, it reminds lawyers that there are other rules that apply to lawyers when they are not active in the practice of law or to practicing lawyers when they are acting in a nonprofessional capacity.

[6] The additions regarding the lawyer's duty to promote improved access to justice reflect the resolution that was adopted by the ABA House of Delegates at its Annual Meeting in New York in August 2000. The addition regarding the lawyer's duty to further the public's understanding of and confidence in law reflects the resolution that was adopted by the ABA House of Delegates at the Midyear Meeting in Dallas in February 2000.

[9] The change from "upright" to "ethical" is stylistic. The remainder of the changes reflect the Commission's belief that the Rules do not always prescribe terms for resolving conflicts between a lawyer's competing responsibilities and interests, although they often do. The last sentence is an attempt to give lawyers further guidance in how the basic principles underlying the Rules may help resolve such conflicts.

SCOPE:

[14] The change in the third sentence is designed to clarify what is meant by "professional discretion."

[15] The addition describes material that was added to a number of Comments throughout the Rules. Given the growth in the law governing lawyers, the Commission believes that these references are helpful to practicing lawyers, particularly where the obligations under such law are more onerous than the obligations reflected in the Rules.

[16] The prior paragraph was split to better reflect the two separate thoughts in each paragraph.

[17] Under Rule 1.18 it is now clear that there are duties under these Rules that attach prior to the formation of the client-lawyer relationship.

[18] The Commission believes that the deleted sentence is an inaccurate statement of the responsibilities of government lawyers, who do not ordinarily represent "the public interest" at large. The Commission believes that the identity of a government client is more accurately described in the ABA Standing Committee on Ethics and Professional Responsibility's Formal Opinion 97-405, which relies on the reasonable understandings of the lawyer and responsible government officials. The Commission intends to incorporate the principles underlying Opinion 97-405 in revisions to Comment [6] to Rule 1.13.

[20] These changes reflect the decisions of courts on the relationship between these Rules and causes of action against a lawyer, including the admissibility of evidence of violation of a Rule in appropriate cases.

~~[19]~~ and ~~[20]~~ These paragraphs were deleted because they merely repeat what is stated elsewhere in the Rules, primarily in the Comment to Rule 1.6.

[21] This material was deleted because the research notes have been superseded by the Legal Background sections of the Annotated Model Rules of Professional Conduct.

Model Rule 1.0 Reporter's Explanation of Changes

TEXT:

The Commission recommends removing the Terminology section from the introductory sections of the Rules and putting it in a new Rule 1.0. The purpose of this change is to give the defined terms greater prominence and to permit the use of Comments to further explicate some of the provisions.

1. Delete "consult" or "consultation"

The Commission recommends deletion of the term "consent after consultation" in favor of "informed consent," which is defined in paragraph (e). This change is being made throughout the Rules. No change in substance is intended.

2. Paragraph (b): "Confirmed in writing"

The Commission has proposed requiring a lawyer to obtain the informed consent of a client or other person, "confirmed in writing," in some circumstances. See, e.g., Rule 1.7. The term "writing" is defined in paragraph (n).

3. Paragraph (c): "Firm" or "law firm"

These changes conform the definition to the changes made in the Comment to Rule 1.10. The Commission is also recommending that the material presently in the Rule 1.10 Comment be moved to the Comment under this Rule. See Comments [2] - [4]. The phrase "including the

government" has been added to Comment [3] to clarify that legal departments of government entities are included within the definition of "firm." The reference to "other association authorized to practice law" was added to encompass lawyers practicing in limited liability entities. No change in substance is intended.

4. Paragraph (d): Clarify that "fraud" refers to conduct characterized as fraudulent under other applicable law

The present definition is ambiguous because it does not clearly state whether, in addition to the intent to deceive, the conduct must be fraudulent under applicable substantive or procedural law. In other words, it is possible that conduct might be considered "fraudulent" merely because it involves an intention to deceive, even if it does not violate any other law. The Commission recommends clarifying that the conduct must be fraudulent under applicable substantive or procedural law.

5. Paragraph (e): "Informed consent"

The Commission recommends that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent." The Commission believes that "consultation" is a term that is not well understood and does not sufficiently indicate the extent to which clients must be given adequate information and explanation in order to make reasonably informed decisions. The term "informed consent," which is familiar from its use in other contexts, is more likely to convey to lawyers what is required under the Rules. No change in substance is intended.

6. Paragraph (g): "Partner": Added reference to "member of an association authorized to practice law"

As with the change to paragraph (c), this reference was added to encompass lawyers practicing in limited liability entities.

7. Paragraph (k): "Screened"

The current Model Rules do not impute conflicts of interest in certain situations when the personally disqualified lawyer is screened from any participation in the matter. See Rules 1.11(b) (former government lawyers) and 1.12(c)(1) (former judges). The Commission is proposing similar treatment of other situations involving a conflict of interest on the part of one lawyer in a firm. See Rules 1.10(c) (lateral lawyers), 1.12(c)(1) (former third-party neutrals) and 1.18(d)(1) (discussions with prospective clients). The Commission is recommending that the requirements of an effective screen be set forth in this paragraph and in the accompanying Comments.

8. Paragraph (m): "Tribunal"

This term was not previously defined. The Commission recommends including a definition and including not only courts but also binding arbitration and legislative bodies, administrative agencies or other bodies acting in an adjudicative capacity.

9. Paragraph (n): "Writing" or "written"

Given the Commission's recommendation that writings be required in more circumstances, it also recommends that the term be defined and that the definition include tangible or electronic records. With respect to electronic records, the paragraph provides a definition of "signed" that includes methods intended as the equivalent of a traditional signature. The electronic signature provisions are modeled on the Uniform Electronic Transactions Act.

COMMENT:

[1] This new Comment was added to clarify that if it is not feasible to obtain or transmit a writing at the time a person gives informed consent, a lawyer may undertake or continue representation based on the oral informed consent, so long as the writing is obtained or transmitted within a reasonable time thereafter.

[2] This paragraph was taken from the Comment to Rule 1.10. It is unchanged, except for the addition of a reference to paragraph (c).

[3] This paragraph was taken from the Comment to Rule 1.10. The only change is stylistic, and no substantive change is intended.

[4] This paragraph was taken from the Comment to Rule 1.10. The Commission concluded that the current Comment is confusing. The revision is intended to clarify that organizational structure will determine whether the entire organization or different components will constitute a firm or firms for purposes of these Rules.

[5] Under applicable substantive law, "fraud" may not be actionable unless someone relied on a misrepresentation or failure to inform and consequently suffered damages. This paragraph makes it clear that reliance is not required for purposes of the disciplinary rules, which focus entirely on the nature of the conduct in question.

[6] This new Comment provides cross-references to Rules requiring the lawyer to obtain the informed consent of the client or another person within the meaning of this Rule. It also explains the requirements of lawyer communication under the Rule.

[7] This new Comment explains what is required in order to constitute a manifestation of consent by the client.

[8] - [10] These new Comments provide cross-references to Rules that provide for screening and explain in more detail what measures may be adequate to assure an effective screen.

TEXT:

The Commission is not recommending any change to the text of the Rule.

COMMENT:

[5] The Commission recommends the addition of a sentence indicating that a Rule 1.2(c) agreement to limit the scope of a representation will limit the scope of the matters for which the lawyer is responsible. Given the increase in the number of occasions in which lawyers and clients agree to a limited representation, the Commission thought it important to call attention to the relationship between Rules 1.1 and 1.2(c). No change in substance is intended.

A minor change was made to make explicit that the duty to be prepared and thorough varies with the complexity of the matter as well as what is at stake. No change in substance is intended.

[6] The changes in the first sentence are intended to identify three distinct aspects of continuing education that are needed to maintain the knowledge and skill requisite for the competent representation of clients. The second sentence has been deleted because it is a precatory aspiration rather than a specification of conduct thought necessary for the competent representation of a client. No change in substance is intended.

Model Rule 1.2 Reporter's Explanation of Changes

TEXT:

1. Modify caption

The caption has been amended to more accurately describe the subjects addressed by the Rule.

2. Paragraph (a): Move "subject to paragraphs (c) and (d)" to beginning of paragraph (a)

The phrase "subject to paragraphs (c) and (d)" has been moved to clarify that all of the actions a lawyer may take pursuant to paragraph (a) are properly subject to the restrictions of paragraph (d) and some of them may be subject to the limitation in paragraph (c). In the current Rule, the limitations of paragraphs (c) and (d) only apply to the lawyer's obligation to abide by the client's decisions concerning the representation.

3. Paragraph (a): Modify to require consultation about means "as required by Rule1.4"

The Commission recommends the addition of a cross-reference to Rule 1.4, which requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." The Commission believes that the current formulation is flawed because it might be read to always require consultation before the lawyer takes action. These changes also reflect the Commission's decision that the lawyer's duty to communicate with the client should be addressed in Rule 1.4 rather than in Rule 1.2.

4. Paragraph (a): Add sentence acknowledging lawyer's implied authority to take action to carry out representation

The Commission believes that current paragraph (a) is flawed because the reference to the lawyer's duty to consult about means can be read to imply that the lawyer always must consult in order to acquire authority to act for the client. The Commission has added a sentence to clarify that "A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation" and has added a new Comment [2] that addresses the resolution of disagreements with clients about the means to be used to accomplish the client's objectives. The new sentence in paragraph (a) parallels the reference in Rule 1.6(a) to the lawyer's implied authority to reveal information relating to the representation. The scope of the lawyer's implied authority is to be determined by reference to the law of agency. The Commission believes that this formulation strikes the right balance between respect for the lawyer's expertise and the preservation of the client's autonomy by allowing the lawyer to exercise professional discretion on behalf of the client, subject to consultation with the client as required by Rule 1.4(a)(2), but leaving open the possibility that a client might revoke such implied authority.

5. Paragraph (a): No general duty to abide by client instructions

Other than acknowledging the power of the client to revoke a lawyer's implied authority, the Commission has not attempted to specify the lawyer's duties when the lawyer and client disagree about the means to be used to accomplish the client's objectives. As explained in Comment [2], the Commission believes that disagreements between a lawyer and client about means must be worked out by the lawyer and client within a framework defined by the law of agency, the right of the client to discharge the lawyer and the right of the lawyer to withdraw from the representation if the lawyer has a fundamental disagreement with the client.

6. Paragraph (a): Replace "whether to accept an offer of settlement" with "whether to settle"

The reference in the current Rule to "accept an offer of settlement" is under-inclusive because it does not include making a settlement offer.

7. Paragraph (c): Permitting "reasonable" limitations on the "scope" of a lawyer's representation

The Commission recommends that paragraph (c) be modified to more clearly permit, but also more specifically regulate, agreements by which a lawyer limits the scope of the representation to be provided to a client. Although lawyers enter into such agreements in a variety of practice settings, this proposal in part is intended to provide a framework within which

lawyers may expand access to legal services by providing limited but nonetheless valuable legal service to low or moderate-income persons who otherwise would be unable to obtain counsel.

a. Replace "objectives of the representation" with "scope of the representation"

The Commission has replaced the current reference to limiting the "objectives of the representation" with limiting the "scope of the representation." Only the client can limit the client's objectives. As indicated in Comment [6], the scope of a representation may be limited either by limiting the subject matter for which the lawyer will assume responsibility or the means the lawyer will employ.

b. Add requirement that limitation be "reasonable under the circumstances"

Unlike the current Rule, proposed paragraph (c) specifically precludes a limited representation that would not be "reasonable under the circumstances." Comment [7] discusses this limitation. In cases in which the limitation is reasonable, the client must give informed consent as defined in Rule 1.0(e). Because a useful limited representation may be provided over the telephone or in other situations in which obtaining a written consent would not be feasible, the proposal does not require that the client's informed consent be confirmed in writing. Comment [8], however, reminds lawyers who are charging a fee for a limited representation that a specification of the scope of the representation will normally be a necessary part of the lawyer's written communication with the client pursuant to Rule 1.5 (b).

c. Replace "consents after consultation" with "gives informed consent"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No substantive change is intended.

8. Delete paragraph (e)

The Commission recommends that the substance of paragraph (e) be placed in a new paragraph (a)(5) in Rule 1.4. Comment [14] will serve as a cross-reference to Rule 1.4. The change is consistent with the Commission's recommendation that the lawyer's duty to communicate with the client be addressed in Rule 1.4 with appropriate cross-references in the Comment to Rule 1.2.

COMMENT:

Caption The current caption does not accurately describe Comments [1] - [3], which relate to the allocation of decision-making authority between lawyer and client.

[1] Current Comment [1] has been modified to reinforce the three main points in paragraph (a) and to provide appropriate cross-references to Rule 1.4(a)(1) and (a)(2). The second to the last sentence in current Comment [1] has been incorporated into Comment [2].

[2] Comment [2] is new and addresses the situation in which lawyer and client disagree about the means to be used to accomplish the client's objectives. The Comment explains why Rule 1.2 leaves such disagreements to be resolved by the lawyer and client with reference to the law of agency, the right of the client to discharge the lawyer and the right of the lawyer to withdraw in the event of a fundamental disagreement with the client.

[3] Comment [3] is new and recognizes the legitimacy of the lawyer's reliance on advance authorization from the client. It also specifies that an advance authorization can be revoked by the client and that such an authorization will not be considered effective if there has been a material change in circumstances.

Caption The caption has been modified to reflect the change to paragraph (c).

[6] Paralleling changes to paragraph (c), current Comment [4] has been modified to explain that a client's decision to seek limited objectives may be relevant to determining the reasonableness of a limitation on the scope of the representation under the circumstances. Cost has been added as a factor that might justify limitation.

[7] This new Comment explains the requirement in paragraph (c) that a limitation on the scope of a representation must be reasonable under the circumstances. It also explains the relationship between a limitation on the scope of a representation and the lawyer's duty of competence under Rule 1.1.

[8] This new Comment alerts the lawyer who is charging a fee for a limited representation that a specification of the scope of the representation will normally be a necessary part of the lawyer's written communication with the client pursuant to Rule 1.5(b).

[9] The Commission has modified current Comment [5] to serve as a general reminder that all agreements between lawyers and their clients must conform with the Rules of Professional Conduct. No change in substance is intended.

[10] The Commission has made minor editorial changes to current Comment [6]. No change in substance is intended.

[11] The Commission has added language to current Comment [7] to provide more guidance to lawyers about what they must do to avoid assisting a client to commit a crime or fraud. Also added is a cross-reference to Rule 4.1, which specifies a lawyer's duties in circumstances in which remaining silent will assist a client to commit a crime or fraud. No change in substance is intended.

[13] Current Comment [9] has been modified to eliminate the ambiguous reference to a "sham" transaction and to replace "should" with "must." This provides a more precise example of a situation in which a lawyer will violate Rule 1.2(d) even though the defrauded person is not a party to the transaction.

[14] New Comment [14] has been added to provide a cross-reference to Rule 1.4(a)(5), which is substantively identical to deleted paragraph 1.2(e).

Model Rule 1.3 Reporter's Explanation of Changes

TEXT:

The Commission is not recommending any change to the text of the Rule.

COMMENT:

[1] Several changes have been made to Comment [1] to clarify the lawyer's authority and duty to take certain actions on behalf of the client. No change in substance is intended.

[1] and [3] New material has been added to comments [1] and [3] to provide some support for the bar's civility initiatives. No change in substance is intended.

[2] This new Comment contains the substance of the last sentence in current Comment [1], with the reference to "should" being replaced with "must" because Rule 1.1 requires that a lawyer provide competent representation. No change in substance is intended.

[4] Current Comment [3] has been modified to sharpen its discussion of a lawyer's responsibilities with respect to taking an appeal from an adverse decision. No change in substance is intended.

[5] This new Comment has been added to alert sole practitioners to the need to have a plan in place to prevent client matters from being neglected in the event of the sole practitioner's death or disability. It also calls attention to the recommendation of the Senior Lawyers Division approved by the House of Delegates in 1997 that "urges state, local and territorial jurisdictions, that do not now have programs in place, to address the issue of the death or disability of lawyers and to develop and implement through court rule or other appropriate means effective procedures for the protection of clients' interests and property and the ethical closure or disposition of the practices." It is also consistent with Formal Ethics Opinion 92-369.

Model Rule 1.4 Reporter's Explanation of Changes

TEXT:

1. Paragraph (a): Clarify lawyer's duty to communicate with client

Two aspects of the lawyer's duty to communicate with the client were previously contained in Rule 1.2. The Commission is recommending that all rules imposing a general duty to communicate with a client be located in Rule 1.4. To clarify the lawyer's important duties to communicate with a client, the Commission has modified paragraph (a) to specifically identify five different aspects of the duty to communicate.

2. Paragraph (a)(1): Add duty to communicate about decisions that require client consent

Paragraph (a)(1) is new and addresses the lawyer's duty to communicate with the client about decisions that require the client's consent. To the extent that current Rule 1.2(a) and paragraph (b) of this Rule implicitly require such communication, no change in substance is intended.

3. Paragraph (a)(2): Add duty to consult about means to accomplish client's objectives

Paragraph (a)(2) is taken from Model Rule 1.2(a), which now contains a textual cross-reference to this Rule. The word "reasonably" has been added to preclude a reading of the Rule that would always require consultation in advance of the lawyer taking any action on behalf of the client, even when such action is impliedly authorized under Rule 1.2(a). The Commission believes that lawyers have commonly understood current Rule 1.2(a) to require only reasonable consultation; therefore, no change in substance is intended.

4. Paragraph (a)(3): Relocate duty to keep client reasonably informed about status of matter

Paragraph (a)(3) is the same as the first half of current Rule 1.4(a). No change in substance is intended.

5. Paragraph (a)(4): Relocate duty to comply with reasonable requests for information

Paragraph (a)(4) is the same as the second half of current Rule 1.4(a). No change in substance is intended.

6. Paragraph (a)(5): Add duty to consult with the client about limitations on the lawyer's conduct

Paragraph (a)(5) contains the substance of current Rule 1.2(e). The Commission deleted Rule 1.2(e) and added paragraph (a)(5) to Rule 1.4 so that all rules imposing general duties to communicate with a client will be located in Rule 1.4. No change in substance is intended.

COMMENT:

[1] This new Comment describes in very general terms the reason for the various duties in Rule 1.4.

Caption A new caption, "Communicating with Client," has been added to distinguish the issue discussed in Comments [2] through [4] - when the lawyer must communicate with the client - from the subsequent discussion in Comments [5] and [6] about the adequacy of the information provided to the client.

[2] This new Comment refers to decisions where the client's consent is required by the Rules and explains the application of paragraph (a)(1) in such circumstances. The Comment also explains that prior communications with the client or a grant of authority by the client may make it unnecessary for the lawyer to communicate with the client prior to taking an action that requires client consent.

[3] This new Comment explains the paragraph (a)(2) duty to reasonably consult with the client about the means used to accomplish the client's objectives. The key issue is whether consultation is required before or after the lawyer takes action on behalf of the client. To call attention to the difference between the duty to reasonably consult about means and the duty in paragraph (a)(3) to keep the client reasonably informed about the status of the matter, the last sentence provides an example of the latter duty.

[4] This new Comment discusses the paragraph (a)(4) requirement that a lawyer promptly reply to reasonable requests for information. The Commission thought that emphasis should be given to promptly returning or at least acknowledging receipt of phone calls.

Caption The new caption "Explaining Matters" alerts lawyers that Comments [5] and [6] relate to the adequacy of the information provided to the client.

[5] This Comment includes points made in current Comments [1] and [2]. The deleted text relates to matters now discussed in Comment [2]. Language has been added to alert lawyers to keep the client advised about the cost implications of tactical decisions made by the lawyer. The final sentence alerts lawyers that in some cases they will be required to secure the client's informed consent, as defined in Rule 1.0(e).

[6] This Comment is the same as current Comment [3], except that the last sentence has been deleted because its point is made in proposed Comment [3].

[7] This Comment is the same as current Comment [4] except that the third sentence has been broadened to more comprehensively alert lawyers that decisions to withhold information are subject to the lawyer's duty of loyalty.

Model Rule 1.5
Reporter's Explanation of Changes

TEXT:

1. Paragraph (a): Substitute Model Code standard

The current Rule requires that a lawyer's fee be reasonable, but it does not state a corollary prohibition of a fee that is larger than reasonable. The omission thus makes it harder

than necessary to impose discipline for excessive fees. The Commission substituted the language of the Model Code prohibition for the current first sentence of (a). No change in substance is intended.

2. Paragraph (a): Add explicit prohibition on unreasonable expenses

Although ethics committee opinions have assumed that lawyers are prohibited from charging unreasonable expenses, as well as unreasonable fees, the current Rule does not say so explicitly. The Commission added language clarifying the lawyer's obligation, in order both to better educate lawyers as to their duties and to facilitate the imposition of discipline, where applicable. No change in substance is intended.

3. Paragraph (b): Require lawyers to communicate fees, scope and expenses in writing

Few issues between lawyer and client produce more misunderstandings and disputes than the fee due the lawyer. The current Rule says that the lawyer must communicate the basis or rate of the fee, preferably in writing. The Commission believes that the time has come to minimize misunderstandings by requiring the notice to be in writing, except where the lawyer will charge a regularly represented client on the same basis or rate or where the fee is de minimis.

4. Paragraph (b): Add scope of representation and expenses to written notice

As a practical matter, a statement about fees is rarely complete without a corresponding statement of what the lawyer is expected to do for the fee. Further, the Commission believes that issues about expenses are often at least as controversial as those about fees. Indeed, clients often do not distinguish between fees and expenses. Thus, proposed paragraph (b) includes statements about the scope of the representation and client responsibility for expenses as well as fees in the requirement of a written agreement. Changes in the basis or rate of the fee or expenses must also be communicated in writing but not changes in the scope of the representation, which may change frequently over the course of the representation.

5. Paragraph (b): Addition of de minimis exception to writing requirement

The Commission is recommending that there be a de minimis exception to the writing requirement. Also, providing such an exception makes clear that there is no requirement that the scope of the representation be communicated in writing when there will be no fee at all, as is the case not only in pro bono matters but also in matters where the lawyer is salaried, e.g., an in-house or government lawyer. The Commission recommends putting an amount in brackets in an acknowledgment that the size of the de minimis exception is a matter that is likely to vary among the states. The Commission is recommending a fairly low amount for the exception on the ground that it is middle and lower income clients who are most in need of the protection offered by this requirement.

6. Paragraph (c): Clarify that contingent fee agreement must be signed by client

The Commission is proposing a number of revisions to the Rules that would require the lawyer to document certain communications or agreements in writing. The Commission believes that it should be clear in all instances what type of writing is required, particularly whether the writing needs to be signed by the client. Certain terms are defined in Rule 1.0, including "writing." Because there are only a few instances in which a client's signature is required, the Commission is recommending that those instances be clearly stated in the text of the Rule. Thus, while the Commission believes that paragraph (c) already requires that a contingent fee agreement be signed by the client, this requirement is now being made explicit. No change in substance is intended.

7. Paragraph (c): Additional notification regarding expenses in contingent fee agreements

Unlike the Model Code, the Model Rules permit lawyers to advance litigation expenses, with repayment contingent on the client prevailing. Nevertheless, lawyers are not required to make such repayment contingent. The Commission believes that clients may be misled without a clear statement, in the contingent fee agreement, that there are expenses for which the client will be liable whether or not the client is the prevailing party.

8. Paragraph (e): Division of fees

The Commission recommends retaining the current text of this Rule, with the sole exception that the client must agree, and the agreement must be confirmed in writing, to the participation of each lawyer, including the share of the fee that each lawyer will receive.

COMMENT:

[1] This Comment is entirely new. It introduces paragraph (a) by stating that lawyers must charge both fees and expenses that are reasonable under the circumstances. It explains that the factors set forth in paragraphs (a)(1) through (8) are not exclusive and that not all factors will be relevant in each instance. It further states the method by which lawyers may properly charge for services performed or incurred in-house, along the lines suggested in ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-379 (Billing for Professional Fees, Disbursements and Other Expenses).

[2] This Comment has been revised to refer to the new requirements set forth in paragraph (b), including a statement about the nature of the required writing. The last sentence clarifies that when the service provided is brief, prompt submission of a written bill is sufficient to meet the requirements of this Rule. The Commission is proposing to delete existing material in order to streamline the Comment in light of the material that has been added.

[3] This Comment is entirely new. It confirms that contingent fees, like other fees, are subject to the reasonableness standard of paragraph (a), including consideration of all of the factors that are relevant under the circumstances. It further refers to applicable law, which may impose limitations on contingent fees or require a lawyer to offer clients an alternative basis for the fee. (This is a revision of the last sentence in current Comment [3], revised to include an

additional reference to ceilings on the percentage allowable under law.) It also refers to applicable law that may govern situations other than a contingent fee.

[4] This amendment to current Comment [2] eliminates the vague "special scrutiny" language and substitutes a cross-reference to the Rule 1.8(a) requirements for business transactions with a client when a fee is to be paid in property instead of money. Rule 1.8(a) treatment is not stated in absolute terms, but the possibility is strongly suggested. The recent ABA Business Law Section report on alternative billing practices agreed that Rule 1.8(a) treatment should be given to fees paid in stock or property.

[5] The Commission proposes to delete the next to the last sentence of current Comment [3] because the statement is merely advisory, given that the requirement of offering an alternative type of fee is not stated or implied in any textual provision. If the contingent fee is reasonable, then lawyers need not offer an alternative fee nor need they inform clients that other lawyers might offer an alternative.

[6] A number of ethics committee opinions have interpreted the current Model Rule to permit contingent fees in post-decree family law matters, i.e., collecting arrearages that have been reduced to judgment, because such fee arrangements do not implicate the same policy matters that are implicated when fees are contingent upon securing a divorce or on the amount of alimony, support or property order. The Commission proposes adding this new Comment to clarify that this is the intended interpretation of paragraph (d)(1).

[7] The changes reflect the changes made to paragraph (e). The Commission proposes revising the explanation of "joint responsibility" to entail legal responsibility, including financial and ethical responsibility, as if the lawyers were associated in a partnership. This is the interpretation that has been given to the term according to ABA Informal Opinion 85-1514, as well a number of state ethics opinions.

[8] This new Comment seeks to eliminate a misunderstanding that might arise about whether the requirements of paragraph (e)(1) must be satisfied when a lawyer leaving a law firm and the firm agree to share some part of a fee to be received in the future. Technically, the future division would be between lawyers who were no longer members of the same law firm. None of the usual reasons for requiring the client's agreement to the arrangement apply to such fee divisions, however, and this Comment is intended to make that clear.

[9] The proposed change highlights that lawyers must comply with fee arbitration or mediation procedures in jurisdictions where they are mandatory.

Model Rule 1.6 Reporter's Explanation of Changes

The Commission is proposing a substantial expansion of the grounds for permissive disclosure under Rule 1.6. While strongly reaffirming the legal profession's commitment to the core value of confidentiality, the Commission also recognizes the overriding importance of

human life and the integrity of the lawyer's own role within the legal system. In this regard, the Commission agrees with the substantial criticism that has been directed at current Rule 1.6 and regards the Rule as out of step with public policy and the values of the legal profession as reflected in the rules currently in force in most jurisdictions.

As revised, Rule 1.6 will permit (though it will not require) disclosure to prevent death or substantial bodily harm and to prevent or rectify substantial injury resulting from a client's serious abuse of the lawyer's services. It will also explicitly permit a lawyer to disclose confidences to obtain legal advice about the lawyer's compliance with the Rules. Finally, it will permit disclosure where it is required by a law or court order. In light of these substantial changes to Rule 1.6, the Commission has both reorganized and substantially revised the Comments.

TEXT:

1. Paragraph (a): Replace "consents after consultation" with "informed consent"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

2. Paragraph (b)(1): Modify to permit disclosure to "prevent reasonably certain death or substantial bodily harm"

The Commission recommends that the exception currently recognized for client crimes threatening imminent death or substantial bodily harm be replaced with a broader exception for disclosures to prevent reasonably certain death or substantial bodily harm, with no requirement of client criminality. This change is in accord with Section 66 of the American Law Institute's Restatement of the Law Governing Lawyers. The Rule replaces "imminent" with "reasonably certain," to include a present and substantial threat that a person will suffer such injury at a later date, as in some instances involving toxic torts.

3. Paragraph (b)(2): Add paragraph permitting disclosure to prevent client crimes or frauds reasonably certain to cause substantial economic injury and in which client has used or is using lawyer's services

The Commission recommends that a lawyer be permitted to reveal information relating to the representation to the extent necessary to prevent the client from committing a crime or fraud reasonably certain to result in substantial economic loss, but only when the lawyer's services have been or are being used in furtherance of the crime or fraud. Use of the lawyer's services for such improper ends constitutes a serious abuse of the client-lawyer relationship. The client's entitlement to the protection of the Rule must be balanced against the prevention of the injury that would otherwise be suffered and the interest of the lawyer in being able to prevent the misuse of the lawyer's services. Moreover, with respect to future conduct, the client can easily prevent the harm of disclosure by refraining from the wrongful conduct. See also Comment [7].

Support for the Commission's proposal can be found in the eight jurisdictions that permit disclosure when clients threaten crimes or frauds likely to result in substantial injury to the financial or property interests of another and the 25 jurisdictions that permit a lawyer to reveal the intention of a client to commit any crime. The Commission's proposal is also in accord with Section 67 of the American Law Institute's Restatement of the Law Governing Lawyers.

4. Paragraph (b)(3): Add paragraph permitting disclosure to prevent, mitigate or rectify substantial economic loss resulting from client crime or fraud in which client has used lawyer's services

The rationale for this exception is the same as that for paragraph (b)(2), the only difference being that the client no longer can prevent disclosure by refraining from the crime or fraud. See also Comment [8]. The Commission believes that the interests of the affected persons in mitigating or recouping their substantial losses and the interest of the lawyer in undoing a wrong in which the lawyer's services were unwittingly used outweigh the interests of a client who has so abused the client-lawyer relationship. Support for the Commission's proposal can be found in the 13 jurisdictions that permit disclosure to rectify the consequences of a crime or fraud in the commission of which the client used the lawyer's services. The proposal is also in accord with Section 67 of the American Law Institute's Restatement of the Law Governing Lawyers.

5. Paragraph (b)(4): Add paragraph permitting disclosure to the extent necessary to secure legal advice regarding lawyer's compliance with Rules

Questions have been raised regarding the propriety of a lawyer revealing confidential information in order to secure legal advice regarding the lawyer's obligations under the Rules, including the lawyer's duty not to counsel or assist clients in crimes or frauds. In most instances, disclosing information to secure such advice is impliedly authorized. Nevertheless, in order to clarify that such disclosures are proper even when not impliedly authorized, the Commission recommends that such disclosures be explicitly permitted under this Rule. It is of overriding importance, both to lawyers and to society at large, that lawyers be permitted to secure advice regarding their legal obligations. Moreover, clients are adequately protected by the requirement that such disclosures be made only when protected by the attorney-client evidentiary privilege. See also Comment [9].

6. Paragraph (b)(6): Add paragraph permitting disclosure to comply with law or court order

The current Rule does not address whether lawyers are permitted or required to disclose information when such disclosure is required by other law or a court order. Current Comment [20], however, states that a lawyer must comply with the final orders of a court or other tribunal requiring the lawyer to give information about the client, and current Comment [21] refers to other law that may supersede Rule 1.6. The Commission recommends that the text of Rule 1.6 be amended to explicitly permit, but not require, disclosure to comply with law or court orders. No change in substance is intended. See also Comments [12] and [13].

COMMENT:

~~[1]~~, ~~[2]~~ and ~~[3]~~ The points made in these Comments have been incorporated into Comment [2]. No change in substance is intended.

[1] This new Comment provides cross-references to the other Rules that protect clients, prospective clients and former clients against the disclosure or adverse use of information relating to the representation.

[2] This modification of current Comment [4] combines material in current Comments [1] through [4] into a single Comment setting forth the rationale for the confidentiality duty. No change in substance is intended.

[3] Current Comment [5] has been edited slightly to clarify that the work-product doctrine is separate from the attorney-client evidentiary privilege. No change in substance is intended.

~~[6]~~ Given that Rule 1.6 contains no suggestion that there might be an exception for government lawyers who disagree with government policy, the Commission recommends the deletion of current Comment [6] as unnecessary.

[4] This new Comment reminds lawyers that the prohibition applies even when the disclosure does not itself reveal protected information but could lead to the discovery of such information, including the use of a hypothetical that poses an unreasonable risk that the listener will ascertain protected information. No change in substance is intended.

[5] This Comment combines and makes minor stylistic changes to current Comments [7] and [8]. No change in substance is intended.

[6] This new Comment replaces and modifies current Comments [9] and [13]. It states the rationale for the exception recognized in paragraph (b)(1) - disclosures to prevent reasonably certain death or substantial bodily harm. It also explains when such harm is reasonably certain, providing an illustration.

~~[10]~~, ~~[11]~~, ~~[12]~~, ~~[14]~~, ~~[15]~~ and ~~[16]~~ The substance of these Comments has been included in various new Comments. The caption "Withdrawal" has also been deleted.

[7] Except for the last two sentences, which are identical to current Comment [17], Comment [7] is new and provides the rationale for paragraph (b)(2) - disclosure to prevent future crimes or frauds threatening substantial economic harm. It also provides a cross-reference to Rules 1.2 and 1.16, which govern the lawyer's conduct regardless of whether the lawyer chooses to exercise the lawyer's discretion to disclose.

[8] This new Comment provides the rationale for the exception recognized in paragraph (b)(3) - disclosure to prevent, mitigate or rectify substantial economic loss resulting from a client's past crimes or frauds in the furtherance of which the client has used the lawyer's services.

[9] This new Comment provides the rationale for the exception recognized in paragraph (b)(4) - securing confidential legal advice about the lawyer's personal responsibility to comply with the Rules.

Caption The caption has been deleted as no longer necessary.

[10] This Comment relating to paragraph (b)(5), disclosure permitted to defend against charges of lawyer misconduct, is derived from current Comment [18]. The new third sentence is taken from current Comment [19]. The deleted last sentence has been incorporated into Comment [14]. No change in substance is intended.

[11] This Comment contains the core of current Comment [19] that addresses disclosure necessary to collect a lawyer's fees. The deleted second sentence has been included in Comment [10] and the deleted last sentence has been incorporated into Comment [14]. No change in substance is intended.

[12] This new Comment addresses the lawyer's responsibilities when the lawyer is faced with other law that may require disclosure of information relating to a client's representation. This issue is cursorily discussed in current Comment [21]. Although recognizing that paragraph (b)(6) permits disclosure to comply with other law, this Comment emphasizes the lawyer's duty to consult with the client to the extent required by Rule 1.4. No change in substance is intended.

[13] This new Comment addresses the lawyer's responsibilities when the lawyer is faced with a court order requiring disclosure of information relating to a client's representation or is called to testify concerning a client. This issue is addressed in current Comment [20]. Although recognizing that paragraph (b)(6) permits disclosure to comply with a court order, this Comment requires the lawyer, absent the client's informed consent to the contrary, to invoke all nonfrivolous claims that the information is privileged and to consult with the client about the possibility of appealing an adverse ruling. No change in substance is intended.

[14] Combining points made in current Comments [14], [18] and [19], this new Comment explains the Rule 1.6(b) requirement that disclosure be limited to information the lawyer reasonably believes is needed to accomplish the purpose for which disclosure is permitted. It emphasizes remonstrating with the client to take appropriate action, disclosing no more than necessary and, where appropriate, seeking protective orders against further dissemination of the information. No change in substance is intended.

[15] This new Comment incorporates the substance of current Comment [14]. A new introductory sentence has been added, and the beginning of the second sentence has been revised for stylistic reasons. The last two sentences provide a cross-reference to other Model Rules that may require disclosure.

Caption This caption has been deleted because current Comments [20] and [21] have been deleted.

~~[20]~~ and ~~[21]~~ Current Comments [20] and [21] have been deleted because these matters are now discussed in Comments [12] and [13].

Caption This new caption has been added to call attention to the two new Comments that discuss the requirement that lawyers act competently and diligently to preserve confidentiality.

[16] This new Comment cross-references Rules 1.1, 5.1 and 5.3, calling attention to the responsibility of the lawyer to act competently to safeguard information relating to the representation. A number of states have retained the formulation of ABA Model Code of Professional Responsibility DR 4-101(D), "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee." Much of the recent discourse about confidentiality has focused on the lawyer's duty to act competently to prevent disclosure. The Commission believes this issue is important and ought to be flagged in the Comment. No change in substance, however, is intended.

[17] This new Comment addresses the lawyer's duty of care when transmitting confidential information. Although much of the current debate concerns the use of unencrypted e-mail, the Comment speaks more generally in terms of special security measures and reasonable expectations of privacy. It takes a case-by-case approach to the problem. The Commission believes this Comment is consistent with the prevailing resolution of this issue in recent ethics committee decisions.

[18] This comment is identical to current Comment [22], with the addition of cross-references to Rule 1.9(c)(1) and (2).

Model Rule 1.7 Reporter's Explanation of Changes

TEXT:

1. Change caption to "Conflict of Interest: Current Clients"

Rule 1.7 does not purport to define or regulate all types of conflicts but rather only those that arise with respect to current clients. The proposed change will more accurately reflect the limited scope of this Rule. No change in substance is intended.

2. Create single paragraph defining "conflict of interest"

The relationship between current paragraphs (a) (directly adverse conflicts) and (b) (material limitation conflicts) is not well understood. Lawyers frequently become confused attempting to determine what constitutes a "directly adverse" conflict when it may not matter

because, even when not "directly adverse," the representation may still involve a conflict under paragraph (b)'s "material limitation" standard.

In addition, present paragraph (a) is conceptually confusing since, in most "directly adverse" conflicts, common representation is likely to affect both the relationship with the current client and the representation of the new client. For example, when the lawyer seeks to represent a new client suing an existing client represented by the lawyer in an unrelated matter, current paragraph (a) looks to the effect of the new representation on the existing client, while paragraph (b) applies to the effect of the existing relationship on the representation of the new client. Thus, most cases involving directly adverse conflicts need to be analyzed under both paragraphs (a) and (b). There appears to be no reason why both conflicts cannot be analyzed under a single paragraph that defines and prohibits the representation unless informed consent is properly obtained.

Under the proposed new structure, paragraph (a) sets forth the basic prohibition against representation involving currently conflicting interests, including the definition of a conflict of interest. Conflict of interest is defined to include both directly adverse conflicts and material limitation conflicts.

Unlike present paragraph (b), in which a conflict exists if the representation "may be" materially limited by the lawyer's interests or duties to others, proposed paragraph (a)(2) limits conflicts to situations in which there is "a significant risk" that the representation will be so limited. This proposed change is not substantive but rather reflects how current paragraph (b) is presently interpreted by courts and ethics committees.

Proposed paragraph (a)(2) specifically identifies "former clients" as nonclients to whom the lawyer may owe duties, as distinct from "other persons" to whom the lawyer may owe duties, such as those arising from the lawyer's role as fiduciary or corporate director. These changes are proposed to make it easier for lawyers to recognize these conflicts when they arise.

The introductory phrases in both paragraphs (a) and (b) are designed to clarify the relationship between the two paragraphs.

The purpose of these proposed changes is to clarify the text and to better educate lawyers regarding the complex subject of conflict of interest. No change in substance is intended.

3. Create single paragraph on consentability and informed consent

The proposed Rule makes clear that in certain situations a conflict may not be waived by the client. That is, the representation may not go forward even with the client's consent. Unlike the current Rule, the proposed Rule contains a single standard of consentability and informed consent, applicable both to directly adverse and material-limitation conflicts. This standard is set forth in a separate paragraph, both to reflect the separate steps required in analyzing conflicts (i.e., first identify potentially impermissible conflicts, then determine if the representation is permissible with the client's consent) and to highlight the fact that not all conflicts are consentable.

Under the current Rule, consentability turns on a determination that the conflict will "not adversely affect the representation." The difficulty with this standard is that in order to determine that a conflict exists in the first place, the lawyer must have already determined that the lawyer's duties or interests *are* likely to "materially limit" the representation. There is a difference between "material limitation" and "adverse affect on" the representation, but the difference is subtle. As a result, lawyers are understandably confused regarding the circumstances under which consent may be sought.

Paragraph (b) breaks down consentability into three components. The first and most common is modeled after the current Rule, in which the goal is to protect clients in situations where the representation is likely to be inadequate. The proposal is to replace the phrase "adverse effect on the representation" with an explicit statement of what that phrase was intended to mean, i.e., that it is unlikely that the lawyer will be able to provide "competent and diligent representation to each affected client." The terms "competent" and "diligent" are already defined and are generally well understood, thus providing a relatively clear standard that lawyers can apply in making the determination whether to go ahead and seek the client's consent. The term "reasonably" makes clear that, as under the current Rule, the consentability standard is an objective one.

Paragraphs (b)(2) and (b)(3) articulate situations in which courts and ethics committees have found certain conflicts to be nonconsentable, not only because they may be harmful to clients, but also because there are other interests, for example, the interests of courts, that need to be protected. Paragraph (b)(2) refers to representation "prohibited by law," that is, law other than the Rules of Professional Conduct. (For example, substantive law in some jurisdictions provides that the same lawyer may not represent more than one defendant in a capital case or both the buyer and seller in a real estate transaction.)

Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in adequate development of each client's position when the clients are aligned directly against each other in the same litigation. Thus, these conflicts are nonconsentable even if the lawyer reasonably believed that the representation would be competent and diligent. It has been suggested that there may be similar institutional interests in separate representation in contexts outside litigation. Since it is not possible to describe such situations in language that preserves this paragraph's bright-line text, the Commission believes that these other situations can be adequately addressed under paragraphs (b)(1) and (b)(2).

Finally, paragraph (b)(4) substitutes "informed consent" of the client for "consent after consultation." It was felt that "consultation" did not adequately convey the requirement that the client receive full disclosure of the nature and implications of a lawyer's conflict of interest. The term "informed consent" was chosen because it already has a fairly well-accepted meaning in other contexts. That term, which is used throughout the Rules in place of "consent after consultation," is defined in Rule 1.0(e). In each Rule where the term is used, there will be a cross-reference in the Comment to the definition in Rule 1.0(e), as well as language in the Comment providing specialized guidance.

The purpose of these proposed changes is to clarify the text and better educate lawyers regarding the complex subject of conflict of interest. No change in substance is intended.

4. New requirement that informed consent be "confirmed in writing"

The Commission was urged to require some form of writing, for the benefit of both the lawyer and the client. Some states have done so, and experience indicates that the requirement is not overly burdensome or impractical.

Under the Commission's proposal, it is not necessary that the client's agreement be obtained in a writing signed by the client. Rather, the term "confirmed in writing" is defined by proposed Rule 1.0(b) to denote informed consent that is either given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. A writing is required in all instances, but the Comment allows for flexibility when there is not time to memorialize the consent before proceeding with the representation. See Comment [20].

COMMENT:

Conflict of interest doctrine is complicated, and the Commission believes that lawyers are in need of additional guidance. Therefore, the Commission is recommending substantial changes to the Comment to Rule 1.7. The changes are designed to clarify basic conflicts doctrine and to address a number of recurring situations. The proposed organization provides an introduction (Comments [1] through [5]), a general roadmap to conflicts analysis (Comments [6] through [22]) and finally an elaboration of conflicts involving litigation (Comments [23] through [25]), nonlitigation (Comments [26] through [28]), common representation (Comments [29] through [33]) and organizational clients (Comments [34] and [35]).

General Principles

Caption The caption has been changed to better reflect the subject of the following Comments.

[1] Comment [1] retains and modifies the first sentence of current Comment [1] but is otherwise new. It states the rationale for the basic prohibition of representation involving conflicts of interest - to avoid compromising loyalty and independent judgment. It then adds cross-references to Rules 1.8 and 1.9.

[2] This entirely new Comment outlines a four-step process for recognizing and resolving conflict-of-interest problems.

[3] This Comment incorporates much of the remainder of current Comment [1]. Changes in the first sentence reflect the dual requirements of paragraphs (a) and (b) that the lawyer recognize a conflict and decline representation unless the requirements of paragraph (b) have been met. The Comment adds a cross-reference to the Rule 5.1 Comment, which states the requirement that lawyers with managerial authority within a law firm make reasonable efforts to establish internal systems for determining conflicts of interest. The last sentence is identical to the last sentence in current Comment [2].

[4] This Comment incorporates much of current Comment [2]. Changes are designed to more clearly state the requirements of the Rule where a conflict arises after a representation has commenced and, in addition, to indicate the type of analysis required to determine whether a lawyer must withdraw from representing one of several clients represented concurrently by the lawyer or, in some cases, from representing all of them.

[5] This new Comment addresses the problem of conflicts that arise after a representation has commenced as a result of unforeseeable developments, such as a merger or acquisition by a corporate client. In the disqualification context, courts have often recognized that it is unreasonable to require the lawyer to withdraw from representing both clients and have permitted the lawyer to withdraw from one of the two representations in order to avoid the conflict (something that is ordinarily not permitted under the so-called "hot potato" doctrine). The Comment specifies that the lawyer may be permitted to withdraw from one of the representations in order to avoid the conflict. The Comment requires the lawyer to comply with Rule 1.16, including seeking court approval where necessary. The Comment further reminds lawyers that they continue to owe the now former client the duty to keep confidential any information gained during the course of the representation.

Identifying Conflicts of Interest: Directly Adverse

Caption The caption has been added to better reflect the following Comments.

[6] This Comment incorporates much of current Comment [3]. It addresses the conflicts defined in paragraph (a)(1), i.e., "directly adverse" conflicts. It provides the rationale for the Rule, addresses the question of whether the Rule applies when a lawyer will have to cross-examine a present client and explains how "directly adverse" conflicts also pose "material limitation" conflicts with respect to the lawyer's existing client.

[7] This new Comment explains how directly adverse conflicts may arise in some transactional matters.

Identifying Conflicts of Interest: Material Limitation

Caption The caption has been added to better reflect the following Comment.

[8] This Comment incorporates much of current Comment [4]. It addresses the conflicts defined in paragraph (a)(2), i.e., "material limitation" conflicts. The changes are designed to clarify the relationship between paragraphs (a)(1) and (a)(2) and to address the question of how likely the risk of harm must be before a conflict of interest is determined to exist.

Lawyer's Responsibilities to Former Clients and Other Third Persons

Caption The caption has been modified to better reflect the subject of the Comment.

[9] This new Comment explains the variety of ways conflicts arise other than from duties to existing or prospective clients, including a specification of some of the ways in which a lawyer's duties to third persons may interfere with the representation of present clients. It specifies that such third persons include former clients and provides a cross-reference to Rule 1.9. This Comment should help clarify that when there is a conflict between a prospective client and a former client, the representation may be undertaken only if the requirements of both Rules 1.7 and 1.9 are met.

Personal Interest Conflicts

Caption The caption has been added to better reflect the following Comments.

[10] This Comment addresses conflicts arising from a lawyer's self-interest and retains most of current Comment [6]. The sentence regarding fees has been deleted on the ground that conflicts between lawyers and prospective clients regarding fee arrangements are typically addressed not by "conflict of interest" rules but rather by Rule 1.5, which regulates fees directly. The third sentence is intended to incorporate ABA Formal Opinion 96-400, which addresses a lawyer negotiating for employment with opposing counsel, which might lead to a lawyer switching to the law firm opposing the lawyer's client in the middle of a representation. The last two sentences add cross-references to Rules 1.8 and 1.10.

[11] This new Comment addresses conflicts arising from a lawyer's family relationships, a topic that was previously addressed in Rule 1.8(i). (For a discussion of the reasons why the Commission is proposing to delete Rule 1.8(i) and address a lawyer's family relationships in the Rule 1.7 Comment, see the Reporter's Explanation on Rule 1.8.) This Comment explains how conflicts arise under Rule 1.7(b) when lawyers representing different clients are closely related. The cross-reference to Rule 1.10 reminds lawyers that these personal-interest conflicts ordinarily will not be imputed to members of the disqualified lawyer's firm.

[12] This new Comment provides a cross-reference to Rule 1.8(j), which prohibits lawyers from engaging in sexual relationships with clients in most circumstances.

Interest of Person Paying for a Lawyer's Service

[13] This Comment modifies current Comment [10] by eliminating the specific illustrations and explaining the relationship between Rules 1.7 and 1.8(f). The Commission is recommending a specific reference in Rule 1.8(f), Comment [12], to compliance with the requirements of Rule 1.7 when third-party payment involves a conflict of interest. The examples involving insurance defense and corporate constituents have been deleted on the grounds that these examples involve a number of complex questions that cannot adequately be addressed in this Comment.

Prohibited Representations

Caption The caption has been changed in order to highlight and then focus on the fact that there are some representations that are prohibited, even with the informed consent of the client.

[14] This Comment modifies current Comment [5] in order to more clearly articulate the fact that some conflicts are nonconsentable, meaning that the lawyer may not undertake the representation even with the client's informed consent.

[15] This new Comment addresses the standard by which consentability is determined under paragraph (b)(1), i.e., when the concern is for the client's own protection.

[16] This new Comment describes the standard by which consentability is determined under paragraph (b)(2), i.e., when the representation is prohibited by applicable law, and provides some examples.

[17] This new Comment describes the standard by which consentability is determined under paragraph (b)(3), i.e., when the clients are aligned directly against each other in the same litigation, and explains that the rationale is to protect institutional interests in vigorous development of each client's position.

Informed Consent

Caption The caption has been changed to reflect the substantive change in the text from "consent after consultation" to "informed consent."

[18] This new Comment explains what is required to meet the requirement that the lawyer obtain the client's informed consent and provides cross-references both to Rule 1.0(e) and to the more detailed paragraphs of this Comment on the implications of common representation.

[19] This new Comment addresses circumstances when it may be impossible to make the disclosures required to obtain consent.

Consent Confirmed in Writing

Caption The caption has been added to set off the new Comment.

[20] This new Comment addresses the new requirement under paragraph (b)(4) that the informed consent of the client be confirmed in writing. It states that it is not necessary in all instances that the writing be obtained or provided at the time the client gives informed consent. If it is not feasible to do so because of the exigencies of the circumstances, then the lawyer may confirm the consent in writing within a reasonable time thereafter.

Revoking Consent

Caption The caption has been added to set off the new Comment.

[21] This new Comment explains that, while a client may always revoke consent and terminate the lawyer's representation of the client, whether or not the revocation will preclude the lawyer from continuing to represent other clients will depend on the circumstances, including the nature of the conflict.

Consent to a Future Conflict

Caption The caption has been added to set off the new Comment.

[22] This new Comment addresses a question that has arisen frequently in practice, i.e., the effectiveness of consent to future conflicts. The Comment states that whether such consent is effective is determined by the test of paragraph (b), specifically whether the conflict is consentable and whether the client has given truly informed consent.

Conflicts in Litigation

[23] This Comment maintains current Comment [7] with only a few modifications reflecting textual changes.

~~[8]~~ The Commission recommends deleting current Comment [8] because the material here is now addressed in Comment [6].

~~[9]~~ The Commission recommends deleting current Comment [9] because the material here is now addressed in Comment [24].

[24] This new Comment replaces current Comment [9] on "positional conflicts." It focuses primarily, not on whether such conflicts are consentable, but rather on the more important and troubling question of whether the clients need to be consulted. The current Comment has been uniformly criticized for making too much of the distinction between trial and appellate courts. This Comment uses an analysis similar to that used for other conflicts, i.e., whether there is a significant risk that the lawyer's duties in one representation are likely to materially limit the lawyer's duties in the other representation. It must be kept in mind, however, that it may be difficult to detect some positional conflicts. Moreover, there is a need to avoid giving clients too much veto power over what types of representation a lawyer or law firm may handle.

[25] This new Comment addresses the application of paragraph (a)(1) to lawyers involved in class-action lawsuits.

Nonlitigation Conflicts

Caption The caption has been changed to reflect the emphasis in these Comments on nonlitigation conflicts.

[26] This Comment maintains current Comment [11] with a few modifications designed to clarify the application of conflict-of-interest doctrine to nonlitigation situations.

[27] This Comment maintains current Comment [13] with a few stylistic changes.

[28] This Comment maintains current Comment [12] with an expanded discussion of nonconsentability in the context of transactional representation. The expanded discussion is taken from the Comment to current Rule 2.2.

Special Considerations in Common Representation

These Comments are taken primarily from the Comment to current Rule 2.2, which the Commission is recommending be deleted on the grounds that the relationship between Rules 2.2 and 1.7 is confusing, the role of lawyer as "intermediary" has not been well understood and the Rule has not proved helpful in clarifying conflict-of-interest doctrine for lawyers. (See memorandum regarding proposed deletion of Rule 2.2.) The Commission believes that situations intended to be encompassed within Rule 2.2 can be adequately dealt with under Rule 1.7 and its Comment.

Caption The caption has been added to set off the new Comments.

[29] This new Comment combines Comments [4] and [7] to current Rule 2.2. "Intermediation" has been changed to "common representation." In addition, in keeping with the general standard of Rule 1.7(b)(1), the Comment states that common representation is improper, not only when impartiality "cannot" be maintained, but also when it is "unlikely" that the lawyer can do so. The Comment also makes clear that a lawyer may be required to withdraw from the representation entirely, depending upon the outcome of the analysis described in Comment [4].

[30] This Comment and Comment [31] are a modified version of Comment [6] to current Rule 2.2. The discussions of evidentiary privilege and the rule of confidentiality have been separated. This Comment addresses the privilege.

[31] This Comment is a modified version of the portion of Comment [6] to current Rule 2.2 that addresses the effect of the obligation of confidentiality on common representation. Unlike current Comment [6], this Comment gives more explicit guidance to lawyers, emphasizing that they should discuss confidentiality at the outset of the representation and that in most cases the common representation will be proper only if the clients have agreed that the lawyer will not maintain confidences between them.

[32] This Comment combines and substantially modifies Comments [8] and [9] to current Rule 2.2 and addresses the requirement of informed consent. It specifies that, when seeking to establish or adjust a relationship between clients, the lawyer must explain how such a role differs from the partisan role expected in other circumstances. It further requires the lawyer to explain the implications of the changed role on the client's responsibility for making decisions.

[33] This new Comment is a slightly modified version of Comment [10] to current Rule 2.2. The changes are stylistic.

Organizational Clients

Caption The caption has been added to set off the new Comments.

[34] This new Comment addresses the application of paragraph (a) to situations involving corporate or other organizational affiliates. The language is largely drawn from the conclusions of ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 95-390, although the Commission believes that there will be more situations in which the lawyer will be prohibited from undertaking representation than may have been reflected in that opinion.

[35] This Comment maintains current Comment [14] with modifications designed to reflect that, when problems arise with a lawyer-director, the lawyer may either resign as director or cease acting as the corporation's lawyer, and to advise the lawyer of the possible consequences of discussing matters at board meetings while the lawyer is present in the capacity of director.

~~[15]~~ The Commission proposes to delete current Comment [15] and the associated caption because it addresses questions outside the disciplinary context.

Model Rule 1.8 **Reporter's Explanation of Changes**

Caption

Change to "Conflict of Interest: Current Clients: Specific Rules"

The caption has been changed to parallel the change in Rule 1.7 and to more accurately reflect the scope of the Rule.

Rule 1.8(a): Business Transactions between Client and Lawyer

TEXT:

1. Paragraph (a)(1): Stylistic changes

The changes to this paragraph are grammatical and stylistic. No change in substance is intended.

2. Paragraph (a)(2): Client to be advised in writing of desirability of seeking counsel

The Commission recommends adding a requirement that the client be advised in writing of the desirability of seeking the advice of independent legal counsel, in addition to affording the client a reasonable opportunity to seek such counsel. A number of jurisdictions have adopted such a requirement. The Commission believes these additional requirements are necessary for the protection of clients; moreover, some are already imposed by common-law decisions providing for the voidability of such transactions by clients.

3. Paragraph (a)(3): Informed consent to essential terms of transaction and lawyer's role

The Commission recommends clarifying the nature of the consent to be given by the client under this paragraph. Lawyers have reported considerable confusion regarding its meaning. Several states have specified that the consent refers to the essential terms of the transaction. Case law in some jurisdictions goes further and requires disclosure regarding the risks of the transaction. The Commission recommends informed consent to both the terms of the transaction and the lawyer's role, including whether the lawyer is representing the client in the transaction.

4. Paragraph (a)(3): Informed consent in writing signed by client

The Commission is proposing a number of revisions to the Rules that would require the lawyer to document certain communications or agreements in writing. The Commission believes that it should be clear in all instances what type of writing is required, particularly whether the writing needs to be signed by the client. Certain terms are defined in Rule 1.0, including the term "writing." Because there are only a few instances in which a client's signature is required, the Commission is recommending that those instances be clearly stated in the text of the Rule. The Commission believes that, because of the risk of overreaching in business transactions between lawyers and clients, the client's informed consent to both the essential terms of the transaction and the lawyer's role should be obtained in a writing signed by the client.

COMMENT:

Caption "Business" was added to the caption to clarify its meaning.

[1] This Comment was revised to state the rationale for the Rule and to clarify which transactions are covered.

[2] This new Comment emphasizes that the lawyer must comply with the requirements of all three subparagraphs. It also elaborates on the nature of the disclosure the lawyer must make under paragraph (a)(3), including a cross-reference to Rule 1.0(e), which gives the general definition of informed consent.

[3] This new Comment clarifies the relationship between Rules 1.8(a) and 1.7, which has not been well understood by lawyers. Both Rules apply whenever the client reasonably expects that the lawyer is representing the client in the transaction itself or when the lawyer's financial interest in the transaction otherwise creates a significant risk to the lawyer's representation of the client in another matter. Thus, Rule 1.8(a) focuses on the risks of the transaction itself, whereas Rule 1.7 focuses on the risks of the representation.

[4] This new Comment clarifies how paragraph (a) applies when the client is represented by independent counsel in the transaction.

Rule 1.8(b): Use of Information Related to Representation

TEXT:

1. Replace "consent after consultation" with "gives informed consent"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

2. Replace "Rule 1.6 or Rule 3.3" with "these Rules"

The Commission recommends that the enumeration of applicable Rules should be in commentary rather than in text. No change in substance is intended.

COMMENT:

Caption The caption was added to set off new Comment [5].

[5] This new Comment states the rationale for the Rule and gives examples of both prohibited and permissible uses of information relating to the representation.

Rule 1.8(c): Gifts to Lawyers

TEXT:

1. Add prohibition on lawyer solicitation of substantial gifts

The Commission recommends adding a prohibition on a lawyer soliciting a substantial gift from a client, in order to avoid the danger of overreaching. The current Rule has been criticized for regulating gifts made by instrument but not those made in other ways.

2. Change in definition of relationships that fall within the exception for lawyers related to client or donee

The Commission has retained the exception for related lawyers. It is recommending changes to clarify that the same degree of relatedness applies in determining whether the donee is related to both the lawyer and the client and to adopt the more expansive and flexible definition of the ABA Model Code of Judicial Conduct (defining "member of the judge's family").

COMMENT:

Caption The caption has been added to set off the following Comments.

[6] Current Comment [2] has been revised to reflect the Commission's decision to prohibit lawyer solicitation of nontestamentary 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.

[7] This Comment is also based on current Comment [2]. The changes are stylistic. No change in substance is intended.

[8] This new Comment clarifies a present ambiguity by addressing the question of whether 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.

Rule 1.8(d): Literary Rights

TEXT:

No change recommended.

COMMENT:

[9] The sole revision to current Comment [3] adds an additional cross-reference to Rule 1.8(a).

Rule 1.8(e): Financial Assistance

TEXT:

No change recommended.

COMMENT:

Caption The caption has been added to set off the new Comment.

[10] This new Comment states the rationale for the Rule, explains that it covers both making and guaranteeing loans and indicates more specifically the kind of expenses that lawyers are permitted to advance. No change in substance is intended.

Rule 1.8(f): Person Paying for Lawyer's Services

TEXT:

Change "consents after consultation" to "gives informed consent"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

COMMENT:

[11] This new Comment replaces current Comment [4]. It presents a more detailed explanation of the rationale for and requirements of the Rule. It also clarifies that a client who pays for the representation of a co-client is governed by this Rule. Finally, it adds a cross-reference to Rule 5.4(c).

[12] This new Comment explains the relationship between this Rule and Rule 1.7.

Rule 1.8(g): Aggregate Settlements

TEXT:

1. Replace "consents after consultation" with "gives informed consent"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

2. Client consent required to be "in a writing signed by the client"

The Commission is proposing a number of revisions to the Rules that would require the lawyer to document certain communications or agreements in writing. The Commission believes that it should be clear in all instances what type of writing is required, particularly, whether the writing needs to be signed by the client. Certain terms are defined in Rule 1.0, including the term "writing." Because there are only a few instances in which a client's signature is required, the Commission is recommending that those instances be clearly stated in the text of the Rule. The Commission believes that because aggregate settlements entail settlement offers posing potentially serious conflicts of interest between the clients, each client's informed consent should be obtained in a writing signed by the client.

COMMENT:

Caption The caption has been added to set off the new Comment.

[13] This new Comment states the rationale for the Rule, which is an application of Rules 1.7 and 1.2. In addition, it reminds lawyers involved in class actions that, while this Rule does not apply, lawyers must comply with procedural requirements regarding notification of the class.

Rule 1.8(h): Limiting Liability and Settling Malpractice Claims

TEXT:

1. Break Rule into two paragraphs

The purpose of this change is to clarify the two separate obligations under this Rule. No change in substance is intended.

2. Paragraph (h)(1): Delete "unless permitted by law"

The Commission is unaware of any statute or case law that addresses the question of whether such agreements should be permitted. Given that the phrase "unless permitted by law" appears to play no significant role in addressing these conflicts, the Commission is recommending that such agreements be permitted when the client is independently represented. The Commission believes that there may be good reasons to permit a lawyer to limit liability prospectively and that the client is adequately protected when represented by independent counsel.

3. Paragraph (h)(2): Add "potential claim"

The purpose of this change is to clarify that the Rule applies even when the client has not actually asserted a claim, for example, when the lawyer asks the client to sign a release as part of settling a dispute over legal fees.

4. Paragraph (h)(2): Reword advice to obtain independent counsel

The purpose of this change is to conform the language to that used in Rule 1.8(a). No change in substance is intended.

COMMENT:

Caption The caption has been changed to better reflect the two separate obligations in the Rule.

[14] This new Comment states the rationale for paragraph (h)(1). It also addresses three questions that frequently arise concerning the application of the Rule - whether the Rule prohibits agreements requiring arbitration of a legal malpractice claim, whether the Rule applies to lawyers practicing in limited-liability entities and whether the Rule prohibits agreements limiting the scope of the representation.

[15] This new Comment states the rationale for paragraph (h)(2).

Deletion of Current Rule 1.8(i): Family Relationships between Lawyers

TEXT:

At the time this Rule was first enacted, there was concern that lawyer-spouses would be unable to find employment in different firms in the same city because of the fear that one spouse's conflicts would result in the disqualification of the other spouse's law firm. Thus, the primary purpose for treating such conflicts under Rule 1.8 rather than Rule 1.7 was to avoid the imputation of the conflict under Rule 1.10. The Rule, however, is both under and over-inclusive. It is underinclusive because it does not address personal-interest conflicts arising from close family or family-like relationships other than those enumerated in the Rule, such as couples who live together in a relationship approximating marriage. Moreover, it is limited to directly adverse conflicts and does not include material limitation conflicts, for example when lawyer-spouses

represent coplaintiffs or codefendants with significantly different positions in the litigation. The Rule is overinclusive because it permits the representation with the consent of the client, regardless of whether the conflict would otherwise be deemed nonconsentable under Rule 1.7. Moreover, while imputation is unnecessary in most cases, in some instances it may be indicated. Under the changes proposed for Rule 1.10, personal interest conflicts are not imputed unless they present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. As a result of these changes, the Commission is recommending deletion of this Rule and the addition of a Comment to Rule 1.7 addressing conflicts of interest arising from a lawyer's family relationships. See Rule 1.7, Comment [11].

COMMENT:

~~[6]~~ The Commission is proposing deleting this Comment and the associated caption along with the text.

Rule 1.8(i): Acquiring Proprietary Interest in Litigation

TEXT:

Substitute "authorized by law" for "granted by law"

The purpose of this change is to clarify that the exemption applies to all liens authorized by substantive law, including those liens that are contractual in nature.

COMMENT:

Caption The caption has been changed to better reflect the meaning of the Rule.

[16] This expanded Comment further explains the rationale for the Rule and adds a cross-reference to Rule 1.8(a), which will apply when a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's effort in the litigation.

Rule 1.8(j): Client-Lawyer Sexual Relationships

TEXT:

Adopt new per se Rule prohibiting most client-lawyer sexual relationships

The Commission recommends following the lead of a number of jurisdictions that have adopted Rules explicitly regulating client-lawyer sexual conduct. Although recognizing that most egregious behavior of lawyers can be addressed through other Rules, the Commission believes that such Rules may not be sufficient. Given the number of complaints of lawyer sexual misconduct that have been filed, the Commission believes that 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.

The Commission further recommends a total, rather than a partial, ban on client-lawyer relationships, except for those pre-dating the formation of the client-lawyer relationship. Partial bans, i.e., those that prohibit relationships only when they involve coercion or cause the lawyer to act incompetently, do not effectively address the problem of conflicts of interest, particularly the difficulty of obtaining an adequately informed consent from the client. Moreover, they do little to prevent problems from arising in the first place.

COMMENT:

Caption The caption has been added to set off the new Comments.

[17] This new Comment states the rationale for the Rule.

[18] This new Comment states the rationale for the Rule's exception for pre-existing relationships, noting that even though the Rule does not apply, such relationships may give rise to conflicts of interest under Rule 1.7.

[19] This new Comment was added to explain how the Rule is applied in the case of an organizational client.

Paragraph (k): Imputation of Prohibitions

TEXT:

1. Treat imputation under Rule 1.8 rather than 1.10

The Commission is recommending that imputation of the prohibitions in Rule 1.8 be addressed by Rule 1.8 rather than by Rule 1.10. Under paragraph (k), an associated lawyer may not necessarily proceed with the informed consent of the client (as the lawyer could under Rule 1.10); moreover, there is no exception here (as there is in Rule 1.10) for personal-interest conflicts of the individually disqualified lawyer.

2. Impute all prohibitions except paragraph (j)

Under current Rule 1.10, only the prohibition of paragraph (c) (gifts to lawyers) is imputed to other lawyers in a firm. The Commission recommends that the prohibition of all paragraphs except (j) be so imputed.

COMMENT:

Caption The caption has been added to set off the new Comment.

[20] This new Comment explains the rationale for paragraph (k).

TEXT:

1. New caption

Because paragraph (c) addresses confidentiality, the current caption is underinclusive.

2. Paragraphs (a) and (b): Substitute "informed consent, confirmed in writing" for "consents after consultation"

In paragraphs (a) and (b), the phrase "consents after consultation" has been changed to "gives informed consent to the representation, confirmed in writing." This change is consistent with a similar change in Rule 1.7 and reflects a judgment of the Commission that both lawyers and their former clients benefit when the lawyer is required to secure the former client's informed consent, confirmed in writing, to a representation that is materially adverse to the former client in the same or a substantially related matter. See Rule 1.0(e) for the definition of "informed consent" and Rule 1.0(b) for the definition of "confirmed in writing."

3. Paragraph (c): Replace "Rule 1.6 or Rule 3.3" with "these Rules"

This change was made because there are Rules other than Rule 3.3 that may require disclosure (at least when disclosure is permitted by Rule 1.6) - see Rules 1.2(d), 4.1(b), 8.1 and 8.3.

COMMENT:

[1] Comment [1] has been amended to make clear that this Rule applies when common clients have had a falling out and one or more of them has dismissed the lawyer. The Comment has also been amended to make the important point that Rule 1.11 now determines when Rule 1.9 is applicable to present and former government lawyers. No change in substance is intended as to how Rule 1.9 applies to lawyers who do not or have not worked for the government.

[2] These changes are designed to further refine and cabin the concept of substantial relationship, particularly as it affects the potential disqualification of former lawyers for an organization, including the government.

[3] This new Comment explains when matters are "substantially related." That term has been the subject of considerable caselaw, and this definition and suggestions about applying it are an effort to be helpful to lawyers in complying with the Rule and courts in construing it. No change in substance is intended.

~~[4]~~ and ~~[5]~~ These Comments have been deleted as no longer helpful to the analysis of questions arising under this Rule. No change in substance is intended.

[5] This Comment has been modified to correct the erroneous reference to paragraph (b) in the first sentence.

[6] This Comment combines current Comments [6] and [7] in an effort to increase the clarity of each. No change in substance is intended.

[7] Because this sentence addresses confidentiality rather than disqualification, the reference to Rule 1.9 has been narrowed to a reference to Rule 1.9(c). No change in substance is intended.

~~[10]~~ This Comment has been deleted as no longer helpful to the analysis of questions arising under this Rule. No change in substance is intended.

[8] A minor wording change was made for clarification. No change in substance is intended.

[9] This Comment combines current Comments [12] and [13] and adds a cross-reference to the Comment in Rule 1.7 that addresses advance waivers of conflicts of interest.

Model Rule 1.10 **Reporter's Explanation of Changes**

TEXT:

1. Paragraph (a): Eliminate imputation of conflicts under Rules 1.8(c) and 2.2

The reference to Rule 2.2 has been deleted because the Commission is recommending elimination of that Rule. The reference to Rule 1.8(c) has been deleted because the Commission is recommending that imputation of the prohibitions in Rule 1.8 be addressed by Rule 1.8 rather than by Rule 1.10. Under Rule 1.8(k) the prohibitions set forth in paragraphs 1.8(a) through (i), but not (j), are imputed to other lawyers with whom the personally disqualified lawyer is associated.

2. Paragraph (a): Eliminate imputation of "personal interest" conflicts

The proposed reference to "personal interest" conflicts at the end of Rule 1.10(a) would eliminate imputation in the case of conflicts between a lawyer's own personal interest (not interests of current clients, third parties or former clients) and the interest of the client, at least where the usual concerns justifying imputation are not present. The exception applies only where the prohibited lawyer does not personally represent the client in the matter and no other circumstances suggest the conflict of the prohibited lawyer is likely to influence the others' work. This is a substantive change in the Rule as written, but the Commission believes that the proposed Rule provides clients with all the protection they need, given that the exception applies only when there is no significant risk that the personal-interest conflict will affect others in the lawyer's firm.

3. Paragraph (c): Screening of lateral hires

A number of jurisdictions now provide that former-client conflicts of lawyers who have moved laterally are not imputed to the new law firm if the personally disqualified lawyer has been timely screened from participation in the matter and the former client is notified of the screen. The Commission is recommending that current Rule 1.10 be amended to permit nonconsensual screening of lawyers who have joined a law firm.

The Commission is persuaded that nonconsensual screening in these cases adequately balances the interests of the former client in confidentiality of information, the interests of current clients in hiring the counsel of their choice (including a law firm that may have represented the client in similar matters for many years) and the interests of lawyers in mobility, particularly when they are moving involuntarily because their former law firms have downsized, dissolved or drifted into bankruptcy. There are presently seven jurisdictions that permit screening of laterals by Rule. The testimony the Commission has heard indicates that there have not been any significant numbers of complaints regarding lawyers' conduct under these Rules.

4. Paragraph (c)(1): Timely screening

This paragraph tracks similar language in current Rule 1.11(a) and in Rule 1.12(c), except that it adds the requirement that the screen be "timely" implemented. A similar requirement is being proposed for those Rules as well and also for Rule 1.18. The term "screened" is defined in Rule 1.0(k) and in Comments [8] - [10] of that Rule.

5. Paragraph (c)(2): Written notice

This paragraph tracks similar language in current Rule 1.11(a) and 1.12(c).

6. Paragraph (e): Relationship of this Rule to Rule 1.11

This paragraph clarifies that Rule 1.11 is intended to be the exclusive Rule governing the imputation of conflicts of interests of current or former government lawyers.

COMMENT:

Definition of "Firm"

The Commission is recommending adoption of a definition of "firm" in Rule 1.0(c). That definition will apply not only for purposes of imputing conflicts under this Rule, but also for addressing the supervisory obligations of lawyers under Rules 5.1 - 5.3. The definition in Rule 1.0(c) and the Comments to that Rule were based on the current Comment to Rule 1.10. As a result, the Commission is recommending deleting that material in this Comment.

[1] This Comment modifies the first two sentences in the current Comment to reflect what is now in Rule 1.0(c). Cross-references to that Rule and its Comment have been added. The remainder of the Comment is deleted because the material has been moved to the Comment to Rule 1.0.

~~[2]~~ and ~~[3]~~ The material in these Comments has been moved to the Comment to Rule 1.0.

~~[5]~~ Current Comment [5] has been deleted because the conflicts arising from moving between government and a private firm are discussed in Rule 1.11.

[3] This entirely new Comment deals with the elimination of imputation of a lawyer's "personal-interest" conflicts to others in the firm because there is no risk to loyal and effective representation of the client. The Comment also provides illustrations of when this exception to imputation might and might not apply.

[4] This entirely new Comment explains how this Rule applies to persons who are nonlawyers, e.g., secretaries, or who obtained their disqualifying information while a nonlawyer, e.g., while a law student. Such persons are disqualified personally, but the conflict is not imputed so long as they are screened from participation in the matter so as to protect the confidential information. This Comment represents a substantive change from the current text of Rule 1.10, but it represents the overwhelming state of the current case law and is intended to give guidance to lawyers about important practical questions.

[6] This entirely new Comment addresses paragraph (c). The second sentence clarifies that courts may impose more stringent standards on lawyers in determining whether to disqualify a lawyer from representing a client in pending litigation.

[7] This entirely new Comment addresses the requirements of paragraph (c)(2) and includes a cross-reference to the definition of "screened" in Rule 1.0(k).

[8] This entirely new Comment addresses the requirements of paragraph (c)(3).

[9] This entirely new Comment deals directly with the availability of and conditions for consent, a subject heretofore largely ignored in this Rule. The Comment notes that consent may be conditioned on screening the disqualified lawyer, but, other than that reference, no provision for general screening under Rule 1.10 without the consent of the opposing party is proposed.

[10] The minor proposed amendments to current Comment [4] are designed to make clear that in the case of current and former government lawyers, imputation is governed by Rule 1.11. Under the current Rules, the application of Rule 1.10 to such lawyers is unclear.

[11] Historically lawyers have relied on paragraph (a) of Rule 1.10 for a complete list of the conflict Rule numbers and paragraph references that trigger imputed disqualification. All references to Rule 1.8 have been removed from Rule 1.10(a) because none of the Rule 1.8 paragraphs fit logically or grammatically in Rule 1.10(a). The Commission added this new Comment for the assistance of lawyers who look to Rule 1.10 to determine if the prohibitions of Rule 1.8 apply to other lawyers in the firm.

Model Rule 1.11

Reporter's Explanation of Changes

TEXT:

1. Change caption to read "Special Conflicts of Interest for Former and Current Government Officers and Employees"

The change in caption reflects the fact that the Rule has traditionally been applied not only to lawyers moving from government service to private practice (and vice versa) but also to lawyers moving from one government agency to another.

2. Paragraph (a): Clarify that individual lawyer who formerly served as public officer or government employee is subject only to this Rule and not to Rule 1.9

There has been disagreement whether individual lawyers who have served as government officials or employees are subject to Rule 1.9 regarding their obligations to former clients or whether their obligations under Rule 1.11(a) are exclusive. The question is an important one, for the individual lawyer, for the lawyer's firm, and for the government. The Commission decided that representation adverse to a former government client is better determined under Rule 1.11(a), which also addresses representation in connection with any other matter in which the lawyer previously participated personally and substantially as a public officer or employee. In order not to inhibit transfer of employment to and from the government, the Commission believes that disqualification resulting from representation adverse to the former government client should be limited to particular matters in which the lawyer participated personally and substantially, which is also the standard for determining disqualification regarding prior participation as a public officer or employee. The meaning of the term "matter" is clarified in new Comment [10].

Paragraph (a)(1) further clarifies that former government lawyers are subject to Rule 1.9(c) regarding the confidentiality of information relating to the former representation of a government client.

3. Paragraph (a): Delete "private"

The text of current Rule 1.11(a) suggests that the disqualification under that paragraph applies only when the lawyer moves from government service to private practice. Current Comment [4], however, states that "[w]hen the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule." To avoid any possible confusion, the Commission determined that the text should be changed to conform to the Comment.

4. Paragraph (a)(2): Change from "consent after consultation" to "gives its informed consent to the representation"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

5. Paragraphs (a) and (d): Consent to be "confirmed in writing"

The Commission recommends requiring that the consent here be confirmed in writing, as with other conflict-of-interest Rules. "Confirmed in writing" is defined in Rule 1.0(b).

6. Paragraph (b): Clarify that conflicts under paragraph (a) – including former client conflicts – are not imputed to other associated lawyers when individual lawyer is properly screened

There is no change in the basic rule of imputation for situations governed under former Rule 1.11(a). The change is intended for situations that previously might have been governed by Rule 1.9 rather than 1.11(a). Although former client conflicts under Rule 1.9 are imputed to associated lawyers under Rule 1.10, this paragraph states clearly that when the conflict arises from the individually disqualified lawyer's service as a public officer or employee of the government, the conflict is governed by paragraphs (a) and (b) of this Rule and is not imputed if the lawyer is screened and the appropriate government agency is notified of the representation. The Commission believes that this result is necessary in order to continue to encourage lawyers to work in the public sector without fear that their service will unduly burden their future careers in the private sector. (Conflicts are not imputed under either the current or the proposed Rule when the move is from one government agency to another.)

7. Paragraph (b): Add scienter requirement

This change conforms this Rule to Rule 1.10, in which associated lawyers are not subject to discipline unless they "know" of the disqualification of their colleague.

8. Paragraphs (b)(1) and (c): Add "timely"

The Commission is recommending a definition of "screened" that includes a requirement that the lawyer be "timely" isolated from participation in the matter. Nevertheless, the Commission believes that the timeliness requirement is so important that it should appear in the text as well. This change is being recommended for all of the Rules that address screening. See Rules 1.12 and 1.18.

9. Paragraph (c): Include definition of "confidential government information" from current paragraph (e)

The material in what is now paragraph (c) is currently in paragraph (b). The Commission is recommending that current paragraph (e) be deleted and the definition of "confidential government information" be moved to paragraph (c), where the defined term is now used. This change is for purposes of clarification only, and no change in substance is intended.

10. Paragraph (d): Clarify relationship between this Rule and Rules 1.9 and 1.10

This paragraph is intended to clarify that individual lawyers may not undertake representation adverse to former clients when to do so would violate Rule 1.9, even when the

representation was not in the same matter but rather was in a substantially related matter in which it is likely that the lawyer received confidential client information. These conflicts, however, are not imputed to lawyers associated in a government agency, even when formal screening mechanisms are not instituted. The lack of imputation presently applies to disqualifications under current Rule 1.11(c) but not necessarily to disqualifications of a current government lawyer under Rule 1.9, in which Rule 1.10 otherwise would apply. Screening is not required for public agencies because it may not be practical in some situations. Nevertheless, Comment [2] states the expectation that such lawyers will in fact be screened where it is practical to do so.

11. Paragraph (d)(1): Add reference to Rule 1.7

The Commission determined that it made sense to address in Rule 1.11, not only the imputation of former-client conflicts, but also the imputation of current conflicts of interest under Rule 1.7. As with former-client conflicts, the Commission decided that these conflicts should not be imputed to lawyers associated in a government agency, even when formal screening mechanisms are not instituted. Screening is not required in the disciplinary context because it may not be practical in some situations. Nevertheless, as with Rule 1.9 conflicts, Comment [2] states the expectation that such lawyers will in fact be screened where it is practicable to do so.

12. Paragraph (d)(2): Substitute "informed consent" of the client for exception where "under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter"

The interests of the former client are protected under Rule 1.9, and, under that Rule, the former client may effectively consent to a subsequent adverse representation. The interests of the government agency itself are protected under paragraph (d)(2). These interests are similar to those protected under paragraph (a)(3), where the former government agency may effectively consent to the subsequent representation. If a government agency can effectively consent under paragraph (a)(3), the Commission sees no reason why it cannot similarly consent to representation otherwise prohibited by paragraph (d)(2). This would include (but not be limited to) situations where "under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter."

13. Delete current paragraph (e)

As set forth above, the Commission proposes to delete current paragraph (e) and move its material unchanged to paragraph (c).

COMMENT:

~~[4]~~ The Commission recommends deleting current Comment [1] and expanding upon the rationale for the Rule in Comment [4].

[1] The reference to Rule 1.9 has been deleted because the relationship between Rules 1.9 and 1.11 is now addressed in Comment [2]. The remainder of the changes are stylistic, and no change in substance is intended.

[2] This entirely new Comment explains the relationship between Rules 1.9, 1.10 and 1.11 as stated in the text of paragraphs (a)(1), (a)(2) and (d)(1).

[3] This new Comment provides the rationale for the obligations of the individual lawyer under paragraphs (a)(3) and (d)(2), which are the obligations of former and present government lawyers aside from those imposed by Rule 1.9. Unlike Rule 1.9, these obligations are designed to protect against abuse of public office generally, not necessarily obligations owed to former clients of the lawyer.

[4] This Comment modifies slightly the provisions of current Comment [3]. First, it avoids using the term "private," given the applicability of the Rule to successive representation between distinct government agencies. It also makes minor stylistic changes and adds a sentence at the end to explain the rationale for limiting the disqualification in paragraphs (a)(3) and (d)(2) to a narrower range of "matter" than is typically covered by conflict-of-interest rules. (See paragraph (e).)

[5] The changes reflect the change in text to delete the reference to "private" clients. The last sentence explains how imputation works when the successive clients are both government agencies.

[6] This Comment provides a cross-reference to the screening requirements in Rule 1.0(k) and further elaborates on the prohibition on fee apportionment in language identical to that used in the Comment to the other screening Rules. See Rules 1.12 and 1.18.

[7] This entirely new Comment elaborates on the notice requirement, in language identical to that in the Comment to the other screening Rules. See Rules 1.12 and 1.18.

~~[6]~~ This Comment has been deleted because its content is covered in Comment [7].

~~[9]~~ The current Comment has been deleted. Its content now appears in Comment [2].

[10] This new Comment clarifies that two particular matters may constitute the same matter for purposes of paragraph (a)(2), depending on the circumstances. The language is drawn from but is not identical to the definition of "matter" as it is used in the federal conflicts of interest statute. Cf. 5 C.F.R. 2637.201(c)(4).

Model Rule 1.12 Reporter's Explanation of Changes

TEXT:

1. Caption: Change to "Former Judge, Arbitrator, Mediator or Other Third-Party Neutral"

In the caption and thereafter throughout the Rule, terminology is modified to encompass a more expansive category of neutrals that participate in court-based and private dispute resolution.

2. Paragraph (a): Add other third-party neutrals

This paragraph has been modified to add mediators and other third-party neutrals. The term "arbitrator" was moved because arbitrators, like mediators and other third-party neutrals, typically do not have law clerks.

3. Paragraph (a): Change from "consent after consultation" to "give informed consent"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "give informed consent," as defined in Rule 1.0(e). No change in substance is intended.

4. Paragraph (a): Consent "confirmed in writing"

The Commission recommends requiring that the consent here be confirmed in writing, as with other conflict-of-interest Rules. "Confirmed in writing" is defined in Rule 1.0(b).

5. Paragraph (b): Add references to other third-party neutrals

As with paragraph (a), the Commission has added references to mediators and other third-party neutrals and deleted "arbitrator" from the sentence addressing law clerks.

6. Paragraph (c): Nonconsensual screening of other third-party neutrals

Under the current Rule, the individual disqualification of a former judge or arbitrator under this Rule is not imputed to associated lawyers in a law firm if the conditions in (c)(1) and (2) are satisfied. The Commission determined that mediators and other third-party neutrals should be treated in the same manner because 1) there is typically less confidential information obtained in these proceedings than when the lawyer represents clients in a client-lawyer relationship and 2) although the third-party neutral usually owes a duty of confidentiality to the parties, it is not the same duty of confidentiality owed under Rule 1.6. The Commission also heard testimony that third-party neutrals do not share information with other lawyers in the firm in the same way that lawyers representing clients do. Finally, the Commission was concerned that failure to permit screening might inhibit the extent to which lawyers serve as third-party neutrals, particularly in voluntary, court-based alternative dispute resolution programs.

7. Paragraph (c)(1): Add "timely"

The Commission is recommending a definition of "screened" that includes a requirement that the lawyer be "timely" isolated from participation in the matter. Nevertheless, the Commission believes that the timeliness requirement is so important that it should appear in the

text as well. This change is being recommended for all of the Rules that provide for screening. See Rules 1.10, 1.11 and 1.18.

COMMENT:

[2] This Comment has been added to explain the textual addition to paragraph (a) of the Rule, i.e., its applicability to arbitrators, mediators and other third-party neutrals.

[3] This entirely new Comment explains the rationale for imputing the conflicts of a personally disqualified lawyer unless the requirements of paragraph (c) are met.

[4] This entirely new Comment addresses the requirements of paragraph (c)(1) and has a cross-reference to the definition of "screened" in Rule 1.0(k).

[5] This entirely new Comment addresses the requirements of paragraph (c)(2).

Model Rule 1.13
Reporter's Explanation of Changes

TEXT:

1. Paragraph (b): Add "for" and substitute "on" for "in"

These changes are stylistic and grammatical. No change in substance is intended.

2. Paragraph (d): Change "when it is apparent" to "the lawyer knows or reasonably should know"

This change clarifies the scienter requirement in this paragraph, using defined terminology and a construction that appears elsewhere in the Rules. See, e.g., Rule 4.3.

COMMENT:

[4] These changes are stylistic. No change in substance is intended.

[5] This change is stylistic. No change in substance is intended.

[6] This modification of Comment [6] is designed to more accurately reflect prevailing law regarding the identity of a government client. Although ultimately the identity of the client is a question of law beyond these Rules, the Commission believes that the limited guidance provided in this revised Comment is helpful.

Model Rule 1.14
Reporter's Explanation of Changes

TEXT:

1. Caption: Change to "Client with Diminished Capacity"

In the caption and thereafter throughout the Rule, terminology referencing a client's capacity is changed to focus on and more accurately express the continuum of a client's capacity.

2. Paragraph (a): Terminology change

The change in terminology in this paragraph is grammatical and reflective of the change of focus of the Rule to the continuum of a client's capacity.

3. Paragraph (b): Add protective measures lawyer may take short of request for guardian and requiring risk of substantial harm unless action is taken

The Commission recommends adding guidance for lawyers regarding "protective action" the lawyer may take short of seeking a guardian, which is generally deemed appropriate only in extreme circumstances. The revision permits the lawyer to "take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client, and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." The Commission believes the recommended change offers the lawyer flexibility when a client faces substantial risk of harm or when emergency legal assistance is required as described in Comments [9] and [10].

4. Paragraph (c): Add limitation on "protective action"

The Commission recommends addition of a new paragraph (c) to specify the means by which "protective action" should be limited to avoid client harm. The proposal explicitly recognizes the relationship of Rule 1.14(b) to Rule 1.6. Specifically, it states that Rule 1.6 allows disclosure of information under Rule 1.14(b) only as "reasonably necessary to protect the client's interests."

COMMENT:

[1] This Comment has been revised with collateral language changes to reflect the Rule's focus on degrees of a client's capacity.

[2] This Comment has been revised to delete the sentence, "If the person has no guardian or legal representative, the lawyer often must act as de facto guardian." The Commission views as unclear, not only what it means to act as a "de facto guardian," but also when it is appropriate for a lawyer to take such action and what limits exist on the lawyer's ability to act for an incapacitated client. The other revision to the Comment is a grammatical and stylistic change.

[3] This new Comment includes additional discussion of the potential risk in the common practice of having family members or other persons participate in the lawyer's representation of a client with diminished capacity. The change is recommended to encourage

lawyers to seek such involvement since this practice may be of assistance to the representation. The Comment also points out potential risk to the extent that family members may be guided, consciously or unconsciously, by their own interests instead of the interests of the client.

[4] This revision of current Comment [3] includes additional discussion indicating that parents as natural guardians may have the same rights as legal guardians to make decisions regarding their children, depending on the nature of the matter or proceeding. (Whether and when parents have rights to make decisions on their children's behalf is a matter of substantive law that is not addressed here.)

The discussion in current Comment [3] on the issue of whether the lawyer should seek appointment of a guardian has been moved, with modification, to new Comment [7]. Finally, current Comment [4] is now the last sentence of proposed Comment [4] in order to provide a single Comment on the lawyer's role when the client of diminished capacity already has a legal representative.

Caption "Taking Protective Action" has been added to highlight and focus on action the lawyer may take during representation of a client with diminished capacity.

[5] This new Comment sets forth the rationale for paragraph (b) and gives additional detail on the circumstances that might trigger the lawyer's permission to consult with family members, adult-protective agencies or other individuals or entities that have the authority to protect the client.

[6] This new Comment provides guidance on determining the extent of a client's diminished capacity.

[7] This new Comment addresses the issue of whether a lawyer should seek appointment of a guardian. Discussion of this issue in current Comment [3], with modification, is relocated here. The modification clarifies that, while it "may" be necessary to have a legal representative appointed to complete a transaction, it is not "ordinarily" required to the extent that a client with some degree of capacity may be able to execute a power of attorney. In addition, the discussion in current Comment [5] regarding rules of procedure requiring a guardian or next friend has been moved to this Comment. A new final sentence serves as a useful reference to other law that may impose a requirement that the lawyer take the least restrictive action under the circumstances.

[8] This is a revision of current Comment [5]. The first sentence has been moved to Comment [7]. The majority of the language is essentially new and refers to the limitations in paragraph (c) on the disclosure of information relating to the representation and clarifies the relationship between Rules 1.14 and 1.6. The last sentence of the current Comment has been deleted because the issue of whether a lawyer may seek guidance from a diagnostician is addressed in Comment [6].

[9] and [10] The changes reflect the Rule's new focus on degrees of a client's capacity.

Model Rule 1.15
Reporter's Explanation of Changes

TEXT:

1. Paragraph (b): Deposits to minimize bank charges

The Commission heard testimony that in some jurisdictions lawyers are unable to avoid bank charges unless they are permitted to deposit money in a client trust account to cover such charges. The addition of this new paragraph is designed to address that problem.

2. Paragraph (c): Advance payment of fees and expenses

This new paragraph provides needed practical guidance to lawyers on how to handle advance deposits of fees and expenses. The Commission is responding to reports that the single largest class of claims made to client protection funds is for the taking of unearned fees.

3. Paragraph (e): Expand to cover all instances of disputed funds

Current Rule 1.15(c) is presently written to cover disputes between the lawyer and "another person," usually the client. The change proposed recognizes that at least three kinds of disputes are in fact possible: client-lawyer, client-creditor and lawyer-client's creditor. The proposed change thus uses more general language, tightens the first two sentences into one and reiterates the lawyer's duty to pay over undisputed sums. The final additional sentence clarifies the lawyer's duty to promptly distribute all portions of the property that are not subject to dispute.

COMMENT:

[1] Consistent with the Commission's action with respect to Rule 1.18, a phrase has been added to make clear that prospective clients are included among the third parties to whom the lawyer owes a duty to protect property pursuant to this Rule.

While the black letter of this Rule is written in mandatory terms, the Comments are often permissive. Sometimes that may be appropriate, as where a safe deposit box is suggested unless something else is warranted by the circumstances. When the issue is close, permissive language has been retained. However, Rule 1.15(a) clearly requires that client property, including money, be kept separate from the lawyer's own, and the Comment has been changed to make that clear. A sentence has been added to provide guidance to lawyers regarding the proper maintenance of trust accounts.

[2] This new Comment addresses new paragraph (b).

[3] This Comment deals with handling client funds that may be set aside for payment of fees. The current language refers only to funds received from third parties, whereas the usual payer will be the client. Further, the lawyer should not have to show that the client is in fact likely to leave town if, pursuant to agreement, the lawyer is entitled to have the security of funds paid over before the fee is actually earned.

In addition, as in Comment [1], the clear Rule 1.15(a) and (e) requirements that disputed client funds be kept in a separate account is made mandatory rather than permissive.

[4] This Comment deals with a practical problem in which a client's creditor tries to get at funds in the hands of the lawyer. There is no doubt that, as a matter of substantive law, in some cases the lawyer would be required to make the creditor whole if the lawyer remitted property to the client to which the creditor was found entitled. In those, but only those, cases, paragraph (e) mandates a lawyer's refusal to remit the funds to the client until the dispute is resolved, while this Comment reinforces and tries to explain this sometimes controversial point. The Comment further explains that the lawyer's duty to protect client creditors only exists when the creditor has a claim against specific funds being held by the lawyer and that the lawyer's duty to protect the third party exists only when there is a nonfrivolous claim under applicable law. When there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] These changes clarify that when a lawyer holds funds in a capacity other than as a lawyer representing a client, this Rule does not apply.

[6] The change to "lawyers' fund for client protection" reflects the current nomenclature for these funds. The new language in the second sentence indicates a lawyer has an obligation to contribute to these funds in jurisdictions where they are mandatory.

Model Rule 1.16 Reporter's Explanation of Changes

TEXT:

1. Paragraph (b): Clarify significance of permission to withdraw "without material adverse effect on the interests of the client"

No change in substance is intended. This proposal is intended to clarify that the lawyer may withdraw for any reason if "withdrawal can be accomplished without material adverse effect on the interests of the client," or, even if there will be such material adverse effect, if the lawyer has good cause, as set forth in paragraphs (b)(2) through (6).

2. Paragraph (b)(4): Alter requirement for permissive withdrawal when client and lawyer disagree over course of representation

a. Substitute "taking action" for "pursuing an objective"

The Commission recommends that a lawyer be permitted to withdraw from representation whenever a client is insisting that the lawyer take action that the lawyer finds repugnant or, in some instances, when the lawyer has a fundamental disagreement with the action proposed by the client, regardless of whether the action concerns the client's objectives or the means of achieving those objectives.

b. Substitute "with which the lawyer has a fundamental disagreement" for "imprudent"

Allowing a lawyer to withdraw merely because the lawyer believes that the client's objectives or intended action is "imprudent" permits the lawyer to threaten to withdraw in order to prevail in almost any dispute with a client, thus detracting from the client's ability to direct the course of the representation. Nevertheless, the Commission believes that a lawyer ought to be permitted to withdraw when the disagreement over objectives or means is so fundamental that the lawyer's autonomy is seriously threatened.

c. Change first word from "a" to "the"

This is a stylistic change to conform with the other subparagraphs of (b).

3. Paragraph (c): Remind lawyers of court requirements of notice or permission to withdraw from pending litigation

Some courts require only that the lawyer notify the court of withdrawal, for example, where a substitution of counsel is being made with the consent of the client. The Commission recommends following the practice of several states that have added the proposed first sentence in order to remind lawyers of their obligations under court rules.

4. Paragraph (d): Add reference to return of unearned fees and unexpended advanced expenses

This change corresponds to the change in Rule 1.15, which requires lawyers to segregate advanced fees and expenses in a client trust account.

COMMENT:

[1] The additional material addresses the question of when a representation is completed and cross-references other Rules, including those in which the services are limited in scope or intended to be short-term in nature. No change in substance is intended.

[3] Three changes are proposed. None of them is substantive. The first proposal is to add a sentence regarding the possibility that a court may require either approval or notice before a lawyer withdraws from pending litigation. The second is to substitute "request" for "wish" for reasons of style. The third is to add a cross-reference to Rules 1.6 and 3.3 regarding any colloquy with a court requesting an explanation for the lawyer's request to withdraw.

[6] These changes are proposed in light of the changes made in Rule 1.14.

[7] The proposed change tracks the proposed change to paragraph (b)(4).

[9] The Commission recommends adding a cross-reference to Rule 1.15 on client property. It also recommends that the last sentence be deleted because its meaning is unclear.

Model Rule 1.17
Reporter's Explanation of Changes

TEXT:

1. Paragraph (b): Eliminate requirement that sale be to single buyer

Paragraph (b) of the current Rule requires that the practice be sold “as an entirety” to a single lawyer or firm. The justification offered is that purchasers would otherwise take only a seller’s profitable cases and leave some clients unrepresented.

The Commission believes that the present requirement is unduly restrictive and potentially disserves clients. While it remains important to ensure the disposition of the entire caseload, it is not necessary to require that all cases must be sold to a single buyer. For example, it may make better sense to allow the sale of family-law cases to a family lawyer and bankruptcy cases to a bankruptcy lawyer. Common sense would suggest the lawyer should sell the cases to the most competent practitioner and not be limited by such a “single buyer” rule, and paragraph (b) has been redrafted accordingly.

2. Paragraphs (c)(2) and (d): Eliminate buyer’s right to refuse representation unless seller’s clients agree to pay increased fee

Paragraph (d) of the current Rule states that the fees charged clients shall not be increased by reason of the sale. However, it also allows the buyer of a practice to tell the seller’s clients that the buyer will not work on their cases unless they agree to pay a greater fee than they had agreed to pay the seller. The only limit is that the buyer may not charge the seller’s clients more than the buyer charges the buyer’s other clients for “substantially similar services.” This is problematical because the seller could not unilaterally abrogate the fee agreement as a matter of contract law. The seller could have withdrawn as permitted under Rule 1.16, but the seller certainly could not have refused to continue the representation unless the client agreed to a modification of the fee contract. In this regard, the Commission thinks the buyer should stand in the shoes of the seller and has modified paragraph (d) accordingly. This proposal is in accord with the rules of California, Colorado (written contracts only), Florida, Iowa, Minnesota (must honor for one year), New Jersey, New York, North Dakota, Oregon, Tennessee (proposed rule), Virginia and Wisconsin.

The Commission proposes to delete paragraph (c)(2) in light of the modification in paragraph (d). Its only purpose was to require that notice be given to the seller’s clients of the buyer’s right to require increased fees under paragraph (d), which right has now been eliminated.

COMMENT:

[1] Minor wording changes have been made as part of the proposed change permitting sale of a practice to more than one lawyer or firm.

[2] Minor changes have been made as part of the proposed change permitting sale of a practice to more than one lawyer or firm and to clarify the third sentence.

[5] This Comment has been changed to explain the rationale for requiring that an entire practice be sold, albeit not to a single purchaser.

[6] Material has been deleted from the Comment because of the Commission's decision to prohibit purchasers from stating they will not continue the representation except at their usual fee.

[9] In accord with the change in the Rule text, the language explaining the right to a unilateral fee increase has been deleted. See discussion of paragraphs (c)(2) and (d).

~~[10]~~ Given the change in the Rule text, current Comment [10] is no longer necessary and has been deleted.

[10] The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

Model Rule 1.18 Reporter's Explanation of Changes

Rule 1.18 is a proposed new Rule in response to the Commission's concern that important events occur in the period during which a lawyer and prospective client are considering whether to form a client-lawyer relationship. For the most part, the current Model Rules do not address that pre-retention period.

TEXT:

1. Paragraph (a): Define prospective client

Paragraph (a) defines the limited circumstances to which this Rule applies by defining who qualifies as a "prospective client."

2. Paragraph (b): Duty of confidentiality owed prospective client

Paragraph (b) identifies the duty to treat all communications with a prospective client as confidential. This obligation is a well-settled matter under the law of attorney-client privilege, and the fact that Model Rule 1.9 does not now technically cover these communications is an omission that this proposal corrects.

3. Paragraph (c): Prohibit later representation adverse to prospective client

Paragraph (c) extends the application of Rule 1.9 to prohibit representation adverse to the prospective client in the same or a substantially related matter. Unlike Rule 1.9, however, this

Rule does so only if the lawyer received information from the prospective client that could be "significantly harmful" to that person in the later representation.

The prospective client situation justifies that different treatment because, prior to the representation decision, there is an inevitable period in which it is in the interest of the prospective client to share enough information with the lawyer to determine whether there is a conflict of interest or simple incompatibility. The lawyer may learn very early in the consultation, for example, that the party adverse to the prospective client is a client of the lawyer's firm. If the discussion stops before "significantly harmful" information is shared, it seems that the law firm's regular client should not be denied counsel of its choice if a substantially related matter arises.

Paragraph (c) also extends the prohibition of this Rule to associated lawyers, except as provided in paragraph (d).

4. Paragraph (d)(1): Representation permitted with client consent

Paragraph (d)(1) makes clear that the prohibition imposed by this Rule can be waived with the informed consent, confirmed in writing, of both the former prospective client and the client on whose behalf the lawyer later plans to take action adverse to the former prospective client. The expression of this requirement is parallel to that in Rules 1.7 and 1.9.

5. Paragraph (d)(2): Screening lawyer who conferred with prospective client

In the event that "significantly harmful" information is revealed, paragraph (d)(2) provides that the lawyer who received the information may be screened from any involvement in the subsequent matter, and others in the law firm may represent the adverse party, but only if the personally disqualified lawyer acted reasonably in attempting to limit that lawyer's exposure to potentially harmful information.

COMMENT:

[1] This Comment highlights three ways in which lawyers may assume obligations to prospective clients: disclosure of information, taking possession of documents or property and giving legal advice. It also explains the inevitably tentative quality of the initial consultation and suggests the reason for giving prospective clients somewhat less than the protection offered former clients by Rule 1.9.

[2] This Comment explains that lawyers are not disqualified when a person unilaterally communicates information to the lawyer without any reasonable expectation that the lawyer will agree to discuss the possibility of forming a client-lawyer relationship.

[3] This Comment explains the lawyer's obligation to preserve confidences of the prospective client, no matter what right the lawyer or law firm may have to undertake later adverse representation.

[4] This Comment first explains that a lawyer should obtain only the information required to determine whether to undertake the representation. If a conflict of interest is found to exist, the lawyer should decline the representation or obtain the required consent from all affected clients.

[5] This Comment identifies consent in advance of the consultation as one way to avoid later concerns about adverse use of the information obtained. Such an option was expressly approved in ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 90-358.

[6] This Comment reiterates the right of a lawyer to undertake representation adverse to a prospective client from whom no "significantly harmful" information was obtained.

[7] This Comment describes how the imputation otherwise required by paragraph (c) may be avoided by either obtaining the informed consent of the prospective and affected clients under paragraph (d)(1) or by screening under the conditions stated in paragraph (d)(2).

[8] This Comment addresses the requirements of paragraph (d)(2)(i) and (ii).

[9] This Comment is a cross-reference to existing Rules that deal with two of the three issues identified in Comment [1]. Any advice a lawyer gives must be competent under Rule 1.1, and Rule 1.15 requires a lawyer to care for property of "third persons," which would include prospective clients.

Model Rule 2.1 Reporter's Explanation of Changes

TEXT:

No change is proposed to the text of this Rule.

COMMENT:

[5] The Commission has proposed an addition to this paragraph to remind lawyers that informing a client of various forms of dispute resolution may be required under Rule 1.4, i.e., when a different form of dispute resolution would constitute a reasonable alternative to litigation. This addition is proposed in recognition of the increasingly important role being played by alternative dispute resolution in litigation. The remaining changes are for clarification and style.

Model Rule 2.2 Reporter's Explanation of Changes

TEXT:

The Commission recommends deleting Rule 2.2 and moving any discussion of common representation to the Rule 1.7 Comment. The Commission is convinced that neither the concept of "intermediation" (as distinct from either "representation" or "mediation") nor the relationship between Rules 2.2 and 1.7 has been well understood. Prior to the adoption of the Model Rules, there was more resistance to the idea of lawyers helping multiple clients to resolve their differences through common representation; thus, the original idea behind Rule 2.2 was to permit common representation when the circumstances were such that the potential benefits for the clients outweighed the potential risks. Rule 2.2, however, contains some limitations not present in Rule 1.7; for example, a flat prohibition on a lawyer continuing to represent one client and not the other if intermediation fails, even if neither client objects. As a result, lawyers not wishing to be bound by such limitations may choose to consider the representation as falling under Rule 1.7 rather than Rule 2.2, and there is nothing in the Rules themselves that clearly dictates a contrary result.

Rather than amending Rule 2.2, the Commission believes that the ideas expressed therein are better dealt with in the Comment to Rule 1.7. There is much in Rule 2.2 and its Comment that applies to all examples of common representation and ought to appear in Rule 1.7. Moreover, there is less resistance to common representation today than there was in 1983; thus, there is no longer any particular need to establish the propriety of common representation through a separate Rule.

COMMENT:

[1] This Comment has been deleted. The Commission believes the term "common representation" is preferable to "intermediation."

[2] This Comment has been deleted as no longer necessary since the term "intermediation" has been eliminated.

[3] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[4] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[5] This Comment has been deleted as no longer necessary after the elimination of the term "intermediation."

[6] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[7] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[8] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[9] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[10] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

Model Rule 2.3 Reporter's Explanation of Changes

TEXT:

1. Restructure text to clarify circumstances in which lawyer may provide evaluation for use of third persons

The Commission recommends restructuring the Rule to clarify its application in two situations. The first is one where the evaluation poses no significant risk to the client. Here, the lawyer may be impliedly authorized to provide the evaluation, and paragraph (a) requires only that the lawyer determine that providing the evaluation is compatible with other aspects of the client-lawyer relationship. The second situation is one where there is a significant risk of material and adverse effect on the client's interests. Here, paragraph (b) provides that the lawyer may not proceed without obtaining the client's informed consent. Paragraph (c) reminds lawyers that the disclosure of information pursuant to providing an evaluation is governed by Rule 1.6, under which disclosures may be impliedly or expressly authorized.

2. Paragraph (a): Substitute "provides" for "undertakes"

This change reflects the Commission's view that it is not the undertaking that is potentially problematic but rather the actual provision of an evaluation for use by third persons.

3. Paragraph (b): Substitute "informed consent" for "consent after consultation"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

4. Paragraph (b): Material adverse effect

This paragraph clarifies that informed consent is not required in all cases but rather only those in which there is a significant risk of material adverse effect on the client's interests.

5. Paragraph (c): Substitute "authorized" for "required"

This change reflects the Commission's view that disclosures in connection with an evaluation under this Rule are not "required" but rather "authorized" and that the authorization must conform to the requirements of Rule 1.6.

COMMENT:

[1] The addition to this Comment is designed to explain the relationship between this Rule and Rule 1.2, in which the lawyer's authority to provide an evaluation may be expressly or impliedly authorized.

~~[2]~~ The Commission recommends deleting this Comment on the ground that neither its meaning nor its function is clear.

Caption The caption has been changed to reflect the context of the Comment, which addresses duties to both third persons and to clients.

[4] The Commission recommends the addition of a cross-reference to Rule 4.1 in response to expressions of concern that lawyers should not render an opinion based on stated facts when the lawyer knows the facts to be otherwise.

Caption This new caption introduces the new material in Comment [5].

[5] This new Comment discusses and explains the requirement to obtain the informed consent of the client if there is a significant risk of material and adverse effect on the client's interests. "Informed consent" is defined in Rule 1.0(e).

Model Rule 2.4
Reporter's Explanation of Changes

TEXT:

The role of third-party neutral is not unique to lawyers, but the Commission recognizes that lawyers are increasingly serving in these roles. Unlike nonlawyers who serve as neutrals, lawyers may experience unique ethical problems, for example, those arising from possible confusion about the nature of the lawyer's role. The Commission notes that there have been a number of attempts by various organizations to promulgate codes of ethics for neutrals (e.g., aspirational codes for arbitrators or mediators or court enacted rules governing court-sponsored mediators), but such codes do not typically address the special problems of lawyers. The Commission's proposed approach is designed to promote dispute resolution parties' understanding of the lawyer-neutral's role.

1. Paragraph (a): Define "third-party neutral"

Paragraph (a) defines the term "third-party neutral" and emphasizes assistance at the request of the parties who participate in the resolution of disputes and other matters.

2. Paragraph (b): Inform parties of nature of lawyer's role

Paragraph (b) requires the lawyer serving as a third-party neutral to inform unrepresented parties in all cases that the lawyer does not represent them. The potential for confusion is

sufficiently great to mandate this requirement in all cases involving unrepresented parties. Consistent with the standard of Rule 4.3, paragraph (b) requires the lawyer to explain the differences in a lawyer's role as a third-party neutral and the role of a lawyer representing a party in situations where the lawyer knows or reasonably should know that the unrepresented party does not understand the lawyer's role as a third-party neutral.

COMMENT:

[1] This introductory Comment describes dispute-resolution processes and notes that the specific role of the third-party neutral may depend on whether the process is court-annexed or private.

[2] This Comment cross-references other law and ethics codes applicable to lawyers serving as third-party neutrals. The Commission believes the referenced material will be helpful to lawyers unfamiliar with existing standards in this area.

[3] This Comment explains the rationale for the requirement of paragraph (b) that lawyers inform unrepresented parties that the lawyer is not representing them and, in some cases, explain the differences between the lawyer's role as neutral and the role of a lawyer representing a party.

[4] This Comment cross-references Rule 1.12, which addresses the conflicts of interest that arise when a lawyer-neutral or that lawyer's firm is asked to represent a client in a matter that is the same as a matter in which the lawyer served as a third-party neutral.

[5] This Comment distinguishes between the lawyer's duty of candor in an arbitration and in other dispute resolution proceedings. Because a binding arbitration is a "tribunal" as defined in Rule 1.0(m), the lawyer's duty of candor in such a proceeding is governed by Rule 3.3. In other dispute-resolution proceedings, the lawyer's duty of candor toward the third-party neutral and the other parties is governed by Rule 4.1.

Model Rule 3.1
Reporter's Explanation of Changes

TEXT:

Add reference to "law and fact"

This change makes explicit the requirement that a claim must have a nonfrivolous basis in both law and fact. See also Comment [2]. No change in substance is intended.

COMMENT:

[2] A new sentence has been added to remind lawyers that they must act reasonably to inform themselves about the facts and law pertinent to a claim they will make on behalf of a

client. The reference to a client's purpose to harass has been dropped because the client's purpose is not relevant to the objective merits of the client's claim.

[3] This new Comment acknowledges the primacy of constitutional law that might require a lawyer to take action on behalf of a criminal defendant that otherwise would violate this Rule.

Model Rule 3.2 Reporter's Explanation of Changes

TEXT:

The Commission is not recommending any change to the Rule text.

COMMENT:

[1] The Commission concluded that the reference in the second sentence to indulging delay "merely for the convenience of the advocates" is too restrictive and modified it to recognize that there are circumstances where it is acceptable for a lawyer to request a postponement for personal reasons.

Model Rule 3.3 Reporter's Explanation of Changes

The Commission has revised and reorganized this Rule to clarify a lawyer's obligation of candor to the tribunal with respect to testimony given and actions taken by the client and other witnesses. The commentary was reorganized and expanded to address some recurring situations not directly addressed in the Rule. In some particulars, the lawyer's obligations to the tribunal have been strengthened. For example, the Rule now makes clear that the lawyer must not allow the introduction of false evidence and must take remedial steps where the lawyer comes to know that material evidence offered by the client or a witness called by the lawyer is false – regardless of the client's wishes. As under the existing Rule, the lawyer's obligations to the tribunal may require the lawyer to reveal information otherwise protected by Rule 1.6. The lawyer's obligation in the existing Rule to avoid assisting client crime or fraud is replaced by a broader obligation to ensure the integrity of the adjudicative process. The lawyer must take remedial measures whenever the lawyer comes to know that any person is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, such as jury tampering or document destruction.

In one special case, however, the lawyer's obligation to the client has been reaffirmed and strengthened, and that is where the lawyer represents the defendant in a criminal proceeding. For the first time the Rule text will address the special obligations of a criminal defense lawyer, providing that such a lawyer does not have the same discretion as other lawyers regarding the client's own testimony. While a criminal defense lawyer is subject to the general rule prohibiting the offering of testimony the lawyer knows to be false, the lawyer may not refuse to allow a

defendant to testify in the defendant's defense if the lawyer only reasonably believes the testimony will be false. The commentary also provides that where a court insists that a criminal defendant be permitted to testify in the defendant's defense, the lawyer commits no ethical violation in allowing the client to do so even if the lawyer knows the client intends to lie.

TEXT:

1. Paragraph (a)(1): Amplify lawyer's duty not to make false statements to tribunal and add obligation to correct false statements previously made

The Commission recommends deletion of the term "material" that presently qualifies the lawyer's duty not to knowingly make false statements of fact or law to a tribunal, bringing this duty into conformity with the duty not to offer false evidence set forth in paragraph (a)(3). A new phrase addresses the lawyer's duty to correct a false statement of material fact or law previously made to the tribunal, also paralleling the duty to take remedial measures in paragraph (a)(3).

2. Paragraph (a)(2): Delete existing provision on lawyer's duty to disclose client crime or fraud

The Commission is deleting current paragraph (a)(2), which provides that a lawyer shall not knowingly fail to disclose to the tribunal material facts when necessary to avoid assisting client crime or fraud. The lawyer's duty to disclose crime or fraud in connection with a proceeding before a tribunal is now addressed more comprehensively in paragraph (b). The lawyer also has disclosure obligations under paragraphs (a)(1) and (a)(3), where the lawyer comes to know of the falsity of statements previously made to the tribunal or evidence previously offered. A lawyer's general duty to avoid assisting client crime or fraud is addressed in Rules 1.2(d) and 4.1.

3. Paragraph (a)(3): Amplify duty to take remedial measures in connection with material evidence lawyer comes to know is false and include discretion to refuse to offer evidence lawyer reasonably believes is false

The Commission is amending current paragraph (a)(4) to extend its remedial obligations to situations where the lawyer's client or a witness called by the lawyer has offered material evidence that the lawyer subsequently comes to know is false. Required remedial measures may, if necessary, include disclosure to the tribunal.

The Commission has also transferred to this paragraph the substance of current paragraph (c), which permits a lawyer to refuse to offer evidence that the lawyer reasonably believes (but does not know) is false. This grant of discretion, however, has been limited so it will not apply to the testimony of a client who is exercising the constitutional right to testify in a criminal case.

4. Paragraph (b): Duty to preserve integrity of adjudicative process

The Commission recommends adoption of a new provision (b) addressing the lawyer's obligation to take reasonable remedial measures, including disclosure if necessary, where the lawyer comes to know that a person is engaging or has engaged in any sort of criminal or

fraudulent conduct related to the proceeding. This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) (“A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal”) and DR 7-108(G) (“A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson’s or juror’s family, of which the lawyer has knowledge”).

5. Paragraph (c): Duration of duties in paragraphs (a) and (b)

The Commission is not changing the scope and duration of the lawyer’s duty of candor to the tribunal but extending it to paragraph (b).

COMMENT:

[1] This new Comment explains that the duties contained in Rule 3.3 apply in all proceedings before a “tribunal” as defined in Rule 1.0(m). It explains that they also apply in ancillary proceedings conducted pursuant to a tribunal’s adjudicative authority, such as a deposition.

[2] The revisions to current Comment [1] clarify that a lawyer has a duty to avoid conduct that undermines the integrity of the adjudicative process and in this regard must not allow the tribunal to be misled by false statements of law or fact.

Caption The caption "Legal Argument" more accurately describes the subjects addressed in Comment [4].

[4] The change reflects paragraph renumbering in the Rule text. No change in substance is intended.

Caption The caption "Offering Evidence" more accurately describes the subjects addressed in Comments [5] through [9].

~~[4]~~ This Comment has been replaced by Comment [5].

~~[5]~~ This Comment has been replaced and supplemented by Comment [9].

[5] This new Comment replaces current Comments [4] and [5] and explains that paragraph (a)(3) prohibits a lawyer from offering testimony or other evidence the lawyer knows is false, regardless of the client’s wishes. Unlike the current Rule, paragraph (a)(3) extends to evidence provided by the client. The Comment explains that a lawyer does not violate the Rule if the lawyer knowingly elicits false testimony for the purpose of subsequently establishing its falsity.

[6] This new Comment explains the lawyer’s duty where the lawyer’s client intends to testify falsely or wants the lawyer to introduce false testimony. The lawyer must seek to dissuade the client and, if this is unsuccessful, must refuse to offer the false evidence.

[7] This new Comment explains that the duties in paragraphs (a) and (b) apply to defense counsel in criminal cases. Where a court requires a lawyer to permit a criminal defendant to give testimony that the lawyer knows is false, however, the obligation of the advocate under these Rules is subordinate to such a requirement.

[8] This new Comment explains that while the prohibition against offering false testimony in paragraph (a) applies only where the lawyer knows that the evidence is false, such knowledge may be inferred from the circumstances.

Caption The caption "Refusing to Offer Proof Reasonably Believed to Be False" has been deleted because the Comment to which it referred is now subsumed under "Offering Evidence."

[9] This Comment, which revises current Comment [14], explains that while paragraph (a)(3) prohibits a lawyer from offering evidence that the lawyer knows is false, a lawyer may refuse to offer evidence that the lawyer only reasonably believes is false, including evidence offered by the client — except where the client is a defendant in a criminal case. Because of the special protections historically provided criminal defendants, criminal-defense counsel do not have the same latitude to refuse to offer client testimony they reasonably believe (but do not know) is false. (See also Comment [7] *supra*.)

Caption The caption "Perjury by a Criminal Defendant" has been deleted because of the deletion of current Comments [7] through [10].

~~[7] through [10]~~ These Comments have been deleted as no longer helpful to the analysis of questions arising under this Rule. No change in substance is intended.

[10] This Comment revises and expands upon current Comment [11] to describe the remedial steps a lawyer must take if the lawyer is surprised by a witness's false testimony or where the lawyer subsequently comes to know that evidence the lawyer has offered is false. These steps include remonstrating with the client, consulting with the client about the lawyer's duty of candor to the tribunal and withdrawing from the representation. If necessary to remedy the situation, the lawyer may make disclosure to the tribunal even if doing so would require the lawyer to reveal information otherwise protected by Rule 1.6.

[11] The revisions to current Comment [6] are editorial in nature. No change in substance is intended.

Caption A new caption, "Preserving Integrity of Adjudicative Process," was added to highlight the Comment [12] discussion of paragraph (b).

[12] This new Comment explains the obligations imposed by paragraph (b), where the lawyer knows that any person intends to engage, is engaging or has engaged in criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Examples of such conduct are bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing

documents or other evidence or failing to disclose information to the tribunal when required by law to do so. This could include lies or misrepresentations by the opposing party or witnesses called by the opposing party, which are not covered by paragraph (a)(3). The obligations imposed by this paragraph will ordinarily subsume those imposed by current paragraph (a)(2), which has been deleted.

Caption The caption "Constitutional Requirements" has been deleted because the discussion of constitutional requirements in current Comment [12] has been incorporated into Comments [7] and [9].

~~[12]~~ This Comment has been deleted because the issues it addressed are now addressed in Comments [7] and [9].

[13] Revisions to this Comment explain that the obligation of candor to the tribunal continues until a final judgment has been affirmed on appeal or the time for review has passed.

Caption The new caption "Withdrawal" sets off the discussion in new Comment [15].

[15] This new Comment explains the relationship between a lawyer's compliance with the duty of candor to the tribunal and the lawyer's obligation to withdraw from the representation under Rule 1.16. While a lawyer's compliance with the Rule does not normally require withdrawal, the lawyer may be obliged to seek the tribunal's permission to withdraw if there results "such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client." The Comment also addresses the issue of disclosure in circumstances where withdrawal is permitted but not required.

Model Rule 3.4 Reporter's Explanation of Changes

TEXT:

The Commission is not recommending any change in the Rule text.

COMMENT:

[2] Language has been added to alert lawyers to the law governing possession of physical evidence of client crimes.

Model Rule 3.5 Reporter's Explanation of Changes

TEXT:

1. Paragraph (b)

The change to specify communication “during the proceeding” was made in light of the Commission’s decision to treat post-discharge communication with jurors in a new paragraph (c). The reference to "court order" has been added to alert lawyers to the availability of judicial relief in the rare situation in which an ex parte communication is needed.

2. Paragraph (c)

Rule 3.5(b) has been held to be unconstitutionally overbroad when applied to post-verdict communications with jurors. See *Rapp v. Disciplinary Board of the Hawaii Supreme Court*, 916 F. Supp. 1525 (D.Hawaii, 1996). The Commission has proposed the addition of a new paragraph (c) that permits such communications unless prohibited by law or court order or the lawyer knows that the juror does not wish to be contacted. Also prohibited, of course, are communications involving misrepresentation, duress, coercion or harassment. The proposal permits more post-verdict communication with jurors than the current Rule but affords the juror greater protection than did ABA Model Code of Professional Responsibility DR 7-108(D) which provided, “After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.”

COMMENT:

[2] and [3] These Comments have been added to reflect the change in the Rule text with respect to communication with jurors after discharge of the jury.

[5] This new Comment makes clear that paragraph (d) applies to any proceeding of a tribunal and calls particular attention to its applicability to depositions.

Model Rule 3.6
Reporter's Explanation of Changes

TEXT:

1. Paragraph (a): Replace "reasonable person" with "reasonable lawyer"

As modified, paragraph (a) requires that a lawyer's assessment of the likelihood that a statement will be disseminated by means of public communication be judged from the perspective of a reasonable lawyer rather than a reasonable person. Whether a statement about legal proceedings will be publicly disseminated is an issue that may be viewed differently by lawyers and nonlawyers, and the Commission thinks that lawyers should only be subject to professional discipline when their judgments are unreasonably inconsistent with those of their professional peers.

2. Paragraph (a): Replace "would expect" with "knows or reasonably should know"

The Commission thinks that the scienter requirement in Rule 3.6 should employ wording consistent with the terminology as defined in Rule 1.0(f) and (j). Thus "reason to expect" is replaced with "knows or reasonably should know." No change in substance is intended.

COMMENT:

[8] Comment [8] is new and adds a cross-reference to the paragraph in Rule 3.8 that sets forth special duties of prosecutors with respect to extrajudicial statements.

Model Rule 3.7 Reporter's Explanation of Changes

TEXT:

No change in substance is proposed in the Rule text.

COMMENT:

[1] A reference to a tribunal has been added to clarify that the prohibition in paragraph (a) is for the protection of the tribunal as well as the parties.

Caption The new caption has been added to better reflect the subject of Comments [2] through [5].

[2] and [3] References to a tribunal have been added to clarify that the prohibition in paragraph (a) is for the protection of the tribunal as well as the parties.

[4] References to a tribunal have been added to clarify that the prohibition in paragraph (a) is for the protection of the tribunal as well as the parties. The last sentence has been modified to emphasize that the advocate-witness rule is distinct from the conflict of interest principles in Rules 1.7, 1.9, and 1.10.

[5] This new Comment explains why paragraph (b) permits a lawyer to act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rules 1.7 or 1.9.

Caption The new caption has been added to better reflect the subject of Comments [6] and [7].

[6] The changes are intended to clarify that lawyers must be alert to the conflicts that may arise when they serve as an advocate in a matter in which they or a lawyer with whom they are associated is a necessary witness and that, if there is a conflict, it is to be resolved in accordance with Rules 1.7 or 1.9.

[7] This new Comment discusses the vicarious disqualification that may result if the lawyer-witness is precluded from serving as advocate by Rules 1.7 or 1.9.

Model Rule 3.8
Reporter's Explanation of Changes

TEXT:

Paragraph (f): Relocate current paragraph (e)

The text of current paragraph (e) has not been modified but has been moved here to consolidate in a single paragraph the prosecutor's obligations regarding extrajudicial publicity.

COMMENT:

[1] The Commission recommends deleting the cross-reference to Rule 3.3(d) in the context of grand-jury proceedings, on the ground that grand-jury proceedings are not ex parte adjudicatory proceedings.

[2] The proposed modifications provide a rationale for the Rule and clarify the distinctions between an unrepresented accused, an accused who is appearing pro se with the approval of the tribunal and an uncharged suspect. No change in substance is intended.

[6] This is a new Comment explaining the material relocated from current paragraph (e). It provides that the reasonable-care standard will be satisfied if the prosecutor issues appropriate cautions to law-enforcement personnel and other individuals assisting or associated with the prosecutor but not under the prosecutor's direct supervision. No change in substance is intended.

Model Rule 3.9
Reporter's Explanation of Changes

TEXT:

The only change in the Rule text is the replacement of the reference to "legislative or administrative tribunal" with "legislative body or administrative agency." The term "tribunal" is defined in Rule 1.0(m) as denoting courts and other agencies when those agencies are acting in an adjudicative capacity. This change is necessary to make clear that Rule 3.9 applies only when the lawyer is representing a client in a nonadjudicative proceeding of a legislative body or administrative agency. No change in substance is intended.

COMMENT:

[1] The third sentence has been modified to clarify that the lawyer must, rather than merely should, act honestly and comply with procedural rules. A cross-reference to Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5 was also added.

[3] The addition of the new references to official hearings or meetings at which the lawyer or the lawyer's client is presenting evidence or argument, applications for licenses, generally applicable reporting requirements and investigations or examinations is intended to clarify the limited situations in which Rule 3.9 is applicable. The Comment is consistent with the holding of ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-375 that Rule 3.9 is inapplicable in connection with a bank examination.

Model Rule 4.1 Reporter's Explanation of Changes

TEXT:

The Commission is not recommending any change in the Rule text.

COMMENT:

[1] This Comment is presently quite brief, and the Commission is recommending additional guidance in the form of 1) a reference to "partially true but misleading statements;" 2) substituting "omissions that are the equivalent of affirmative false statements" for the vague "failure to act;" and 3) a cross-reference to Rule 8.4.

[2] The Commission received several requests to clarify the lawyer's obligation of candor in negotiations. The Commission is recommending the addition of the word "ordinarily" to clarify that, under some circumstances, an estimate of price or value could constitute a false statement of fact under this Rule. In addition, the Commission recommends a reference to the lawyer's obligations under the jurisdiction's criminal and tort law of misrepresentation.

Caption Presently the caption refers only to client fraud, whereas paragraph (b) refers to both frauds and crimes. Thus, the word "crime" has been added to the caption.

[3] The Comment has been expanded to explain that a lawyer's duty under this Rule not to assist client crime or fraud is a "specific application" of the lawyer's duty under Rule 1.2(d). It also explains the remedial measures a lawyer may be required to take to avoid assisting client crime or fraud. Disclosure is required only to the extent permitted by Rule 1.6.

Model Rule 4.2 Reporter's Explanation of Changes

TEXT:

Add reference to "court order"

Although a communication with a represented person pursuant to a court order will ordinarily fall within the "authorized by law" exception, the specific reference to a court order is

intended to alert lawyers to the availability of judicial relief in the rare situations in which it is needed. These situations are described generally in Comment [4].

After consideration of concerns aired by prosecutors about the effect of Rule 4.2 on their ability to carry out their investigative responsibilities, the Commission decided against recommending adoption of special rules governing communications with represented persons by government lawyers engaged in law enforcement. The Commission concluded that Rule 4.2 strikes the proper balance between effective law enforcement and the need to protect the client-lawyer relationships that are essential to the proper functioning of the justice system.

COMMENT:

[1] This new Comment states the purposes served by Rule 4.2 and, in particular, emphasizes that the Rule is designed not merely to protect individual clients but also to enhance the proper functioning of the legal system.

[2] This contains the substance of current Comment [1]. The last sentence has been deleted and its subject addressed in Comment [3]. A new sentence clarifies that Rule 4.2 does not preclude communication with a represented person who is seeking a second opinion from a lawyer who is not representing a party in the matter. Also, material has been added from the commentary to Rule 8.4(a) emphasizing that a lawyer may not make a communication prohibited by this Rule through the acts of another. At the same time, parties are not precluded from communicating with one another, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

[3] This Comment addresses when communications to or by the government may be within the Rule's "authorized by law" exception. The first sentence revises the final sentence of current Comment [1] and alerts lawyers to the possibility that a citizen's constitutional right to petition and the public policy of ensuring a citizen's right of access to government decisionmakers may create an exception to this Rule. The remainder of the Comment substantially revises current Comment [2] on the applicability of the "authorized by law" exception to communications by government lawyers, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. The reference in current Comment [2] to judicial precedent has been deleted, and the relationship between the Rule and applicable constitutional limits on government conduct has been reformulated. In place of the statement that the Rule imposes ethical restrictions that "go beyond" those imposed by constitutional provisions, the Comment explains that the fact that a communication does not violate the constitution "is insufficient to establish" that the communication is permissible under the Rule. For example, the fact that an individual has waived the constitutional right to consult the individual's lawyer at the time of arrest "is insufficient to establish" the ethical propriety of an ex parte communication by the government with that individual if the individual's lawyer has not agreed to the communication. In reformulating the relationship between the Rule and applicable legal or constitutional requirements, the Commission intends no substantive change in the applicable standard.

[4] This new Comment explains the two circumstances in which a lawyer may seek a court order authorizing a communication: 1) where a lawyer is uncertain whether or not the

communication is permitted by Rule 4.2; and 2) where a communication is prohibited by the Rule but "exceptional circumstances" nonetheless justify it. The example given is where ex parte communication with a represented person is necessary to avoid reasonably certain injury.

[5] This Comment revises current Comment [3] by adding two new sentences. The first makes clear that the protections accorded by Rule 4.2 may not be waived by the client. The second addition addresses situations in which a lawyer does not know at the initiation of a communication that a person is represented by counsel but finds out later. It reminds lawyers that they must terminate communication once they learn that the person is represented by counsel in the matter to which the communication relates. No change in substance is intended.

[6] This Comment modifies current Comment [4] identifying the constituents of a represented organization with whom a lawyer may not communicate without the consent of the organization's lawyer. The current Comment's inclusion of all "persons having a managerial responsibility on behalf of the organization" has been criticized as vague and overly broad. As reformulated, the Comment contains the more specific reference to "a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter." In focusing on the constituent's authority in the matter at issue and relationship with the organization's lawyer, the Comment provides clearer guidance than the broad general reference to "managerial responsibility."

In addition, the reference in the current Comment to a constituent whose act or omission in the matter may be imputed to the organization for purposes of civil or criminal liability has been retained. However, the Commission deleted the broad and potentially open-ended reference to "any other person ... whose statement may constitute an admission on the part of the organization." This reference has been read by some as prohibiting communication with any person whose testimony would be admissible against the organization as an exception to the hearsay rule.

A new sentence has been added to clarify that consent of the organization's lawyer is not required for communications with former constituents. The Commission, however, has added a warning to lawyers that Rule 4.4 precludes the use of methods of obtaining evidence that violate the legal rights of the organization.

[7] The penultimate sentence of current Comment [5] has been deleted because it suggests incorrectly that the required element of knowledge can be established by proof that the lawyer had "substantial reason to believe" that the person was represented in the matter. This is inconsistent with the definition of "knows" in Rule 1.0(f), which requires actual knowledge and involves no duty to inquire.

Model Rule 4.3

Reporter's Explanation of Changes

TEXT:

1. Add prohibition on giving legal advice to unrepresented persons

Under the ABA Model Code of Professional Responsibility, DR 7-104(A)(2), a lawyer was prohibited from giving advice to an unrepresented person, other than the advice to secure counsel. This statement is presently contained in the Comment to Model Rule 4.3. Although the cases generally perceive no change of substance in the Rule, it has been reported that, in negotiations between lawyers and unrepresented parties, the giving of legal advice (often misleading or overreaching) is not uncommon. Of the jurisdictions that have adopted the Model Rules, 11 have included a textual provision similar to the prohibition on giving legal advice in the Model Code.

The reason for the initial decision to delete the Model Code prohibition from text was the difficulty of determining what constitutes impermissible advice-giving. The Commission recommends that language be included in the Comment that addresses the application of the textual prohibition in some common situations. Although the line may be difficult to draw, it is important to discourage lawyers from overreaching in their negotiations with unrepresented persons.

2. Limit prohibition on advice-giving to situations where unrepresented person's interests may be in conflict with client

Following the practice of the majority of states that have adopted a textual prohibition on advice-giving, the Commission recommends restricting the prohibition to situations where the lawyer knows or has reason to know that the unrepresented person's interests "are or have a reasonable possibility of being in conflict with the interests of the client."

COMMENT:

[1] The Commission is proposing three changes in this paragraph. First, a sentence has been added to indicate that, in order to avoid misunderstandings, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. The second is the deletion of the general statement on advice-giving, in recognition that a similar statement now appears in the text. Finally, a cross-reference to Rule 1.13(d) has been added.

[2] A second Comment has been added to give guidance on what constitutes impermissible advice-giving. It first explains the rationale for limiting the prohibition to persons whose interests may be in conflict with the client's. It then attempts to distinguish between the permitted supplying of information and the impermissible giving of legal advice in negotiations and settlement discussions.

Model Rule 4.4
Reporter's Explanation of Changes

TEXT:

Paragraph (b): Add material on obligations of lawyer upon receipt of inadvertently sent document

Numerous inquiries have been directed to ethics committees regarding the proper course of conduct for a lawyer who receives a fax or other document from opposing counsel that was not intended for the receiving lawyer. ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 92-368 advised that the receiving lawyer is obligated to refrain from examining the materials, to notify the sending lawyer and to abide by that lawyer's instructions. That opinion has been criticized, in part because there is no provision of the Model Rules directly on point. The Commission decided that this Rule should require only that the lawyer notify the sender when the lawyer knows or reasonably should know that material was inadvertently sent, thus permitting the sending lawyer to take whatever steps might be necessary or available to protect the interests of the sending lawyer's client.

COMMENT:

[1] A phrase has been added to this Comment identifying "intrusions into privileged relationships" as among the third-party rights a lawyer must respect.

[2] This new Comment explains the obligations imposed by paragraph (b). It makes clear that the Rule does not address possible additional obligations of the lawyer that might be imposed by other law. Nor does it address the legal duties of a lawyer who receives a document that the lawyer knows or believes may have been wrongfully obtained by the sending person. Finally, the Comment explains that, for purposes of the Rule, the term "document" includes e-mail or other electronic modes of transmission.

[3] This new Comment lends support to those lawyers who voluntarily choose to return a document unread when they know or reasonably believe that the document was inadvertently sent. The Commission believes that this is a decision ordinarily reserved to the lawyer under Rules 1.2 and 1.4 and that a lawyer commits no act of disloyalty by choosing to act in accordance with professional courtesy.

Model Rule 5.1
Reporter's Explanation of Changes

TEXT:

1. Caption

The caption has been modified to reflect the applicability of paragraph (a) to lawyers who possess managerial authority comparable to that of a partner.

2. Paragraphs (a) and (c)(2): Modify to apply to lawyers with managerial authority comparable to that of partner

This change was made to clarify in the Rule text that paragraph (a) applies to managing lawyers in corporate and government legal departments and legal services organizations, as well as to partners in private law firms. No change in substance is intended.

COMMENT:

[1] A cross-reference to the definition of a law firm in Rule 1.0(c) has been added. Also, a new sentence has been added to call attention to the difference between lawyers who possess managerial authority comparable to that possessed by law-firm partners and who are subject to paragraph (a) and supervisory lawyers who must comply with paragraph (b).

[2] This new Comment provides examples of policies and procedures that partners and managing lawyers should have in place in order to comply with paragraph (a).

[3] Current Comment [2] has been modified so it refers exclusively to paragraph (a). Other minor changes reflect that the policies and procedures required by paragraph (a) may vary with the structure of a firm and the nature of its practice.

[4] Current Comment [3] has been modified to emphasize that paragraph (c), as distinct from paragraphs (a) and (b), specifies circumstances in which a lawyer will be held personally responsible for the specific misconduct of another lawyer.

[5] Current Comment [6] has been modified to clarify that paragraph (c)(2) applies to partners and lawyers with comparable managerial authority, as well as to supervising lawyers.

[8] This new Comment emphasizes that the extra duties imposed on partners, managing lawyers and supervisory lawyers by Rule 5.1 does not alter the basic duty of each lawyer in a firm to personally comply with the Rules of Professional Conduct. Although emphasis is added, no change in substance is intended.

Model Rule 5.2
Reporter's Explanation of Changes

The Commission is not recommending any change to the Rule.

Model Rule 5.3
Reporter's Explanation of Changes

TEXT:

Paragraphs (a) and (c)(2): Modify to apply to lawyers with managerial authority comparable to that of partner

As with Rule 5.1, this change was made to clarify in the Rule text that paragraph (a) applies to managing lawyers in corporate and government legal departments and legal service organizations, as well as to partners in private law firms. No change in substance is intended.

COMMENT:

[1] "[S]hould" has been replaced with "must" in the third sentence because the duty to give appropriate instruction and supervision is mandatory.

[2] This Comment distinguishes the responsibility to create law-firm systems imposed by paragraph (a) from the supervisory responsibility addressed in paragraph (b) and the personal responsibility of managing and supervisory lawyers for the specific misconduct of nonlawyer employees as addressed in paragraph (c).

Model Rule 5.4 Reporter's Explanation of Changes

TEXT:

1. Paragraph (a)(4): Permit sharing of court-awarded legal fees with nonprofit organization

This addition is proposed to clarify that a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter. The propriety of such fee-sharing arrangements was upheld in Formal Opinion 93-374 of the ABA Standing Committee on Ethics and Professional Responsibility. Other state ethics committees, however, while agreeing with the policy underlying the ABA Opinion, found violations of state versions of Rule 5.4 because the text of the Rule appeared to prohibit such fee-sharing. The Commission agrees with the ABA Standing Committee that the threat to independent professional judgment is less here than in circumstances where a for-profit organization is involved and is therefore recommending this change.

2. Paragraph (d)(2): Broaden to include nonlawyers who occupy positions with responsibilities similar to those of corporate directors or officers

The current Rule is too limited because it employs terminology peculiar to corporate law, and lawyers are now practicing in professional limited liability companies. When applied to a professional limited liability company, paragraph (d)(2) is intended to preclude a nonlawyer from serving as a manager in a company that is managed by managers rather than members and from serving in a position like that of a president, treasurer or secretary of a corporation.

COMMENT:

[2] This Comment provides a cross-reference to Rule 1.8(f) on payment of a client's fee by a third person. No change in substance is intended.

Model Rule 5.5

This Rule was not part of the House of Delegates debate of the Ethics 2000 Report. It was amended in August 2002 after debate of the Multijurisdictional Practice Commission Report. The text of the amendments is at <http://www.abanet.org/cpr/mjp-home.html>.

Model Rule 5.6 Reporter's Explanation of Changes

TEXT:

1. Paragraph (a): Add references to shareholders, operating and other similar types of agreements

The reference to a partnership agreement is underinclusive because lawyers also practice in professional corporations and professional limited liability companies.

2. Paragraph (b): Substitute "client controversy" for "controversy between private parties"

This change clarifies that the Rule applies to settlements not only between purely private parties, but also between a private party and the government. See ABA Ethics Opinion 394.

COMMENT:

[1] "[P]artners and associates" has been replaced with "lawyers" in recognition that lawyers associate together in organizations other than traditional law firm partnerships.

Model Rule 5.7 Reporter's Explanation of Changes

TEXT:

Paragraph (a)(2): Broaden to apply to all circumstances not covered by paragraph (a)(1) and to all entities controlled by the lawyer

Paragraph (a)(2) has been broadened to cover all circumstances in which a lawyer's provision of law-related services are distinct from the lawyer's provision of legal services. This change, coupled with the changes to Comments [2] and [3], is intended to clarify that (1) there can be situations in which a law firm's provision of law-related services will be distinct from the firm's provision of legal services, even though rendered by the firm rather than a separate entity, and (2) that in such circumstances the lawyer must comply with paragraph (a)(2). This change eliminates an unintended gap in the coverage of the Model Rule.

COMMENT:

[2] This change clarifies that a lawyer can directly provide law-related services in circumstances that are distinct from the lawyer's provision of legal services. This precludes an overly restrictive reading of paragraph (a)(1) to the effect that the provision of law-related services could never be distinct from the provision of legal services if directly provided by a lawyer or law firm, rather than by a separate entity.

[3] The new sentence clarifies that paragraph (a)(2) applies in all cases in which the provision of law-related services is distinct from the provision of legal services within the meaning of paragraph (a)(1), without regard to whether the law-related services are provided directly by the lawyer or the lawyer's firm or by a separate entity controlled by the lawyer or law firm.

[10] The Commission changed the reference to Rule 1.7(b) in light of changes that were made to that Rule.

Model Rule 6.1 Reporter's Explanation of Changes

TEXT:

The Commission has added a sentence at the beginning of the Rule to give greater prominence to the proposition that every lawyer has a professional responsibility to provide legal services to persons unable to pay. The point is now made in current Comment [1].

COMMENT:

[11] This new Comment calls upon law firms to act reasonably to enable all lawyers in the firm to provide the pro bono legal services called for by the Rule.

Promoting the Provision of Pro Bono Legal Service

The Commission invited and considered extensive comment about the possibility of modifying Rule 6.1 to require all lawyers to provide pro bono legal services. As a result of its inquiry, the Commission remains committed to the proposition that providing pro bono legal service to persons of limited means is an important obligation of every lawyer. The Commission also believes that the current system for mobilizing lawyers to provide pro bono legal service is not adequate to the task at hand. After considerable reflection, however, the Commission has concluded that amending Rule 6.1 to require all lawyers to provide pro bono legal service is not an appropriate response to the problem. Rather, the Commission encourages the ABA to heighten its efforts to find more appropriate and effective means to increase the voluntary participation of lawyers in the provision of legal services to persons of limited means.

Model Rule 6.2

Reporter's Explanation of Changes

The Commission is not recommending any change to the Rule.

Model Rule 6.3 Reporter's Explanation of Changes

The Commission is not recommending any change to the Rule.

Model Rule 6.4 Reporter's Explanation of Changes

The Commission is not recommending any change to the Rule.

Model Rule 6.5 Reporter's Explanation of Changes

TEXT:

Rule 6.5 is a new Rule in response to the Commission's concern that a strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program. The paradigm is the legal-advice hotline or pro se clinic, the purpose of which is to provide short-term limited legal assistance to persons of limited means who otherwise would go unrepresented.

1. Paragraph (a): Rule only applies to short-term legal services provided under auspices of program sponsored by court or nonprofit organization

Paragraph (a) limits Rule 6.5 to situations in which lawyers provide clients short-term limited legal services under the auspices of a program sponsored by a nonprofit organization or court. The Commission believes that the proposed relaxation of the conflict rules does not pose a significant risk to clients when the lawyer is working in a program sponsored by a nonprofit organization or a court and will eliminate an impediment to lawyer participation in such programs. See Comment [1].

2. Paragraph (a)(1): Rules 1.7 and 1.9(a) apply only if participating lawyer "knows" of conflict of interest

Paragraph (a)(1) provides that the lawyer is subject to the requirements of Rules 1.7 and 1.9(a) only if the lawyer knows that the representation involves a conflict of interest. The purpose is to make it unnecessary for the lawyer to do a comprehensive conflicts check in a practice setting in which it normally is not feasible to do so. See Comment [3]. In cases in which

the lawyer knows of a conflict of interest, however, compliance with Rules 1.7 and 1.9(a) is required.

3. Paragraph (b): Rule 1.10 only applicable as specified in paragraph (a)(2)

Paragraph (a)(2) provides that a lawyer participating in a short-term legal services program must comply with Rule 1.10 if the lawyer knows that a lawyer with whom the lawyer is associated in a firm would be disqualified from handling the matter by Rules 1.7 or 1.9(a). By otherwise exempting a representation governed by this Rule from Rule 1.10, however, paragraph (b) protects lawyers associated with the participating lawyer from a vicarious disqualification that might otherwise be required. Thus, as explained in Comment [4], a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will a personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program. Given the limited nature of the representation provided in nonprofit short-term limited legal services programs, the Commission thinks that the protections afforded clients by Rule 1.10 are not necessary except in the circumstances specified in paragraph (a)(2).

COMMENT:

[1] This Comment explains the scope of the Rule.

[2] This Comment explains the relationship to Rule 1.2(c) and adds a reminder that, except for the relaxation of the requirements of Rules 1.7, 1.9 and 1.10, the lawyer must comply with the Rules of Professional Conduct when providing limited legal services.

[3] This Comment provides the reason for limiting disqualification to situations in which the lawyer knows the lawyer's representation involves a conflict of interest for the lawyer or that a lawyer associated with the lawyer in a law firm would be disqualified from handling the matter. A strict duty to identify conflicts does not make sense in the context of the short-term limited representation provided through a hotline or pro se clinic.

[4] This Comment explains the effect of and reason for otherwise exempting nonprofit, short-term limited legal services programs from Rule 1.10.

[5] This Comment recognizes that in some instances a lawyer who initially intends only to provide a limited short-term representation will decide to provide more extensive legal services. In such circumstances, the lawyer must comply with the generally applicable conflict-of-interest rules.

Model Rule 7.1
Reporter's Explanation of Changes

TEXT:

1. Modify to limit prohibition to false and misleading communications

The Commission has limited Rule 7.1 to a prohibition against false or misleading communications, defined in terms of the material misrepresentations or omissions that are the subject of current paragraph (a). The categorical prohibitions in current paragraphs (b) and (c) have been criticized as being overly broad and have therefore been relocated from text to the commentary as examples of statements that are likely to be misleading. The Commission believes this approach strikes the proper balance between lawyer free-speech interests and the need for consumer protection.

2. Paragraph (b): Delete "is likely to create an unjustified expectation about results the lawyer can achieve"

The Commission recommends deletion of this specification of a "misleading" communication because it is overly broad and can be interpreted to prohibit communications that are not substantially likely to lead a reasonable person to form a specific and unwarranted conclusion about the lawyer or the lawyer's services. See Comment [2].

3. Paragraph (b): Delete "states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law"

The Commission recommends that this portion of paragraph (b) be moved to Rule 8.4(e) because this prohibition should not be limited to advertising. Comment [4] provides a cross-reference.

4. Delete paragraph (c)

The Commission also believes that a prohibition of all comparisons that cannot be factually substantiated is unduly broad. Whether such comparisons are misleading should be assessed on a case-by-case basis in terms of whether the particular comparison is substantially likely to mislead a reasonable person to believe that the comparison can be substantiated. See Comment [3].

COMMENT:

[1] The matters addressed by the deleted portions of current Comment [1] are now addressed in Comment [3].

[2] New Comment [2] discusses the prohibition against materially misleading statements. The third sentence sets forth a new standard for determining whether a lawyer's truthful statement is misleading. The "substantial likelihood" test is used in Rule 3.6 to balance the competing interests in free speech and fair trial. The Commission thinks that this standard strikes the proper balance between the lawyer's free-speech interests and the need for consumer protection.

[3] New Comment [3] addresses the problem areas covered in current paragraphs (b) and (c), explaining circumstances under which statements raising unjustified expectations and

making unsubstantiated comparisons may be false or misleading. The first sentence is a modification of the deleted portion of current Comment [1]. Rather than stating that truthful reports of a lawyer's achievements are ordinarily prohibited as misleading, the Comment is limited to a warning that such statements may be misleading. The second sentence indicates that comparisons that cannot be factually substantiated will be misleading only if there is a substantial likelihood that a reasonable person would conclude that the comparison could be factually substantiated. Neither statement is as sweeping as its counterpart in the current Comment or paragraph (c). Because many jurisdictions encourage or require the use of disclaimers in lawyer advertising, the final sentence indicates that disclaimers may reduce the likelihood that a statement about the lawyer or the lawyer's services will be misleading.

[4] This new Comment is a cross-reference to Rule 8.4(e) which prohibits lawyers from stating or implying that they have an ability to influence improperly a government agency or official or that they can achieve results by means that violate the Rules of Professional Conduct or other law.

Model Rule 7.2 **Reporter's Explanation of Changes**

NOTE: Additional amendments were made to this Rule in August 2002, after debate of a proposal by the Standing Committee on Ethics and Professional Responsibility. The Ethics Committee amendments are at <http://www.abanet.org/cpr/ethics.html>.

TEXT:

1. Paragraph (a): delete specification of types of public media and add reference to "electronic communication"

This change is proposed to accommodate the new technology that is currently being used by law firms to market legal services [e.g., websites and e-mail. Examples of "public media" are being dropped from the Rule text and moved to Comment [3], obviating the necessity of changing the Rule to accommodate the next new public-communication technology. A specific reference to the Internet has been added to Comment [3].

A reference to electronic communication has also been added. To provide a specific example of this type of technology, a reference to e-mail has been added to Comment [3] with a cross-reference to the prohibition in Rule 7.3(a) of solicitation by real-time electronic contact.

2. Delete current paragraph (b)

The requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes. Thus the Commission, with the concurrence of the ABA Commission on Responsibility in Client Development, is recommending elimination of the requirement that records of advertising be retained for two years.

3. Paragraph (b)(2): Replace reference to "legal service organization" with "legal service plan"

This change in terminology is intended to avoid confusion between a "legal services organization," which provides direct legal services to clients and is included in the definition of a law firm in Rule 1.0(c), and prepaid and group legal service plans, and other similar delivery systems, whose usual charges are excepted from the prohibition against a lawyer giving anything of value to a person for recommending the lawyer's services in Rule 7.2(b).

4. Paragraph (b)(2): Modify to permit lawyers to pay the usual charges of "a not-for-profit or qualified lawyer referral service"

This change is intended to more closely conform the Model Rules to ABA policy with respect to lawyer referral services. It recognizes the need to protect prospective clients who have come to think of lawyer referral services as consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. The effect of the proposal is to permit lawyers to pay the usual charges of a for-profit lawyer referral service, but only if it has been approved by an appropriate regulatory authority as affording adequate protections for prospective clients, preferably in conformity with the four core standards prescribed in the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act. Because the need for special regulation arises from the prevailing public perception of lawyer referral services, this special regulatory regime is only applicable to a for-profit organization that holds itself out to the public as a lawyer referral service. See Comment [6].

5. Paragraph (c): Modify to permit identification of law firm as entity responsible for advertisement

The Commission thinks that law firms should be able to designate the firm as the entity responsible for the contents of an advertisement. Such information, rather than the name of a specific lawyer in the firm, should be sufficient to enable disciplinary authorities to take action necessary to protect the public from misleading advertising.

6. Paragraph (c): Require identification of the address of the law firm or lawyer responsible for advertisement

Because Rule 7.5 permits the use of trade names and because lawyers frequently advertise in locations where they do not maintain an office, the Commission has added a requirement that each advertisement include an office address for the law firm or lawyer named in the advertisement. This information will help disciplinary authorities track down those who are responsible for an advertisement, but, more importantly, it will provide prospective clients with important information about where the lawyer or law firm is located - an important fact in this era of multi-jurisdictional advertising.

COMMENT:

[3] Although the Commission concluded that a specification of the various public media lawyers can use to market their services should not be included in the Rule text, it thought it appropriate to explicitly affirm the legitimacy of using electronic media, including the Internet and the World Wide Web. The reference to "lawful" electronic mail was included to require lawyers to comply with any law that might prohibit "spamming" — i.e., the mass e-mailing of commercial messages. A cross-reference to Rule 7.3(a) has been added to alert lawyers to the proposed prohibition of solicitation by real-time electronic contact.

~~[5]~~ This Comment and the related caption have been deleted because current paragraph (b) was deleted from the Rule text.

[5] The discussion of advertising expenses has been modified to more accurately reflect the current state of client-development activities in law firms. To this has been added a cross-reference to Rule 5.3 as a reminder of the partner's and firm's obligations with respect to the conduct of nonlawyers involved in client development activities.

[6] In response to a concern about the ambiguity of the reference in paragraph (b)(2) to "a legal service organization," this new Comment defines a legal service plan to specifically include prepaid and group legal service plans, and also to include "a similar delivery system that assists prospective clients to secure legal representation." This clarifies that lawyers may pay the usual charges of not only traditional prepaid and group legal service plans, but also the usual charges of new hybrid plans that might undertake to provide a variety of services to prospective clients. Also by its definition of a lawyer referral service as an organization that holds itself out to the public as a lawyer referral service, the Comment precludes extension of the special regulatory regime governing lawyer referral services to prepaid or group legal service plans and other similar delivery systems. Finally the Comment articulates ABA policy with respect to the core characteristics of a qualified lawyer referral service.

[7] This new Comment alerts lawyers who accept assignments or referrals from legal service plans or referrals from lawyer referral services that they must act reasonably to assure that the activities of the plan or service are compatible with the lawyers' professional obligations.

Model Rule 7.3 Reporter's Explanation of Changes

TEXT:

1. Paragraph (a): Extend prohibition to "real-time electronic contact"

The Commission, in accord with the ABA Commission on Responsibility in Client Development, is recommending that lawyer solicitation by real-time electronic communication (e.g., an Internet chatroom) be prohibited. Differentiating between e-mail and real-time electronic communication, the Commission has concluded that the interactivity and immediacy of response in real-time electronic communication presents the same dangers as those involved in live telephone contact.

2. Paragraph (a)(1): Exempt contacts with lawyers

In agreement with a recommendation of the ABA Commission on Responsibility in Client Development, the Commission has concluded that lawyers do not need the special protection afforded by this Rule. Such an exemption would permit in-person contacts with in-house lawyers of organizations but would not permit contact with nonlawyer representatives of such organizations.

3. Paragraph (a)(2): Exempt contacts with persons with "close personal relationship" to lawyer

The ABA Model Code of Professional Responsibility permitted in-person contact with close personal friends. Approximately 10 states still do. Although the Commission recognizes the imprecision of the concept of a close personal relationship, it seems difficult to justify prohibiting a lawyer from calling a close friend and offering to represent the friend in a legal matter.

4. Paragraph (b): Add reference to "real-time electronic contact"

The prohibition against real-time electronic contact in paragraph (a) requires the addition of a reference to real-time electronic contact in paragraph (b).

5. Paragraph (c): Add reference to electronic contact and modify exception to conform to paragraph (a)

The reference to electronic contact is needed so a lawyer sending e-mail to a person known to need legal services will be required to identify the e-mail as an advertisement. The relocation and modification of the exception was necessary to conform paragraph (c) with the changes in paragraph (a).

COMMENT:

[1], [2] and [3] The references to real-time electronic contact and electronic communications were added to conform the Comment to the proposed changes in the text of the Rule.

[3] The second sentence of this Comment has been modified to reflect the deletion of current paragraph (b) from Rule 7.2. The change in the second to the last sentence corrects an error in the current Comment.

[4] The first sentence has been modified to indicate that the reference in the Rule text to a "prior professional relationship" denotes a former client-lawyer relationship. A sentence has been added to explain the inapplicability of paragraphs (a) and (c) to contacts with lawyers. The last sentence has been added to recognize the constitutional limitations on regulators attempting to prohibit lawyers from cooperating with nonprofit organizations assisting members or

beneficiaries to secure legal counsel necessary for redress of grievances. See *United Transportation Union v. State Bar*, 401 U.S. 576 (1971).

[8] These changes are stylistic. No change in substance is intended.

Model Rule 7.4 Reporter's Explanation of Changes

TEXT:

1. Caption: Add reference to "Specialization"

As Rule 7.4 deals with communication of both fields of law in which the lawyer practices and fields of law in which the lawyer claims to be a specialist, the current caption is underinclusive.

2. Paragraph (a): Move first sentence to new paragraph (a)

This change serves to separate the two basic subjects addressed by this Rule: communication of fields of law in which the lawyer practices, as permitted by paragraph (a), and communication of fields of law in which the lawyer claims to be certified as a specialist, as governed by paragraph (d). No change in substance is intended.

3. Paragraph (b): Move current paragraph (a) to new paragraph (b)

As revised, the grant of permission to lawyers who are admitted before the United States Patent and Trademark Office to use the designation "Patent Attorney" is no longer presented as an exception to the prohibition against claiming to be certified or recognized as a specialist, but rather is treated as a separate subject. This is because a claim to be a patent attorney is premised on admission to practice rather than on certification as a specialist and also entails more than a simple designation of an area in which the lawyer practices. No change in substance is intended.

4. Paragraph (c): Move current paragraph (b) to new paragraph (c)

As revised, the grant of permission to lawyers who engage in Admiralty practice to use the designation "Proctor in Admiralty" is no longer presented as an exception to the prohibition against claiming to be certified or recognized as a specialist, but rather is treated as a separate subject. This is because a claim to be a Proctor in Admiralty is not premised on certification but does seem to denote more than a simple designation of an area in which the lawyer practices. No change in substance is intended.

5. Paragraph (d): Replace current paragraphs (c) and alternate (c) with new paragraph (d)

The key substantive change in Rule 7.4 is to replace current paragraphs (c) and alternate (c) with new paragraph (d). One effect of this change is to eliminate the provisions in current paragraph (c) that allow lawyers to claim certification as a specialist even though the certifying organization is not approved by an appropriate state authority (or accredited by the ABA). This is currently permitted so long as the lawyer indicates the absence of such approval in the same sentence as the claim. The Commission does not think that the disclaimer called for by current paragraph (c) provides an adequate safeguard against potentially misleading claims of certification by an unapproved organization. The Commission believes it is both necessary and constitutionally permissible for the states to protect prospective clients against potentially misleading claims of certification by requiring the organizations conferring the certification to be approved by an appropriate state authority or accredited by the ABA.

Paragraph (d) also contains a new requirement that the name of the certifying organization be clearly identified. This will enable prospective clients to make further inquiry about the certification program.

COMMENT:

[1] A minor change has been made to indicate that this Comment refers to paragraph (a) of the restructured Rule.

[2] The first sentence has been deleted because paragraphs (b) and (c) are no longer presented as exceptions to the prohibition against claiming to be certified as a specialist. Other minor changes conform the Comment to the changes in the Rule text.

[3] The Comment has been modified to conform with paragraph (d). This Comment notes that organizations other than the ABA, such as state bar associations, might be approved by a state authority to accredit organizations that certify lawyers a specialists. The Comment has also been modified to speak in general terms about what is signified by certification as a specialist and what should be expected of certifying organizations.

{4} and {5} These Comments have been deleted because they relate to current paragraphs (c) and alternate (c), which have been replaced by paragraph (d).

Model Rule 7.5
Reporter's Explanation of Changes

NOTE: Additional amendments were made to this Rule in August 2002, after debate of a proposal by the Standing Committee on Ethics and Professional Responsibility. The Ethics Committee amendments are at <http://www.abanet.org/cpr/ethics.html>.

TEXT:

Paragraph (b): Add reference to "other professional designation"

A reference to "other professional designation" has been added in paragraph (b) to clarify that the Rule applies to website addresses and other ways of identifying law firms in connection with their use of electronic media.

COMMENT:

[1] The new sentence in Comment [1] recognizes that a law firm's website address is a professional designation governed by Rule 7.5. Thus, a law firm may not use a website address that violates Rule 7.1.

[2] The reference to partnership in the current Comment is underinclusive because lawyers also practice in professional corporations and limited liability companies.

Model Rule 7.6
Reporter's Explanation of Changes

The Commission is not recommending any change to the Rule.

Model Rule 8.1
Reporter's Explanation of Changes

TEXT:

The Commission is not recommending any change in the Rule text.

COMMENT:

[1] These changes clarify that there is a duty to supplement an answer later found to be wrong. The point might already be comprehended within the black letter "correct a misapprehension known by the person to have arisen in the matter," but, to make the point clear, the new language has been added and paragraph (b) is cited as the source of the obligation. No change in substance is intended.

[3] This change reminds lawyers that bar admission and professional discipline are judicial proceedings subject to the requirements of Rules 1.6 and 3.3. Although Rule 1.6 does not require a lawyer to come forward with adverse evidence, in a limited number of cases, the requirements of Rule 3.3 may do so. No change in substance is intended.

Model Rule 8.2
Reporter's Explanation of Changes

The Commission is not recommending any change to the Rule.

Model Rule 8.3
Reporter's Explanation of Changes

TEXT:

1. Paragraphs (a) and (b): Change "having knowledge" to "who knows"

In importing DR 1-103 of the ABA Model Code of Professional Responsibility into the Model Rules, the "having knowledge" formulation was used even though that term is undefined in the Rules. "Knows" and "knowingly," on the other hand, are defined terms, and the Commission is substituting them in this Rule for consistency and to put the mandate into the active voice. No change in substance is intended.

2. Paragraph (c): Substitute Rule 1.6 for "privilege"

The proposed change makes Rule 1.6 the operative standard as it is throughout the rest of the Model Rules.

3. Paragraph (c): Change "serving as a member of" to "participating"

This change expands the reporting exception to any lawyer or judge who participates in an approved lawyers assistance program, even if such participation is limited to a single instance.

4. Paragraph (c): Modify reference to information gained in lawyers assistance program

The Commission determined that the attempt to qualify or specify the conditions on which information gained by a lawyer or judge while participating in an approved lawyers assistance program is unnecessary and confusing. This modification makes it clear that this Rule does not require the reporting of information obtained during such participation.

COMMENT:

[5] The changes in the fourth sentence are intended to make clear that Rule 1.6 is the operative standard, not the attorney-client privilege. The last sentence of current Comment [5] has been deleted because it is inaccurate. It is not a violation of the Model Rules for a lawyer, impaired or otherwise, to "intend" to do something wrong, so it would not be reportable "professional misconduct" under any construction of the Rules. As drafted by the Commission, Rule 1.6 permits but does not require disclosure in certain circumstances. The changes also clarify that paragraph (c) of this Rule does not generally address the confidentiality obligations of a lawyer or judge who participates in a lawyers assistance program, but merely creates an exception to the reporting obligation under paragraphs (a) and (b). Whether an obligation of confidentiality is incurred depends on the rules of the particular program as well as law external to these Rules.

Model Rule 8.4
Reporter's Explanation of Changes

TEXT:

Paragraph (e): Add material deleted from Rule 7.1

Rule 7.1 currently provides that a lawyer may not make a false or misleading communication about the lawyer or the lawyer's services and, further, that a communication is false or misleading, inter alia, if it "states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law." The Commission recommends that this prohibition be moved out of Rule 7.1 and added to paragraph (e) in order to clarify that the prohibition is not limited to statements made in connection with marketing legal services.

COMMENT:

[1] The purpose of this new Comment is to explain when a lawyer is subject to discipline for violating or attempting to violate the Rules "through the acts of another" and to distinguish such conduct from advising a client concerning action the client is legally entitled to take.

Model Rule 8.5

This Rule was not part of the House of Delegates debate of the Ethics 2000 Report. It was amended in August 2002 after debate of the Multijurisdictional Practice Commission Report. The text of the amendments is at <http://www.abanet.org/cpr/mjp-home.html>.