LEGAL ETHICS FOR ENTERTAINMENT LAWYERS

Texas Disciplinary Rules of Professional Conduct

Rule 1.06 Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or laws firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Rule 1.07 Conflict of Interest: Intermediary

(a) A lawyer shall not act as intermediary between clients unless:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.

(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

Rule 1.08 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client unless:

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

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

(3) the client consents in writing thereto.

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

(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

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

(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents;

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

(3) information relating to representation of a client is protected as required by Rule 1.05.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all

the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

(g) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

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

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

(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(i) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

(j) As used in this Rule, "**business transactions**" does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.

Rule 1.09 Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05.

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(l) or if the representation in reasonable probability will involve a violation of Rule 1.05.

SAMPLE ATTORNEY/MANAGER FIRM AGREEMENT PROVISIONS

(f) It is understood and agreed that you shall be entitled to continue providing artist management services for existing and new clients through your management company, provided such artist management services do not include any legal services, and to retain all amounts earned pursuant to such artist management services without accounting therefore to the firm.

(g) It is understood and agreed that you shall be entitled to continue providing business management services for your client Big Rock Star through your separate business management company as long as such business management services do not include any legal services, and to retain all amounts earned pursuant to such business management services without accounting therefore to the Firm. You agree that your business management services shall be conducted by means of separate stationery, email addresses, telephone numbers, and other forms of identification that does not include the Firm forms of identification. You also agree to obtain and maintain, at your cost, professional liability insurance providing coverage for your business management services provided during the term of this Agreement. You further agree to defend, indemnify and hold the Firm and its partners harmless from any costs or damages incurred (including but not limited to reasonable outside attorneys' fees) in connection with any claim asserted against the firm or its partners arising out of your business management services, the cost of enforcing any right to indemnification hereunder, and the cost of pursuing any insurance providers.

ENTERTAINMENT LAW ETHICS

Kenneth J. Abdo, Esq.[1] Jack P. Sahl[2]

A. INTRODUCTION

Entertainment law is a highly competitive practice in which lawyers often assume non-traditional roles and responsibilities. Marketing, advertising, selling (shopping), packaging, networking and deal-making are common business activities for agents, managers and lawyers. As a result, lawyers sometime resemble agents and managers. However, lawyers are distinguished from others because lawyers are governed by codes of professional behavior.

Unlike agents and managers, lawyers must be highly educated and trained. They must pass a bar examination before being licensed to practice law. Their qualifications and character are scrutinized prior to entering law school and before taking the bar exam. After becoming licensed, most states require lawyers to continue legal education and training to maintain licensure.

Lawyers' achievements are often overshadowed by criticism of self-interest, greed and incompetency. As a result, grievances and malpractice claims are filed against entertainment lawyers.[3] A violation of the code threatens his or her reputation, license, and livelihood.

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2. **Jack P. Sahl** is a professor at the University of Akron School of Law, Akron, Ohio where he teaches Professional Responsibility and Entertainment Law. He also often consults on entertainment and professional responsibility matters. Before becoming a law professor, he worked full time in the music industry. Professor Sahl regularly lectures on professional responsibility in the United States and abroad. He is a member of the publications Board of the American Bar Association's Center for Professional Responsibility and the Ohio State Bar Association's Legal Ethics and Professional Conduct Committee. Professor Sahl is also the Deputy Director of the Miller Institute of Professional Responsibility, a research center studying lawyer and judicial conduct.

3. *See e.g.,* John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: The Struggle to Reform Ohio's Disciplinary System,* 68 U. Cinc. L. Rev. 65 (1999) (noting examples of criticism of lawyers and recommending disciplinary reforms).

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Lawyers' reputations depend on their ability to build and maintain professional relationships. However, along with public and professional scrutiny, references to entertainment (and all) lawyers such as "counselor," "advocate," "champion" and even "mouthpiece" reflect the critical valued and powerful roles that lawyers perform. Despite the jokes and jabs, the standard of living that many lawyers enjoy reflects the significant value that society attaches to quality legal services.

Entertainment attorneys who aggressively represent clients often test the limits of permissible professional conduct. Given the highly competitive and entrepreneurial nature of the entertainment business, it is not surprising that entertainment lawyers are the subject of complaints before disciplinary authorities and the courts. This article addresses the realities and concomitant ethics issues often encountered by entertainment lawyers.

B. PROFESSIONAL CONDUCT

Given increased complexity of the law, advanced technology, sophisticated and litigious clients, practicing law today involves significant risks.[4] One source predicts that recent law school graduates "will be the subject of three or more claims of legal malpractice before finishing a career."[5] Thus, lawyers should have professional liability insurance and understand how their insurance policies define the practice of law to insure that the policies cover their activities.[6]

Professional responsibility is one of the most rapidly changing fields in law. There have been changes to the ABA Model Rules of Professional Conduct (1983) (MRPC), a code of ethical conduct that has been adopted in some version by more than 45 states.[7] States that follow a version of the older ABA Model Code of Professional Responsibility (1974) have

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4. *See* Sahl, *supra* note 3, at 66 (noting that a decline in the high rate of grievances against lawyers is unlikely given these factors and an increase in public dissatisfaction with lawyers).

5. RON E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE x (1989) (hereinafter Mallen).

6. A lawyer's professional liability policy "is not written for 'negligence,' but for certain 'acts, omissions or errors' in rendering professional services." *Id.* at vol 4, 299. Courts have liberally defined the phrase, professional legal services, for purposes of covering lawyers' activities. If the client's principal purpose for retaining the lawyer is the rendition of legal services, "then the rendition of non-legal services that are incidental to the task are included" in the insurance policy. *Id.* at 302-03. A lawyer retained for non-legal purposes, such as, investing a client's funds or selling limited partnership interests for commissions, is not entitled to coverage. *Id.* at 304-05. Thus, depending on the context, a lawyer's advice to a client about selecting a home in the "Hamptons" or selling a client's songs to publishers or advertising companies, may not constitute the rendition of legal services.

7. JAMES E. MOLITERNO, CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS 26 (2000). A significant amount of entertainment business occurs in California and New York, the locations of many entertainment companies and creative talent. Although California does not follow the MRPC format, it has promulgated rules and statutes many of which are similar to the MRPC. New York follows the format of the older ABA ethical code, the MCPR. Since the MRPC are widely adopted, this article focuses on the MRPC with references to the California Business and Professions Code ("CBPC") and Rules of Professional Conduct of the State Bar of California ("RPCC").

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revised portions of their codes that often track the MRPC. Courts adjudicating malpractice actions, and disciplinary authorities considering grievances, often use these codes to evaluate the propriety of lawyer conduct. Another change concerns the American Law Institute, which recently completed its new Restatement of the Law Governing Lawyers. The Restatement has identified important issues beyond the ABA's ethical codes.[8] In addition, in 1998 the ABA created the Ethics 2000 Commission to consider changes to the MRPC. The Commission held numerous hearings throughout the nation and released its report at the end of 2000. The report recommended numerous changes to the MRPC.[9]

In 2002, the American Bar Association adopted substantial revisions to the MRPC. The name and format of the amended Rules are the same as in 1983. Very few states follow the MRPC as amended in 2002, but many have established committees to review the changes. This article refers to the amended Model Rules, unless stated otherwise.

Lawyers should conduct "professional responsibility audits" of their practices to insure that they are complying with state ethical codes concerning the practice of law.[10] For example, some states have particular rules concerning direct mail solicitation and advertising, which lawyers will want to review for compliance purposes.[11] Records of a lawyer's audit of his or her practice may become useful evidence of the lawyer's efforts to comply with ethical standards if the lawyer becomes the subject of a grievance or a malpractice complaint.

A. Establishing an Attorney-Client Relationship

Courts and disciplinary authorities have found that the attorney-client relationship exists as soon as the client reasonably relies on the attorney's advice. As a result, attorneys should be careful about casually offering advice on legal matters. An attorney should formally establish a professional relationship with a client and memorialize it in writing.[12] At the initial meeting with the client, the attorney should not give advice unless the attorney is prepared to accept responsibility for the

8. MORGAN & ROTUNDA, PROBLEMS AND MATERIAL ON PROFESSIONAL RESPONSIBILITY 13 (7th ed. 2000)(hereinafter MORGAN)(identifying malpractice and liens to secure payment for legal services as some of the subjects not covered in MRPC); ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, 301:111 (1998) (reporting that some commentators believe the ALI's Restatement (Third) of the Law of Lawyering might create yet another standard of care for judging lawyers' conduct in malpractice actions).

9. *See* MORGAN, *supra* note 8, at 12 n.9.

10. There are legal consultants and companies, such as, the PLI, that will provide professional responsibility seminars to law firms and lawyers to promote compliance with states' ethical rules for practicing law.

11. Some states require that solicitation letters be in envelopes with the phrase, "Advertisement Only," in red ink and ten point type or more. *See* OCPR DR 2-101(F)(e). A few states require internet advertising to be pre-screened by bar committees. *See* Part 7 of the Texas Disciplinary Rules.

12. S*ee* MRPC, Rule 1.5 (b) (suggesting that with new clients that lawyers communicate in writing the basis of the fee); *see also Id.* at (c) (requiring written contingent fee agreements that are signed by the client).

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consequences of the "client's" reliance thereon.[13] Lawyers should be especially careful not to give advice at "beauty contest" interviews by parties seeking to hire lawyers, because they may be liable for incorrect advice and may also be precluded from representing the clients' opponents for conflict of interest reasons.[14] Ideally, the attorney should inform a prospective client at the initial meeting that he or she is not providing legal advice, and should reiterate this point in a follow-up letter thanking the person for his or her interest. This follow-up letter may also include the terms of a retention agreement that should have been discussed at the initial meeting. The retention agreement should clearly outline the scope and conditions of the lawyer's representation as well as the basis for the fee if the client decides to employ the attorney.[15] A comprehensive and precise retention agreement defines the expectations of the attorney and the client, facilitates good client relations, and protects the attorney against claims of wrongdoing based on the client's unreasonable expectations.

B. MRPC 1.1 - A Lawyer's Duty of Competence

Once an attorney agrees to represent a client, MRPC 1.1 requires the lawyer to provide competent representation.[16] Competence requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. The Comment to MRPC 1.1 states that in determining the competency of a lawyer to handle a matter, "relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, and the preparation and study . . ." the lawyer can give to the matter.[17] The comment also recognizes that it may be necessary to associate or consult with a more experienced lawyer or even refer the matter to another lawyer. As a result, consultations even among more experienced entertainment lawyers are common and highly advisable. Lawyers should be careful in making referrals or associating counsel because they might be liable for incompetent referrals or associations.

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13. Togstad, et al. v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980); *see* Croce v. Kurnit *infra* note 32.

14. Bridge Products, Inc. v. Quantum Chemical Corporation, 1990 WL103200 (N.D. Ill.); DCA Food Industries, Inc. v. Tasty Foods, Inc., 626 F.Supp. 54 (W.D. Wis. 1985).

15. MRPC, Rule 1.2 "Scope of Representation." For example, a lawyer may agree to negotiate the terms of a management contract for a client but not to handle his divorce. *Id.*; at 1.2(c) (permitting a lawyer to "limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

16. As a matter of law, the attorney owes the client a fiduciary duty of care, diligence and loyalty. *See* Daniel J. Pope & Suzanne Lee, *Breach of Fiduciary Duties and Punitive Damages,* 66 Def. Couns. J. 257 (1999).

17. *See* MRPC, Rule 1.1, Comment 1. Otherwise, no attorney would be competent to accept a first case. *See* CBPC §6092, RPCC, Rule 3-110.

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Some states provide for the involuntary deactivation of a practitioner's license in the event of mental incompetency or habitual use of drugs.[18] Many bar associations have substance abuse committees that confidentially assist lawyers with substance abuse and mental health issues.

C. Conflicts of Interest - *What's going on?*[19]

1. Conflicts of interest in the entertainment industry have increasingly attracted significant attention. The public and the profession seem to have insatiable appetites for following lawsuits filed by famous artists against their famous lawyers.[20]

The unconventional culture of the entertainment business is conducive to conflicts of interest and other lawyer misconduct. The business is fast-paced, highly competitive, and intense. It is commonly described as "incestuous" with a premium attached to "who you know" as much as "what you know." The entertainment business also tends to be dominated (at least at the corporate top) by a small number of resilient power-brokers.[21] It is not unusual for these individuals to be fired or to resign from their positions only to resurface in a similarly powerful position at another company. Informed entertainment lawyers follow the trade journals and other media to track the frequent movement of business people within the industry as such changes often create conflicts of interest and other potential ethical problems.

Some observers feel that conflicts of interest may be beneficial to parties. For example, a prominent entertainment attorney who represents a successful producer and a famous actor may unite them (as some agents do) in a "package" deal to secure box-office success. Although the package deal brings together clients with possibly differing interests, the combination ultimately makes the producer, actor, lawyer, and studio more successful. Everyone wins. For a less famous talent, the package is very valuable because it could launch their career. There is always the risk however, that attorneys may protect their special relationships with the studio and others in package

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18. *See* CBPC §6190.

19. The late, great Marvin Gaye, 1971, Tamala Records.

20. One observer has stated the following about the recent interest in conflicts cases: "[s]ue the lawyers when not paying them does not work." The increase in conflict of interest cases and related lawsuits have been, in part, on non-entertainment lawyers who do not understand the business culture. McPherson, *Conflicts in the Entertainment Industry? . . . Not!*, 10, NO.4 ENT. & SPORTS L. J. 5. (Winter 1993) (hereinafter McPherson).

21. In a TIME magazine article, super-agent Michael Ovitz was quoted, "[l]ook this industry created conflicts of interest." TIME, *The Ultimate Mogul*, p. 54, April 19, 1993.

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deals by promoting more prominent clients at the expense of less famous clients.22

2. *MRPC 1.7 sets forth the general rule governing conflicts of interest:*

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

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

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

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

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

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

D. Simultaneous Representation. Under MRPC 1.7(a), an attorney's simultaneous representation of a music manager who is a prior client and an artist in negotiating their artist-management contract raises serious conflicts of interest issues. Some commentators contend that attorneys should decline joint representation in this context because of the inherent conflict in the positions of the parties.[23] The parties' interests with

22 McPherson, *supra* note 20.

23. *E.g.* Jack P. Sahl, *Ethics for Entertainment Lawyers: Avoiding Conflicts of Interest*, 12TH ANNUAL INTERNATIONAL FOLK ALLIANCE CONFERENCE. (Cleveland Rock & Roll Hall of Fame, 2/11/2000) (suggesting that lawyers should generally avoid dual representation of managers and artists in negotiating the terms of a personal management contract).

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respect to certain contract provisions, such as the duration of the contract, may be directly adverse. Even if the parties' interests are not directly adverse, a concurrent conflict of interest may exist if there is a significant risk that the attorney's responsibilities to the earlier client, the manager, may materially limit the attorney's representation of the artist and violate 1.7(a). The manager's attorney should ask the artist to retain independent counsel to facilitate the negotiation of the contract, to help ensure the enforcement of an eventual agreement, and to avoid personal liability for violating the conflict of interest rules. Another, perhaps less prudent, option is for the manager's attorney to obtain written informed consent from both clients of any conflicts of interest.[24] It is important to note that some conflicts are nonconsentable.[25] Comment 14 to MRPC 1.7 describes a nonconsentable conflict as one in which, "the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."[26]

1. *The Comments to MRPC 1.7 - A Better Understanding of Conflicts of*

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24. Author John Grisham sued his attorney for breach of fiduciary duty and malpractice, in part, for not advising him of the conflicts of interest in the attorney's simultaneous representation of both Grisham and his agent. Grisham claimed he retained the lawyer on the advice of his agent and that the attorney failed to inform Grisham that he did not have to renew his original agreement with the agent. *See* Richard E. Flamm & Joseph B. Anderson, *Conflict of Interest in Entertainment Law Practice, Revisited*, 14 ENT. & SPORTS L. J. 3 (1996) (discussing Grisham v. Garon-Brooke Assocs., Inc., Action No. 3:96 CV045-B (N.D. Miss. 1996) (hereinafter Flamm).

25. MRPC, Rule 1.7, Comment 14. Billy Joel sued his former New York lawyers claiming $90 million in damages. Joel charged attorney Grubman with conflict of interest, alleging that Mr. Grubman represented the singer while also representing his manager, top executives of his recording label, CBS Records (now Sony Music), and the merchandising company which holds the franchise for t-shirts and other items. Grubman's firm alleged that any conflicts were fully disclosed. Joel's conflict of interest claims also include an allegation that Grubman paid kick-backs to Billy Joel's manager in order to retain Joel as a client. Joel also claimed breach of contract, fraud, breach of fiduciary duty, and legal malpractice against his former attorney. Grubman was hired by Billy Joel's manager (and former brother-in-law) to represent Joel in negotiations with CBS Records. In a separate action, Joel also sued his former manager. The matters were settled for an undisclosed amount. Joel v. Grubman, 1992, Case No. 261-55-92 N.Y. Sup. Ct.

26. A television producer sued his former law firm alleging that the firm secretly represented other clients whose interests conflicted with his. Producer Phillip DeGuere, Jr. claimed that CBS contracted with him as writer and executive producer on "The Twilight Zone" series. CBS canceled the series after taping only nine of the 22 episodes it had ordered. DeGuere claimed that, under the contract, the network owed him $900,000 but that upon counseling with his law firm, he agreed to accept $250,000 in cash and a commitment for a different 13-week series in a subsequent season. DeGuere claimed he did not know that at the same time the law firm was representing him against CBS, the firm was also representing Columbia Pictures against CBS in a deal for the purchase of the daytime drama, "The Young and The Restless". DeGuere's suit claimed that, because CBS paid a premium price for the soap opera, it was forced to cut development of new shows, including a new television project produced by DeGuere, hence limiting CBS' ability to perform under the terms of his settlement agreement with him. DeGuere's attorney stated that the law firm should not be representing studios when they are also representing talent who must negotiate deals with those studios. Persistence of Vision, Inc. v. Ziffren, Brittenham & Branca, 1992, L.S. Sup. Ct. Case No. BC021603. Jimi Hendrix' father sued his long-time attorney and the foreign investment companies that purportedly granted rights to the late guitarist's favorable masters and copyrights. Hendrix alleged that Leo Branton, Jr. concealed the true nature of various agreements regarding Jimi Hendrix' recordings and copyrights and often acted in direct conflict of interest. Hendrix v. Branton, April 16, 1993, U.S. Dis. Ct. Wash.

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Interest:

The conflict of interest rules are designed to protect and advance two important values - confidentiality and undivided loyalty - in the attorney-client relationship.[27] These two values overlap and are at the core of the lawyer's fiduciary duty to clients. Both values are disregarded by a lawyer who harms a client by sharing the client's confidences with the client's adversary - reflecting obvious disloyalty. The Comments to MRPC 1.7 provide additional insight concerning the lawyer's ethical duty of loyalty to the client.

The Comment to MRPC 1.7(a) indicates that an attorney is generally prohibited from representing a client when that representation involves a concurrent conflict of interest. "Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated."[28] Another less obvious example involves several parties forming a partnership. The safest practice is for each partner to secure separate counsel in negotiating or reviewing the partnership agreement. Alternatively, MRPC 1.7 expressly provides that after full disclosure of the potential conflicts of interest, the parties can waive such conflicts of interest by giving their informed consent, confirmed in writing, to multiple representation. Of course, if a direct conflict of interest does arise between the parties during the negotiation of the partnership agreement, or litigation erupts among the parties, the Comment to MRPC 1.7 suggests that unless the lawyer has obtained the informed consent of the client under the conditions of 1.7(b), the attorney ordinarily must withdraw in order to safeguard the confidentiality of the parities pursuant to MRPC 1.6. It is important to note that the representation of multiple parties is not uncommon and not always impermissible in the entertainment business. For example,

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27. *See* MRPC, Rule 1.6 (requiring lawyers to protect client confidences and listing exceptions to the general rule).

28. *Id.* At Rule 1.7, Comment [6]; *see* Cinema 5, Limited v. Cinerama, Inc., 528 F.2d 1384 (2d. Cir. 1976) (establishes the general standard in federal courts that a lawyer cannot sue an actively represented client of another firm in which the attorney is a partner). *But see* Universal City Studios v. Reimerdes, 98 F. Supp. 2d 449 (S.D.N.Y. 2000). In Reimerdes, Time Warner sought the disqualification of a lawyer who represented a defendant in a suit by the movie studios against the defendant who posted a computer program over the Internet that defeats the encryption system for DVD's. *Id*. 450-51. The same lawyer represented Time Warner and other defendants in an unrelated suit involving the rights to the term, "Muggles," from the Harry Potter books. *Id*. The federal judge in the Southern District of New York denied Time Warner Entertainment's disqualification motion because Time Warner had improperly delayed the filing of its motion to unfairly prejudice the defendant. *Id*. at 455. In addition, there was no evidence that the defendant's lawyer was privy to any of Time Warner's secrets because of the lawyer's work for Time Warner involving the "Muggles" case. *Id*. *See also* Stan Soocher, *Bit Parts* 16 Enter. Law & Fin. 8 (May 2000) (briefly discussing Reimerdes).

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it may be permissible for a lawyer to negotiate a recording contract for a manager and the members of a group with a third party record label.

The Comment to MRPC 1.7(a) explains that loyalty to the client is also compromised "when there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer . . . ."[29] In such a case, the lawyer is unable to recommend or carry out an appropriate course of action for the client. For example, a lawyer representing a personal manager in an artist management contract cannot ethically acquiesce to a shorter duration of the contract because the artist's father, a builder, has promised to give the lawyer a good rate on remodeling his home.

Subdivision (b) of MRPC 1.7 permits a lawyer to represent a client notwithstanding the existence of a concurrent conflict of interest if (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing. It is often very difficult to anticipate, and thus to inform the individuals in the group about, all of the possible future conflicts of interest that may arise among them.[30] When a lawyer is in doubt about undertaking or continuing representation because of a conflict of interest concern, he or she should consult with other lawyers, preferably experts in professional responsibility. If the lawyer is still concerned about the representation, he or she should decline representation until the new client responsible for the conflict of interest obtains independent counsel.

The Comments to MRPC 1.7 acknowledge that conflicts of interest in contexts other than litigation may be difficult to assess. "Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise,

29. MRPC, Rule 1.7(a)(2).

30. *See* Flamm *supra* note 24 at n.16 citing , Adler v. Manatt, Phelps, Phillips & Kantor, L.A. Supr. Ct. BC O5307 (Apr. 1992) and noting that the former drummer of Guns'n Roses sued a law firm for malpractice and other causes for damages resulting from his signing an agreement with other members of the band)

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and the likely prejudice to the client from the conflict. The question is often one of proximity and degree."[31] Thus, the evaluation of lawyer conduct in the entertainment industry will involve to some degree the custom and nuances involved in the business as well as the MRPC and its Comments. For example, if the lawyer represents a corporation which may "loan-out" the services of the artist or manager shareholder, the Comments warn of the potential for conflict if the lawyer also serves on the corporation's board of directors.

2. *Reviewing Other Noteworthy Conflicts of Interest Issues:*

a. Business transactions. On its face, MRPC 1.8 appears to state clearly that a lawyer shall not enter a business transaction with a client unless (1) the transaction is fair and reasonable to the client, (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction, and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.[32] Does entering into a shopping agreement for a contingent fee from income derived from a record contract, the sale of a book, or some similar deal constitute entering a business transaction? The attorney should disclaim in the shopping agreement that the parties are entering into a joint business venture, to help ensure that the lawyer does not violate the ethical rules concerning a business transaction with a client.[33]

b. Payment for attorney fees by another. MRPC 1.8(f) permits someone other than the client to pay the lawyer for his services if the client gives informed consent and there is no interference with the

31. MRPC, Rule 1.7, Comment [26].

32. The widow of the late popular songwriter and singer, Jim Croce, sued in New York Federal Court claiming unconscionability and breach of fiduciary duty against Croce's publishers, managers and an attorney on managerial and personal services contracts. At the initial meeting, an attorney was introduced to the Croces as "the lawyer" and reviewed the contract terms. The Croces were aware that the attorney had a business relationship with the publishers and managers on the transaction. Although the attorney was clearly not the Croces' lawyer and the Court upheld the contracts, the Court found the attorney liable for all of Croce's legal fees in challenging the contracts. The Court held that the attorney had breached a fiduciary duty to the Croces by failing to advise them to seek independent counsel. The lesson of the Croce case is that a lawyer who stands to profit from a business enterprise may find himself in a fiduciary relationship with a non-client by failing to advise independent counsel at the outset. The case has also inspired the inclusion of an acknowledgment in management contracts that the artist has been advised of the opportunity to seek independent counsel. Croce v. Kurnit, 565 F.Supp. 884 (S.D.N.Y. 1982), *aff'd*., 737 F.2d 229 (2nd Cir. 1984).

33. *See* RPCC, Rule 3-300.

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lawyer's independent professional judgment and relationship with client, including the need to protect client confidences. For example, a manager could pay a lawyer to represent an artist in divorce proceedings. It is even possible, although not especially advisable, that a manager could pay a lawyer to represent an artist and negotiate a personal management agreement with the manager's lawyer. If the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with MRPC 1.7.34 (1.8 comment 12 says this).

c. Attorney interest in literary rights. MRPC 1.8(d) precludes a lawyer from making or negotiating an agreement with the client prior to the conclusion of the representation which gives the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. In the context of on-going litigation, the conclusion of representation occurs when there is a non-appealable final judgment. It is important to note that the rule does not prohibit a lawyer representing a client in a transaction concerning literary property from accepting as his fee an ownership interest in the property.[35]

d. Conflicts in representing former clients. Like practicing in small communities, the "incestuous" entertainment industry gives rise to potential conflicts of interest with respect to representing a party against a former client. MRPC Rule 1.9 and its Comments state that a conflict of interest arises with a former client when the lawyer's representation of a new client bears a "substantial relationship" to the matter of the representation that the attorney provided to a former client.[36] Disqualification of a lawyer from the subsequent representation is for the protection of the former client. The lawyer should either withdraw from representation or seek the former client's informed consent regarding the conflict of interest, realizing that in some cases a waiver will be difficult because of the risk that the lawyer will harm the former client by using the former client's confidences. The former client's informed consent must be confirmed in writing.[37]

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34. MRPC, Rule 1.8, Comment 12.

35. MRPC, Rule 1.8, Comment [9].

36. The "substantial relationship" test was developed in T.C. Theater Corp. v. Warner Brothers Pictures, 113 F.Supp.265 (S.D.N.Y.1953) (holding that if the matters or cause of action of the new representation are substantially related to the former representation, "the Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the [new] representation" *Id. at 268-69*). *See* MRPC, Rule 1.9, Comment [3].

37. MRPC, Rule 1.9(a) & (b)(2). An action was filed by Steve Fargnoli, a former manager for the musician, Prince, alleging a conflict of interest stemming from the Ziffren firm's formerly representing Fargnoli from 1981 to

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In this type of conflict of interest situation, the lawyer is advised to have as full and frank a discussion as possible with parties, keeping in mind the need to preserve each client's secrets and confidences.

C. AGENTS, MANAGERS AND LAWYERS

The practice of entertainment law is quite broad. It includes litigators, estate planners, tax professionals, in-house counsel, and deal makers - entrepreneurial attorneys who facilitate business deals. The functions of agents, managers, and entrepreneurial entertainment lawyers often overlap. These functions are not easily distinguishable. Personal managers are given powers-of-attorney and function much like a lawyer. They counsel their artists on business and career matters and enter into contracts on their behalf. Agents, who must be licensed in most states, endeavor to procure employment for the artist. The licensing requirement and the narrow definition of their job induces some agents to broaden their involvement and income by becoming agent or managers. Lawyers are often positioned to assume all these roles, as representative, counselor and attorney-in-fact.[38]

A. Textbook Definitions of Roles[39]

Agents procure employment for artists in the entertainment fields. At common law, "agents" are persons authorized by a principal to act on behalf of that principal under the principal's control.[40] A music agent's work, unlike an agent in the film or book publishing industries, is generally limited to soliciting and procuring engagements for live performances, personal appearances and, perhaps, endorsements. Agents for musical talent are also subject to the strictures of the American Federation of Musicians ("AF of M"), an international trade union. The AF

1986, then later representing Prince during a time when Fargnoli sued the musician and his corporations. The suit alleged that the Ziffren firm disclosed to Prince some of Fargnoli's confidential communications protected under the attorney/client privilege. The Ziffren firm had helped Prince and Fargnoli settle a dispute during their representation of Prince and at the invitation of Fargnoli. In granting the law firm summary judgment, the Court noted that the parties had entered into a release including conflict of interest claims after the parties settled their dispute. Fargnoli v. Ziffren, Brittenham & Branca, 1992, Case No. BC068280 L.A. Sup. Ct.

38. Lawyers may have to obtain licenses if they procure employment. There are a number of articles providing guidance for the attorney who wishes to become an agent, manager, or both. *See, e.g.*, RAYMOND L. WISE, LEGAL ETHICS 185 (2d ed. 1970); James O'Brien III, *Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists,* 80 CALIF. L. REV. 471 (1992); Bruce S. Stuart, *Swifties, Shifties, and That E-Biz Jazz: The Ethical Roles of Attorney/Literary Agents,* HASTINGS COMM/ENT.L.J. 245 (Winter, 1996).

39. DONALD E. BIEDERMAN, ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES (3d ed. 1996).

40. W. EDWARD SELL, AGENCY, (1975). THE RESTATEMENT (SECOND) OF AGENCY §424, subd. 1 (1958) defines agency in any enterprise as a *fiduciary* relationship created from the client (principle)'s consent that the agent may act on the client's behalf and subject to the client's control. This means that, besides being liable for breaches of statutorily-imposed duties, an agent is liable for the common law breach of the fiduciary duties of good faith, fair dealing, and loyalty.

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of M requires that agents confine their efforts to procuring employment, and require that they be licensed by the AF of M. Unlicensed agents are forbidden from doing business with the AF of M, and severe penalties are incurred for musicians doing business with unlicensed agents. Almost as important to this discussion is the AF of M's limits on the fees agents or personal managers can receive. Agents are allowed a *maximum* of fifteen percent of an artist's gross receipts. A personal manager, defined by the AF of M as having only to do with the development of the artist's career in giving advice and guidance, can only receive *five* percent over the agent's percentage of the artist's gross receipts. Related exploitations by agents may include merchandising deals at performances or arranging for films of live performances.

Personal Managers are the artist's principal career advisors in all business affairs, including daily management to strategic career development planning. Personal managers often oversee the hiring of other managers to deal with other aspects of the artist's career. Personal managers often hire the business manager. Business managers, usually accountants, manage business and personal finances. While the business manager manages the money, the personal manager focuses his/her efforts on how the money is earned. This focus often leads a personal manager to delve into the agent's realm of procuring employment. A personal manager involved in procuring employment may be subject to sanctions as an unlicensed agent.[41]

Lawyers are engaged to protect the legal interests of their clients. The rules of professional conduct may be the attorney's chief impediment stumbling to becoming establishing him or herself as an agent or manager. The MRPC govern conflicts of interest and the duty of loyalty. Both may be compromised when an attorney assumes the roles of counselor and agent/manager.[42]

B. Practical Roles[43]

Practically speaking, the roles of agent, manager and lawyer are not easily distinguishable. Conflicts arise when the parties switch or merge roles. For example, the lawyer who also acts as a personal manager must proceed carefully given the potential for conflicts of interest and the possibility that the lawyer-client relationship will be adversely affected by the artist's frustrations with unrealized career

41. *See, e.g.*, Chinn v. Tobin, California Labor Comm'r Case No. 17-96 (1997); Waisbren v. Peppercorn Productions, Inc., 48 Cal. Rptr. 2d 437 (1996); Mandel v. Liebman, 303 N.Y. 88 (1951); Raden v. Laurie, 262 P. 2d 61 (Cal. 1953). *See also* Don Biederman, *Agent or Manager? There is a Difference . . . Isn't There?,* 15 No.9 ENT L. REP. 3 (Feb., 1994); Fred Jelin, *The Personal Manager Controversy: Carving the Turf,* 7 No.1 ENT. L. REP. 3 (June, 1985) (hereinafter Jelin).

42. *See* also Joseph B. Anderson and Darrell D. Miller, *Professional Responsibility 101,* 11 ENT. & SPORTS LAW 8 (Summer 1993) (discussing an earlier article on legal ethics as applied to agent/managers, *see* McPherson, *supra* note 20).

43. Harold Orenstein & David Guinn, ENTERTAINMENT LAW & BUSINESS: A GUIDE TO THE LAW AND BUSINESS PRACTICES OF THE ENTERTAINMENT INDUSTRY (1996).

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expectations.[44]

Much like a lawyer or a personal manager, agents create or reject employment opportunities and influence an artist's career and image. Agents negotiate deals, or "package" deals, by using business and personal relationships to bring artists together with other creative talent for tours, sponsorships, recordings and other business. Agents are responsible for the collection, accounting, and distribution of money, just like a business manager. Agents are paid by commissioning the artist's gross income from employment procured by the agent usually at 10% to 15% rate.

Personal managers may procure employment like an agent. The music industry is a particularly appropriate setting for considering lawyers who also act like personal managers or agents because the role of a personal manager developed out of a need for business assistance by artists in the music industry.[45] In addition, musicians need contracts and information which are often provided by the personal manager. Managers negotiate recording contracts while agents book the artist's performances or services.[46] Finally, managers nurture the artist's career and often become a producer of the artist's talents. Managers have usually represented a coterie of talent and may use one or more of his clients to produce an event or to assist him in developing a particular artist's career.

Unlike agents, personal managers are not required to register with state administrative agencies. Unlike lawyers, there is no legally enforced code of professional conduct or licensing process for managers. Yet, managers do not operate wholly without restraints. In California, a manager who procures employment must be licensed as a "talent agency." The Labor Commission of California has jurisdiction over manager-artist contracts, subject to California Supreme Court review.[47] Finding work for artists in New Jersey requires a manager to be licensed as a "booking agency."[48] Unlike agents, managers may have powers of attorney to bind their artist to deals managers negotiate on their artist's behalf.

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44. Who must and who need not be licensed often turns on whether the person in question is providing the services of an agent or of a manager, or both. For example, booking agents in New York are required to be licensed as employment agencies under N.Y.S. §171 (1997). However, personal managers need not have a license. *See also* Friedkin v. Harry Walker, Inc., 395 N.Y.S. 2d 611 (1977) (holding that agents who did not manage their clients' careers but only secured employment for them were required to be licensed as employment agencies under §171, as procuring employment for their client was not merely incidental to their job); Gervis v. Knapp, 43 N.Y.S. 2d 849 (1943) (finding that infant singer's guardian could not disaffirm a contract as unenforceable which was entered into on infant's behalf by a personal manager who was not licensed because licensing was not required of a manager who was "primarily a manager").

45. *See* Jelin, *supra* note 41.

46. *Id.*

47. *Id.* at 4.

48. N.J.S. §34:8-43 (1997). This statute also governs agents.

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Managers, therefore, commission a large percentage of the gross income of the artist earned in the entertainment fields, usually 15% to 25%.[49]

Lawyers may package deals through relationships, shop talent and creative material, advise on money matters, recommend individuals or businesses for assistance, protect the client's financial interests, and intentionally or inadvertently exercise a greater degree of control over the client than is customary in other law practices. Lawyers may bill hourly or a contingency fee if work is done on a speculative basis (such as shopping and negotiating a record deal), or a combination of both. (Refer to section IV of this outline). Certain entertainment lawyers fit the textbook and practical definition of both agents and managers. This is not weird or wrong. It is a fact. Lawyers who wish to perform these services must do so within the applicable guidelines and restrictions governing all lawyers.

C. Licensing Regulations and Rules

Many states require agents - persons providing employment opportunities - to be licensed. California and New York have the most comprehensive laws regarding the licensing and regulation of entertainment agencies.[50] In order to be licensed, agents must demonstrate, in part, their good character and competency in the business of providing work. Among other requirements, agents may also have to show proof of the nature and location of the agent's business. The statutes also address agency agreement forms, fees, disposition of grievances and penalties. Penalties for violating the statutes are court-enforced with criminal misdemeanor and/or civil penalties, which include voiding contracts and ordering the return of commissions. Cases establish that persons operating in violation of the statutes in New York and California[51] are nevertheless exposed to statutory penalties whether they are licensed by the state or not. These cases demonstrate how talent can assert non-compliance with the applicable licensing statute and void management contracts *ab initio*. Remedies available to the talent include recovering all commissions paid to managers proven to have in effect operated as unlicensed agents. State labor commissions (established for the protection of employees) issue licenses and enforce the statutes.

Managers who do not assume agency functions do not require licensing in

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49. This commission is subject to the guidelines established by the American Federation of Musicians ("AF of M"), an international trade union. The AF of M sets a ceiling of fifteen percent (of an artist's gross receipts) for agents working with members of the union. Personal managers are limited to five percent of the gross, over and above the agent's percentage. BY-LAWS OF THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ART. 23, §2 (revised Sept. 15, 1987).

50. California Labor Code §§1700 et seq; New York General Business Law §§170 et seq.

[51]51. Waisbren v. Peppercorn Productions, Inc., et al., 48 Cal. Rptr.2d 437 (1996); Pine V. Laine, 321 N.Y.S. 2d 303 (1st Dept. 1971); Buchwald v. Superior Court of San Francisco, 62 Cal. Rptr. 364 (Ct.App. 1st Dist. 1967); Anita Baker v. BNB Associates, Ltd., Case No. TAC 12-96, California Labor Commission, determination date 12-27-96.

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California or New York.[52] However, managers must be careful to structure their employment procuring activities so that they will comply with these and other requirements that such activities are permissible if they are "merely incidental" to their actions as manager. It is advisable to include language in a management contract to the effect that the artist acknowledges that the personal manager is not an employment agency or theatrical agent and that the personal management duties do not include securing or soliciting employment for the artist. Formally recognizing the cross-over function of agents and managers, the California statute exempts from its definition of "talent agency" (and, therefore, exempts from licensing) managers who procure, offer or promise to procure recording contracts for music artist. California further allows an unlicensed person to act in conjunction with and at the request of a licensed talent agency in the negotiation of an employment (recording) contract (emphasis supplied). The New York statute specifically exempts from its definition of "theatrical employment agency" (and, therefore, exempts from licensing) the business of managing where such business only "incidentally" involves seeking employment. The California statute also specifically empowers talent agencies to "counsel or direct artists in the development of their professional careers." Therefore, California agents may manage while managers (with narrow exceptions) cannot function as agents without complying with the licensing requirements. By not enacting statutes specifically addressing the entertainment agencies, some states have left the regulation of agents and managers to general employment statutes and common law. Common law imposes fiduciary duties of loyalty, good faith, and fair and honest dealing on all agents and managers and lawyers.[53]

Lawyers are licensed by the state judiciary, which is also responsible for promulgation and enforcement of the applicable rules of professional conduct and for deciding legal malpractice cases. As previously noted, most state rules emulate the provisions contained in the American Bar Association Model Rules of Professional Conduct (Model Rules) which are the reference standard in this discussion.

D. Music Lawyer as Manager or Agent

Lawyers can serve as agents or managers while simultaneously practicing law. In the music industry, lawyers procure recording contracts for their clients and help manage their career by participating in career strategy and deal making. Unlike agents, lawyers usually do not regularly book personal appearances for their clients. Thus, lawyers often tend to act more like managers than agents. Personal management requires daily and detailed attention to the personal affairs and logistics of an artist. Because an experienced music lawyer may know the business better than

52. Mandel v. Liebman, 303 N.Y. 88 (1951); Raden v. Laurie, 262 P.2d 61 (Cal. 1953).

53. Detroit Lions, Inc. v. Argovitz, 580 F.Supp. 542 (E.D. Mich. 1984). A non-lawyer sports agent violated conflicts of interest standards when negotiating on behalf of a player with a team in which the agent was also part owner; Croce v. Kurnit, 565 F.Supp. 884 (S.D.N.Y. 1982), *aff'd* 737 F.2d 229 (2d Cir. 1984).

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an inexperienced manager, the attorney who has a proactive relationship with the artist and manager may find himself or herself making recommendations, facilitating relationships, creating opportunities, and advising the manager as well as the artist. By doing so, the lawyer becomes, in effect, part of the management team. In some cases, the attorney may be invited by both artist and management to take on duties which are generally the prerogative of artist management. This usually means representation on a contingent fee basis and greater involvement with the artist's daily affairs in addition to providing general legal counsel. By limiting the work a lawyer can dedicate to other legal clients, the attorney may become more like a company general counsel or "in-house" lawyer.

Lawyers are agents and it is axiomatic that an attorney's authority to represent clients creates an agency and fiduciary relationship. Attorneys who regularly (and not "incidentally") make deals on a speculative basis in return for a contingent payment may still be required to be separately licensed as an agent under the applicable statute of the state in which the attorney's principal place of business is located. This should obviate the need for the attorney/agent to register as an agent elsewhere. However, should an attorney/agent establish an office or agency in a state in which he or she is not licensed to practice law, licensing under that state's rules as an agent (and certainly as an attorney, if the intention is to practice law) will be required.

In Chinn v. Tobin,[54] the California Labor Commissioner ruled that an attorney who owned a production company was not procuring employment as an agent for an artist/client when he hired the artist to be in one of his productions. The Commissioner held that an attorney having an ownership interest in the employment is functioning as an employer, not as an agent "with third parties" within the meaning of the Act. However, conflict of interest issues were raised but not resolved by the Commissioner.

E. Special Considerations Regarding Lawyer Conduct

1. *Merging the Roles of Various Entertainment Representatives:*

Lawyers' ethical obligations are extensive and often long-lasting.[55] These obligations also create challenges for entertainment lawyers who perform services often rendered by other personnel, such as agents. The general rule is that entertainment attorneys who also act as agents or managers are still subject to their states' codes of professional conduct to the extent that any of their activities involve the delivery of legal services.[56] Lawyers cannot merely switch titles to avoid their

54. Chinn v. Tobin, California Labor Comm'r Case No. 17-96 (1997).

55. *See* Swidler & Berlin and Hamilton v. United States, 524 U.S. 399 (1998) (holding that the attorney-client evidentiary privilege continues after the client's death).

56. It is also worth noting that Rule 5.4 of the MRPC prohibits lawyers from forming a partnership with a non-lawyer if any of the activities of the partnership or the professional corporation involves the practice of law.

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ethical responsibilities. As a result, lawyers have taken different approaches to dealing with what is perceived as a competitive disadvantage in the entertainment business when acting in these other roles.[57] Some attorneys argue that when they act as an agent or a manager they are not providing legal services and, therefore, are not subject to the codes of professional conduct. This approach has some risk as lawyers' professional liability policies may not cover all of their services. Other attorneys formally establish separate businesses that render financial advice, career advice, or solicit employment opportunities. The attorneys may incorporate the businesses and employ full-time personnel but they expressly do not provide legal services.

As long as attorneys are licensed to practice law, they are subject to their states' codes of professional conduct for even their non-professional activities. Lawyers must be very careful when creating separate business enterprises to make sure that these are not used to circumvent the lawyer's ethical obligations. For example, a lawyer could create a separate talent agency and then solicit in-person talent for the agency. The lawyer could not use such solicitation however to develop clientele for his law practice.

2. *Advertising and solicitations.*

MRPC 7.2 and 7.3 governs lawyer advertisement and solicitation.[58] In general, lawyers can mail written advertisements and solicitations directly to prospective clients providing they are truthful and non-deceptive.[59] Lawyers may also advertise through recorded or electronic communication, including public media.[60] Lawyers "shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's . . ." contact is pecuniary gain, unless the person contacted is a lawyer or has a family, close personal, or

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Similarly, a lawyer cannot permit non-lawyers to own shares of a professional corporation that he is involved in that delivers legal services. *Id.*; *see* also RPCC Rule 1-310.

57. Some contend that the applicability of the law profession's ethical codes to lawyers performing non-law services is not a settled area. *See* Robert E. Fraley & F. Russell Harwell, *Sports Law and the "Evils" of Solicitation*, 9 Loy. L.A. Ent. L.J. 21 (1989).

58. *See* RPCC, Rule 1-400. *See generally*, Jack P. Sahl, *The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment*, 34 St. Mary's L. J. 795 (2003) (noting the increased emphasis on marketing by the legal profession and examining the history of lawyer advertising).

59. MRPC, Rule 7.1; s*ee* Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988); *see also* Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding a limited 30-day ban on written solicitation by lawyers to accident victims and their families to protect privacy of state's citizens and the "flagging reputation of state's lawyers"). *See generally* Bates v. State Bar of Arizona, 433 U.S. 351 (1977).

60. MRPC, Rule 7.2(a).

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prior professional relationship with the lawyer.[61] Lawyers also cannot state or imply that they are specialists in a field of law, such as entertainment law, unless the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association and the name of the certifying organization is clearly identified in the communication.[62]

Entertainment lawyers can communicate or promote their legal services in several ways in hope of developing their practice. The most effective way is to establish a strong reputation for providing competent and efficient legal work with the general public as well as the profession. Satisfied clients will return with more work and they will refer new clients. Lawyers should create a profile in the arts and entertainment community by attending performances and other related events, for example, awards ceremonies and benefits. Lawyers should volunteer their service for arts organizations, for example, by serving on the board of directors. Authoring entertainment law articles, attending continuing legal education programs, speaking to groups, and traditional advertising - notices in trade magazines or firm brochures - are all ways to network and to develop an entertainment practice.

3. *Referrals and fee splitting*.

Many entertainment lawyers rely on referrals for their services from a variety of sources, including previous clients, lawyers, agents, managers, and personnel with entertainment companies. Referrals with conditions attached, for example, a desire to be retained as the client's manager or agent, raise serious conflict of interest issues. In addition, lawyers are prohibited from paying persons to refer clients.[63] MRPC 1.5(e) does permit lawyers to refer cases to other lawyers or to associate lawyers in their cases and share the fee. The clients must agree to the arrangement, including the share each lawyer will receive, and the agreement must be confirmed in writing.[64] The lawyers' share must reflect their work or their assumption of joint responsibility in the case.[65] MRPC 1.5(e)(3) requires that the total fee be reasonable.

D. COMPENSATION FOR ATTORNEY SERVICES AND AGREEMENTS

61. *See* MRPC, Rule 7.3(a); *see* RPCC, Rule 1-400.

62. MRPC, Rule 7.4 (d).

63. MRPC, Rule 7.2(b); *see* RPCC, Rule, 1-320.

64. MRPC, Rule 1.5(e)(2).

65. MRPC, Rule 1.5(e) (1)-(3).

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Entertainment lawyers deal in the development of creative material. Their relationships with talent and entertainment companies are important to developing a successful practice. Lawyers market or "shop" talent and their creative properties to companies for purchase, license and ultimately for commercial exploitation. Shopping talent and their properties is highly speculative work - only a very small percentage of talent or their properties ever achieve commercial success. Since many entertainment clients cannot afford to retain lawyers on an hourly basis for their services, including shopping their creative work, clients and lawyers instead often agree to a contingency fee arrangement. A comprehensive retention agreement for legal services should unambiguously address scope of representation and the basis of payment. A separate shopping agreement may also be considered if this is the primary or only service provided by the attorney.

Unlike employment contracts with managers and agents, clients can terminate employment contracts with lawyers at any time.[66] If a client terminates his or her lawyer, the lawyer is generally entitled to only quantum meruit recovery. Lawyers offer a broad range of professional services and it may be useful to have a specific contractual provision regarding the lawyer's shopping services and compensation. To help ensure that a lawyer's work is covered by his or her professional liability insurance, the retention agreement should specify that the client is retaining the lawyer primarily for law-related services.[67] If the retention agreement provides for compensation based on an hourly rate, the rate for the lawyer's services will vary depending on a several factors, including the complexity of the representation, the lawyer's unique skills and experience, and the value for such services in a particular geographical area. Representation of a more national or international nature may generate higher hourly rates than for more local work. Lawyers' hourly rates for entertainment work can range from $200 to 400 per hour - with lawyers on the east and west coasts earning more within the range.

A customary contingent fee ranges from 5% to 10% of the defined gross compensation of the client and rarely exceeds 10%. The exact percentage depends, in part, on the client's record for commercial or critical success and the likelihood that the lawyer's efforts will be successful. For example, it is reasonable with a superstar to take a lower percentage of the gross compensation and with a new or "baby act" to insist on 10%. Successfully shopping a new artist to a recording contract with a small, local, independent record company is a situation in which a lawyer might charge 10% of the artist's gross compensation. A lower contingency fee is expected if coupled with a reduced hourly fee. In both the hourly rate and the contingency fee arrangements, the client usually pays the out-of-pocket costs.

In the contingency fee circumstance, the definition of gross compensation is important and a source of great controversy. In many entertainment contracts, gross compensation is

66. MRPC, Rule 1.16, Comment [4] (stating that clients have the right to discharge, with or without cause, their attorneys).

67. *See supra* note 6.

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defined broadly. It may exclude, however, income that is not derived from or enhanced by the lawyer's professional services. For example, when representing a book author, it may be appropriate for the lawyer to include in gross compensation income from book publishing and also proceeds from television, a motion picture, or personal appearances. The lawyer wants to apply the contingency rate or commission to as much of the client gross compensation that is reasonable in the industry and under the MRPC. This may be justified because first, the book deal created all the other commercial opportunities for the client-author and second, the lawyer's legal services are being used in these other areas. It is worth noting, that it may be in the client-author's best interests to exclude some streams of income, such as proceeds from music, theatrical, or other "unrelated" sources. Like managers, agents and entertainment companies, lawyers are reluctant to limit the possible sources or streams of income. They usually insist on a percentage of the gross compensation from any source, whether known or yet to be discovered, especially given the trend in multimedia and the crossover nature of entertainment products in new technology. Lawyer contingency agreements, like personal management contracts, may also contain a "sunset" provision. It requires the client to pay the contingency fee for the lawyer's past services even after the representation is terminated, usually for a period of six to twelve months. In addition and distinct from the sunset provision, the lawyer may negotiate and receive an ongoing commission on the client's proceeds derived from deals that the lawyer helped to procure for the client. The commission may be for a limited period or extend for so long as the artist receives royalties from that source.

Model Rule 1.5 requires hourly and contingent fees to be reasonable.[68] Attorneys can consider the following criteria in determining a reasonable fee: "the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly; . . . the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; . . . the experience, reputation, and the ability of the lawyer or lawyers performing the services required; and whether the fee is fixed or contingent."[69] These criteria offer attorneys great flexibility and protection in charging fees. Thus, it is not unusual to find entertainment lawyers in different parts of the country charging similar fees for national or international projects because of the unique skill and experience they share in the field.

Contingent fee agreements must be in writing, signed by the client, and "state the method by which fees are to be determined, the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable, whether or not the client is the prevailing party."[70] Contingent

68. *See* RPCC, Rule 4-200.

69. MRPC, Rule 1.5(a)(1)-(8).

70. *Id*. at (c).

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fees tend to produce more income for attorneys than hourly fees. This is permissible, in part, because there is often a risk with contingent fees that the attorney will not be paid because the representation is unsuccessful. For many entertainment attorneys, the potential value of a deal or successful representation dictates the amount or reasonableness of a contingency fee.[71]

Entertainment attorneys often assist in the personal management of a client. Managers frequently bill between 15% and 25% of a talent's gross income for their services. Attorneys assuming managerial responsibilities may wish to consider the customary amounts that managers are paid in setting a reasonable contingency fee.

In some entertainment fields, it is customary for the talent's services to be provided by a "loan-out" corporation, a "personal services" corporation, or some other entity, owned and controlled by the talent. Such entities include production, music touring and merchandise companies. The lawyer's Engagement Letter of Agreement should either acknowledge or anticipate the representation of these entities by including them as parties or having a contractual provision that designates the lawyer as the counsel for the entities upon their formation.

E. SANCTIONS

State supreme courts regulate the right to practice law even for lawyers who never appear in court.[72] These courts establish codes of professional conduct and disciplinary systems to protect the public and the bar. Federal courts usually defer to state admission standards in admitting lawyers and admission is only necessary for those lawyers who practice in a particular federal court.[73] Both state supreme and federal courts can discipline lawyers.

There are two principle methods by which the public can hold lawyers and judges accountable for their misconduct.[74] The first method is filing a lawsuit against an attorney for civil liability.[75] Most lawsuits filed against attorneys are for negligence, a fiduciary breach, breach of contract or fraud.[76] Successful plaintiffs in lawyer liability cases are entitled to

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71. Some types of practices, such as personal injury or debt collection, have contingency fees that the range from 33% to possibly 50%.

72. Morgan, *supra* note 8, at 41.

73. *Id.*

74. Judicial immunity largely insulates judges from civil liability for their official conduct.

75. *See* Mallen, *supra* note 5, at 554-55. Lawsuits against lawyers for professional liability are generally referred to as malpractice actions. Although there is little consensus or discussion about the meaning of legal malpractice, it commonly describes a kind of tortious conduct. *Id.* at 2. Liability for professional negligence is certainly included within the meaning of malpractice. *Id*. at 3-5.

76. The most common action brought against attorneys is for negligence. The essential elements of a negligence claim are: "(1) the employment of the attorney or other basis for imposing a duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that such negligence was the proximate cause of damage to the

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attorneys' fees and to punitive damages when the attorney's conduct involves gross negligence or malice.[77]

The second method of holding lawyers accountable involves the states' disciplinary systems. Clients and others can file a grievance against an attorney with the state authority responsible for reviewing lawyer conduct, for example, the statewide disciplinary counsel. These authorities often rely on assistance from state and local bar associations to receive, review, investigate, prosecute, and hear grievances. Grievances and sanctions against lawyers have increased in recent years. The range of sanctions for lawyer discipline include: disbarment, suspension, formal reprimand, informal reprimand and a fine. One or more of these sanctions may be applied to an attorney for one significant violation or an accumulation of lesser violations of a state's professional conduct code.

Case Sera Sera

In May 1956, Jerome B. Rosenthal entered into a retainer Agreement with Doris Day Melcher and continued to present her as an attorney, business manager, business adviser and agent until his services were terminated in July 1968. Later that year, Doris Day Melcher and her son, Terrence Melcher, filed a complaint with the state bar against Rosenthal. Disciplinary proceedings resulted in the State Bar Court unanimously recommended that he be disbarred. The case presents facts instructive of what lawyers also functioning as an agent and manager should not do and what can happen when they do.

The Supreme Court of California, in affirming the disbarment, held that Rosenthal engaged in transactions involving undisclosed conflicts of interest, took positions adverse to his former clients, overstated expenses, doubled billed for legal fees, failed to return client files, failed to provide access to records, failed to give adequate legal advice, failed to provide clients with an opportunity to obtain independent counsel, filed fraudulent claims, gave false testimony, engaged in conduct designed to harass his clients, delayed court proceedings, obstructed justice and abused legal process.[78]

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plaintiff;" and (4) actual damages. *Id*. at 607-08. As part of a lawyer malpractice action, courts have traditionally required the plaintiff to show that but for the attorney's conduct the client would succeeded in the underlying claim. S*ee,* Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998) (holding that the uncollectability of a judgment in the underlying action is an affirmative defense to a malpractice claim against an attorney); see also Morgan, *supra* note 8, at 89 (discussing lawyer malpractice claims and the so-called "suit-within-a-suit" requirement).

77. Patrick v. Ronald Williams, P.A., 402 S.E.2d 452 (N.C.App. 1991); *see* Togestad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980); 4 DUNNELL MINN. DIGEST *Attorneys* §11.00 (4th ed. 1989).

78. Jerome B. Rosenthal v. State Bar of California, 43 Cal.3d 612, 238 Cal.Rptr. 377 (1987). Que Sera, Sera (Whatever Will Be, Will Be), Doris (Kappelhoff) Day, from the film "The Man Who Knew Too Much" (1955) (song also recorded for Columbia Records).

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MARCH 18, 2017

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RULES OF PROFESSIONAL CONDUCT

RULE 1.1: COMPETENCE

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

Comment

Legal Knowledge and Skill

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

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

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

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

Thoroughness and Preparation

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

Maintaining Competence

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

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files,

notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. See Illinois Supreme Court Rule 776, Appointment of Receiver in Certain Cases.

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

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

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

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

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

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

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

Comment

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

Communicating with Client

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

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

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a

reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

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

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

Withholding Information

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

RULE 1.5: FEES

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

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

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

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

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

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Comments [3B] through [3D] to Rule 1.15 and Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

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

Prohibited Contingent Fees

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

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, or referral of a matter where appropriate, and often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or, where the primary service performed by one lawyer is the referral of the client to another lawyer, if each lawyer assumes financial responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint financial responsibility for the representation entails financial responsibility for the representation as if the lawyers were associated in a general partnership. See *In re Storment*, 203 Ill. 2d 378 (2002). A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm, or payments made pursuant to a separation or retirement agreement.

Disputes over Fees

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

RULE 1.6: CONFIDENTIALITY OF INFORMATION

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

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

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

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

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

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

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

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

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

(d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers' assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules.

Comment

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

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

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in

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

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

Authorized Disclosure

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

Disclosure Adverse to Client

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

[6A] Paragraph (b)(1) preserves the policy of the 1980 Illinois Code of Professional Responsibility and the 1990 Illinois Rules of Professional Conduct that permitted a lawyer to reveal the intention of a client to commit a crime. This general provision would permit disclosure where the client's intended conduct is a crime, including a financial crime, and the situation is not covered by paragraph (c).

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate

authorities to prevent the client from committing fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Like paragraph (b)(1), paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, but the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

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

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

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

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

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law

supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

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

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

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

Withdrawal

[15A] If the lawyer's services will be used by a client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). The lawyer may give notice of the fact of withdrawal regardless of whether the lawyer decides to disclose information relating to a client's representation as permitted by paragraph (b). The lawyer may also withdraw or disaffirm any opinion or other document that had been prepared for the client or others. Where the client is an organization, the lawyer must also consider the provisions of Rule 1.13.

Acting Competently to Preserve Confidentiality

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

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

Former Client

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

Lawyers' Assistance and Court Intermediary Programs

[19] Information about the fitness or conduct of a law student, lawyer or judge may be received by a lawyer while participating in an approved lawyers' assistance program. Protecting the confidentiality of such information encourages law students, lawyers and judges to seek assistance through such programs. Without such protection, law students, lawyers and judges may hesitate to seek assistance, to the detriment of clients and the public. Similarly, lawyers participating in an approved intermediary program established by a circuit court to resolve nondisciplinary issues among lawyers and judges may receive information about the fitness or conduct of a lawyer or judge. Paragraph (d) therefore provides that any information received by a lawyer participating in an approved lawyers' assistance program or an approved circuit court intermediary program will be protected as confidential client information for purposes of the Rules. See also Comment [5] to Rule 8.3.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

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

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

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

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

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

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

Comment

General Principles

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

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

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

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

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

Identifying Conflicts of Interest: Directly Adverse

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

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

Identifying Conflicts of Interest: Material Limitation

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

Lawyer's Responsibilities to Former Clients and Other Third Persons

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

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction

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

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

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

Interest of Person Paying for a Lawyer's Service

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

Prohibited Representations

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

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

able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

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

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

Informed Consent

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

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

[20] Reserved.

Revoking Consent

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

Consent to Future Conflict

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

Conflicts in Litigation

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

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

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

Nonlitigation Conflicts

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

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

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

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent

or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

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

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

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

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

Organizational Clients

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

adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

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

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

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

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

(2) the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and

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

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

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

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

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

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

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

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

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

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

(h) A lawyer shall not:

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

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

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

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

and

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

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

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

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or

services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the lawyer inform the client in writing that the client may seek the advice of independent legal counsel and provide a reasonable opportunity for the client to do so. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent). The common law regarding business transactions between lawyer and client may impose additional requirements, such as encouraging the client to seek independent legal counsel, in lawyer liability and other nondisciplinary contexts.

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

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land,

the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

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

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

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

Literary Rights

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

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers

do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

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

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

Client-Lawyer Sexual Relationships

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

sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

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

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

Imputation of Prohibitions

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

RULE 1.9: DUTIES TO FORMER CLIENTS

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

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

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

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent.

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

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

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

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client

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

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

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

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

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

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

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

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

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11 and with former judges, arbitrators, mediators or other third-party neutrals is governed by Rule 1.12.

(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Principles of Imputed Disqualification

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

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

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

information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer. Where a lawyer has joined a private firm after having been a judge or other adjudicative officer or law clerk to such person or an arbitrator, mediator or other third-party neutral, imputation is governed by Rule 1.12, not this Rule.

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

[9] Where the conditions of paragraph (e) are met, imputation is removed and consent is not required. Requirements for screening procedures are stated in Rule 1.0(k). This paragraph does not prohibit a lawyer from receiving a salary or partnership share established by independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified. Nonconsensual screening in such cases adequately balances the interests of the former client in protecting its confidential information, the interests of the current client in hiring the counsel of its choice (including a law firm that may have represented the client in similar matters for many years), and the interests of lawyers in career mobility, particularly when they are moving involuntarily.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to

the representation that is a violation of a legal obligation to the organization, or a crime, fraud or other violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a crime or fraud, and

(2) the lawyer reasonably believes that the crime or fraud is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged crime, fraud or other violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged crime, fraud or other violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and

shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. “Other constituents” as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a crime, fraud or other violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the misconduct and its consequences, the responsibility in the organization and the apparent motivation of those involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer’s advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization’s highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing

body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

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

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer

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

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

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

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer

engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

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

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

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

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

Assisting the Client Upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

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

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

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

(1) both the affected client and the prospective client have given informed consent, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and that lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Comment

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

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

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

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

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from

representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

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

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

[8] Reserved.

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

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

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

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the

lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact as well as law. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the

existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel, including counsel in a limited scope representation pursuant to Rule 1.2(c), concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client

concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[8A] For purposes of this Rule, when a person is being represented on a limited basis under Rule 1.2(c), a lawyer is only deemed to know that the person is represented by another lawyer, and the subject of that representation, upon receipt of (i) a proper Notice of Limited Scope Appearance under Supreme Court Rule 13(c)(6), or (ii) with respect to a matter not involving court proceedings, written notice advising that the client is being represented by specified counsel with respect to an identified subject matter and time frame. A lawyer is permitted to communicate with a person represented under Rule 1.2(c) outside the subject matter or time frame of the limited scope representation.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication

considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

RULE 7.2: ADVERTISING

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

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

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

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

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

RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

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

(1) is a lawyer; or

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

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

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

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

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

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

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c)

are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

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

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

[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule 8.4(a).

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) The Supreme Court of Illinois does not recognize certifications of specialties in the practice of law, nor does it recognize certifications of expertise in any phase of the practice of law by any agency, governmental or private, or by any group, organization or association. A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) Except when identifying certificates, awards or recognitions issued to him or her by an agency or organization, a lawyer may not use the terms "certified,'' "specialist,'' "expert,'' or any other, similar terms to describe his qualifications as a lawyer or his qualifications in any subspecialty of the law. If such terms are used to identify any certificates, awards or recognitions issued by any agency, governmental or private, or by any group, organization or association, the reference must meet the following requirements:

(1) the reference must be truthful and verifiable and may not be misleading in violation of Rule 7.1;

(2) the reference must state that the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.

Comment

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.

[2] Paragraph (b) states the general policy of the Supreme Court of Illinois not to recognize certifications of specialties or expertise, except that it recognizes that admission to patent practice before the Patent and Trademark Office confers a long-established and well-recognized status. The omission of reference to lawyers engaged in trademark or admiralty practice that were contained in the prior rule is not intended to suggest that such lawyers may not use terms such as "Trademark Lawyer" or "Admiralty" to indicate areas of practice as permitted by paragraph (a).

[3] Paragraph (c) permits a lawyer to state that the lawyer is certified, is a specialist in a field of law, or is an "expert" or any other similar term, only if certain requirements are met.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(d) engage in conduct that is prejudicial to the administration of justice.

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. Nor shall a lawyer give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans that a judge or a member of the judge's family may receive under Rule 65(C)(4) of the Illinois Code of Judicial Conduct. Permissible campaign contributions to a judge or candidate for judicial office may be made only by check, draft, or other instrument payable to or to the order of an entity that the lawyer reasonably believes to be a political committee supporting such judge or candidate. Provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this paragraph.

(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

(h) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

(i) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an education loan in a bankruptcy proceeding shall not constitute bad faith under this paragraph, but the discharge shall not preclude a review of the lawyer's conduct to determine if it constitutes bad faith.

(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

(k) if the lawyer holds public office:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;

(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or

(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of

another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

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

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good-faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good-faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

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