Annotated Model Rules of Professional Conduct

American Bar Association

CLIENT-LAWYER RELATIONSHIP

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

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.

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.

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.

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

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

(1981); *In re Deardorff*, 426 N.E.2d 689 (Ind. 1981); *In re Barry*, 90 N.J. 286, 447 A.2d 923 (1982); *see also* ABA Model Rule 5.2.

RULE 1.2 SCOPE OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

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

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment

Scope of Representation

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

The exact form or manner in which a lawyer gives advice concerning a criminal or fraudulent act is not determinative of whether the lawyer's assistance was given in good faith. As one court stated:

> The effort to distinguish between a "suggestion of a possible course of action" . . . and "advice or counsel" . . . is without force or basis. The precise form of the words in which the advice is couched is immaterial. The question is, Has the lawyer conveyed to the client the idea that by adopting a particular course of action he may successfully defraud someone or impede the administration of justice? If a bank official, who had . . . robbed his bank, should call upon a lawyer . . . and ask for his suggestion as to what he should do, could the lawyer escape responsibility by saying to his client "Have you thought about . . . going to . . . Argentin[a], where you are not likely to be traced for a long time?" instead of saying directly, "I advise you to . . . run away?"

In re Bullowa, 223 A.D. 593, 602, 229 N.Y.S. 145, 154 (1928).

If a lawyer perceives that the client expects assistance that would be improper or illegal for the lawyer to provide, the lawyer has a duty to clarify the limitations on the scope of the lawyer's conduct. *See* ABA Model Rule 1.2(e). Such a duty to inform the client protects the client and ensures that the client's decisions regarding whether and how to proceed are knowledgeable. *E.g., In re Buder*, 358 Mo. 796, 217 S.W.2d 563 (1949); *see also Easley v. State*, 334 So. 2d 630 (Fla. Ct. App. 1976).

RULE 1.3 DILIGENCE

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

Comment

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

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

senior colleagues. Those practicing alone are cautioned not to yield to the temptation of getting in over their heads.

Id. at 288, 447 A.2d at 925; *see also Lewis v. State Bar*, 28 Cal. 3d 683, 621 P.2d 258, 170 Cal. Rptr. 634 (1981) (concurring opinion) (expressing special concern for the plight of young lawyers who start their careers as sole practitioners without benefit of a supervising lawyer).

Of course, a lawyer should not compound the initial neglect by attempting to cover up a failure through misrepresentations to clients. *See, e.g., In re Sheehy*, 454 A.2d 1360 (D.C. 1983); *In re Barry*, 90 N.J. 286, 447 A.2d 923 (1982); *In re Getchius*, 88 N.J. 269, 440 A.2d 1341 (1982).

Lack of diligence can also subject a lawyer to civil liability, for when failure to exercise diligence proximately causes damage, it generally constitutes both a tort and a breach of contract. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971). Thus, recovery may be had against such a lawyer in actions for legal malpractice, *see, e.g., Woodruff v. Tomlin*, 593 F.2d 33 (6th Cir. 1979), *aff'd in part, rev'd in part and remanded*, 616 F.2d 924 (6th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980), and under other appropriate statutes as well. *See Wiggin v. Gordon*, 115 Misc. 2d 1071, 455 N.Y.S.2d 205 (Civ. Ct. 1982) (extreme pattern of legal delinquency may give rise to treble damages under New York Judiciary Law). *But see Black v. Bayer*, 672 F.2d 309 (3d Cir. 1982) (public defenders and court-appointed counsel enjoy absolute immunity from liability for failure to act with due diligence in suits brought under § 1983 of Civil Rights Act, 42 U.S.C. § 1983). Moreover, a lawyer whose negligence permits the statute of limitations to run on a client's medical malpractice claim cannot recover contribution or indemnity from the negligent physician in the subsequent legal malpractice suit. *Alexander v. Callanen*, 104 Misc. 2d 762, 429 N.Y.S.2d 141 (1979); *accord Vesely, Otto, Miller & Keefe v. Blake*, 311 N.W.2d 3 (Minn. 1981).

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

Comment

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a

quences which might follow the client's decision to plead not guilty and proceed to trial, *Evans v. State*, 477 S.W.2d 94 (Mo. 1972) (counsel has duty to advise that trial may result in death penalty). In order to communicate meaningfully to the client all rights and alternatives available, the lawyer must undertake sufficient inquiry and investigation of the case. This may require, for example, investigating potential defenses, exploring the basis for a motion to suppress, and considering possible plea bargaining and sentencing lenience. *See, e.g., Mason v. Balcom*, 531 F.2d 717 (5th Cir. 1976). The lawyer's failure to communicate properly with the client may form the basis for relief for the client in a subsequent proceeding. *See, e.g., Cooks v. United States*, 461 F.2d 530 (5th Cir. 1972) (guilty plea set aside as not knowing and not voluntary); *United States v. Harpole*, 263 F.2d 71 (5th Cir. 1959) (defendant did not effectively waive objection to jury from which blacks were systematically excluded when lawyer purported to so waive without first consulting the defendant).

After conviction, the lawyer should explain the meaning and consequences of the judgment, the client's right to appeal, the lawyer's professional judgment as to the relative merit of an appeal, and the advantages and disadvantages of an appeal. *Pires v. Commonwealth*, 373 Mass. 829, 370 N.E.2d 1365 (1977); ABA Standards for Criminal Justice Standard 4-8.2 (2d ed. 1980); *cf. Young v. Bridwell*, 20 Utah 2d 332, 437 P.2d 686 (1968). A lawyer who discontinues the pursuit of an appeal must so notify the client, for failure to do so deprives the client of an opportunity to secure substitute counsel. *See Moultrie v. State*, 542 S.W.2d 835 (Tenn. Crim. App. 1976). The burden to properly inform a convicted client regarding the progress of an appeal and the withdrawal of appointed counsel increases in direct proportion to the harm that may result to the client, *People v. Lanza*, 200 Colo. 241, 613 P.2d 337 (1980); *The Florida Bar v. Dingle*, 220 So. 2d 9 (Fla. 1969).

A lawyer's duty to inform the client about the legal and practical aspects of the matter is more exacting if there is a potential conflict of interest and even more so if that conflict stems from the lawyer's own interest in the transaction. *See Stanley v. Board of Professional Responsibility*, 640 S.W.2d 210 (Tenn. 1982). *See generally* ABA Model Rule 1.7 & legal background.

RULE 1.5 FEES

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal 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) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(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 writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, 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. 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, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

Comment

Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into

Fee Disputes

With regard to fee disputes, see generally *In re LiVolsi*, 85 N.J. 576, 428 A.2d 1268 (1981) (upholding constitutionality and validity of state rule establishing lawyer fee arbitration committees); ABA Section of Bar Activities, Special Committee on Resolution of Fee Disputes, *The Resolution of Fee Disputes* (1976); *e.g., In re Wetzel*, 118 Ariz. 33, 574 P.2d 826 (1978) (lawyer disciplined for frequent resort to litigation to collect fees, when such litigation was not necessary to prevent fraud or injustice, and when the lawyer had made little or no attempt to resolve fee disputes); *Office of Disciplinary Counsel v. Kissel*, 497 Pa. 467, 442 A.2d 217 (1982) (lawyer disbarred who applied client funds to satisfy disputed fee and sent bill collectors to harass client); *see also Mancino v. Friedman*, 69 Ohio App. 2d 30, 429 N.E.2d 1181 (1980); Smith, *Pitfalls of Suing Clients for Fees*, 69 A.B.A. J. 776 (1983); ABA General Practice Section, *Arbitration of Attorneys' Fee Disputes* (1982) (survey results); Annot., 17 A.L.R.4th 993 (1982) (provision for arbitration of fee disputes between lawyers and clients); Annot., 91 A.L.R.3d 583 (1979) (lawyer disciplined for fee collection practices).

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) 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.

Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

duct was involved. It also requires that the lawyer's belief be reasonable regarding the extent of disclosure necessary. Model Code DR 4-101(C)(4) has been interpreted to permit a lawyer to disclose information where there is a serious possibility of a charge or claim even though none has actually been filed against the lawyer. *See Meyerhofer v. Empire Fire & Marine Insurance Co.,* 497 F.2d 1190 (2d Cir. 1974), *cert. denied,* 419 U.S. 998 (1975); *In re Friend,* 411 F. Supp. 776 (S.D.N.Y. 1975). *But see State Bar v. Dixon,* 187 Cal. Rptr. 30, 653 P.2d 321 (1982) (lawyer disciplined for using client confidences in suit brought by client to enjoin lawyer from harassing her). Some commentators have argued that the self-defense exception should not apply where charges are brought against the lawyer by a third person rather than by the client. ABA Model Rule 1.6(b)(2) permits disclosure in such circumstances, but only where the client's conduct is involved and the lawyer reasonably believes disclosure is necessary to conduct a defense.

Some commentators have proposed an absolute rule of confidentiality. *See* M. Freedman, *Lawyers' Ethics in an Adversary System* 27–42 (1975). Such a rule is not supported by prior case law or by consideration of the legal context of the client-lawyer relationship. *See State v. Phelps,* 24 Or. App. 329, 545 P.2d 901 (1976). An absolute rule would prohibit disclosure in circumstances where the lawyer's individual legal obligations may require disclosure. Cases such as *In re Ryder,* 263 F. Supp. 360 (E.D. Va.), *aff'd per curiam,* 381 F.2d 713 (4th Cir. 1967); *In re Ellis,* 155 Kan. 828, 130 P.2d 564 (1942); *In re King,* 7 Utah 258, 322 P.2d 1095 (1958); and *Hawkins v. King County,* 602 P.2d 361 (Wash. Ct. App. 1979), present such circumstances. An absolute confidentiality rule would also prevent disclosure where a sound moral basis exists for discretion to disclose notwithstanding the fact that other law imposes no obligation to make disclosure. *See, e.g., People v. Fentress,* 103 Misc. 2d 179, 425 N.Y.S.2d 485 (Dist. Ct. 1980) (attorney disclosed to his mother that a common friend had killed someone and was threatening suicide, and later the mother notified the police).

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

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

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

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Comment

Loyalty to a Client

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on

Bankruptcy Code's Ethical Standards: A Current Controversy, 67 Mass. L. Rev. 118 (1982); Ratliff, *Multiple Representation Where Public Interest is Involved May be Hazardous to Your Professional Standing*, 26 Res Gestae 434 (1983); Comment, *Conflicts of Interest for an Attorney Representing a Labor Union*, 7 J. Legal Prof. 203 (1982).

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

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

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner 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 use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

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

(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 consents after consultation;

(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 consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not 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.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

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

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

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

Comment

Transactions Between Client and Lawyer

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide.

Paragraph (j): Proprietary Interest in Cause of Action

A lawyer is prohibited by Rule 1.8(j) from acquiring a proprietary interest in the cause of action or subject matter of litigation. *Accord* ABA Model Code DR 5-103(A); *Gallagher v. State Bar*, 28 Cal. 3d 832, 622 P.2d 421, 171 Cal. Rptr. 325 (1981); *Hawkins v. State Bar*, 23 Cal. 3d 622, 591 P.2d 524, 153 Cal. Rptr. 234 (1979); *People v. Razatos*, 636 P.2d 666 (Colo. 1981), *appeal dismissed*, 455 U.S. 930 (1982); *In re Levinsohn*, 72 N.J. 1, 367 A.2d 431 (1976); *Dayton Bar Association v. Gunnoe*, 64 Ohio St. 2d 172, 413 N.E.2d 842 (1980); *In re Belser*, 269 S.C. 682, 239 S.E.2d 492 (1977). This prohibition would not preclude a lawyer from acquiring a lien to secure the lawyer's fee, or from entering into a contingent fee agreement, both of which are express exceptions to ABA Model Rule 1.8(j). *Accord* ABA Informal Opinion 1461 (Nov. 11, 1980). Presumably, this proscription would also not prohibit a lawyer from advancing court costs and expenses of litigation, the payment of which is contingent on the outcome of the matter, as permitted by ABA Model Rule 1.8(e).

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) 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 consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Comment

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of paragraph (a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the

ABA Informal Opinion 1322 (Mar. 31, 1975). An exception to this prohibition exists regarding information generally known about a former client, regardless of a lack of client consent. ABA Model Rule 1.9(b). In contrast, the public information exception does not apply regarding a present client. *See* ABA Model Rule 1.8(b).

The disqualification and the prohibition on use of information imposed by ABA Model Rule 1.9 are safeguards for the benefit of the former client and may be waived. *E.g., In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976); *Consolidated Theatres v. Warner Brothers Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 3 F. Supp. 120 (W.D. Pa. 1933), *appeal dismissed*, 68 F.2d 564 (3d Cir.), *cert. denied*, 291 U.S. 675 (1934); *Interstate Properties v. Pyramid Co.*, 547 F. Supp. 178 (S.D.N.Y. 1982). If the client makes a conditional waiver, the lawyer must comply with those conditions. *E.g., Bugg v. Chevron Chemical Co.*, 224 Ga. 809, 165 S.E.2d 135 (1968). Under the "appearance of impropriety" test, on the other hand, waiver would not be possible. *See Packer v. Rapoport*, 88 N.Y.S.2d 118 (Sup. Ct.), *rev'd on other grounds*, 275 A.D. 820, 89 N.Y.S.2d 703 (1949), *aff'd sub nom. In re Pabst's Will*, 277 A.D. 1116, 101 N.Y.S.2d 936 (1950), *aff'd*, 278 A.D. 699, 103 N.Y.S.2d 127 (1951).

If a former client expressly waives any objection to the allegedly adverse representation after consultation by the lawyer, the representation may generally be undertaken. *See Interstate Properties v. Pyramid Co.*, 547 F. Supp. 178 (S.D.N.Y. 1982); *see also Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979) (after disclosure, plaintiff retained counsel who had previously represented competitors). Furthermore, where a former client attempts to avoid a transaction on the ground of his former lawyer's conflict of interest, the transaction may be protected by the principle of implied waiver if the client made no objection to the lawyer's adverse successive representation. *E.g., Continental Insurance Co. v. Hancock*, 507 S.W.2d 146 (Ky. Ct. App. 1973); *Brasseaux v. Girouard*, 214 So. 2d 401 (La. Ct. App.), *cert. denied*, 253 La. 60, 216 So. 2d 307 (1968). *But see* ABA Informal Opinion 1125 (Sept. 9, 1969) (when former client gave consent to subsequent representation of client's husband against her in divorce but thereafter withdrew consent, lawyer should withdraw from representation of husband, even though detrimental to husband).

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previous-

ly represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) 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 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(b) that is material to the matter.

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

Comment

Definition of "Firm"

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

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

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm,

Rule 1.10 does not provide for screening as a mechanism to avert disqualification absent a waiver by the affected client. Clients need not rely on assurances that screening will adequately safeguard confidential information. However, screening properly may be affected in order to secure such a waiver. *See Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); *cf. Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977).

RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Comment

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

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

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer.

Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). However, some courts recognize an exception to this rule where, for example, a prosecutor formerly represented as a private lawyer the particular defendant involved in the current case. *See* Annot., 31 A.L.R.3d 953 (1970) (disqualification of prosecutor because of relationship with accused). In such a situation, disqualification of not only the prosecutor, but the prosecutor's entire staff, may be desirable to avoid the appearance of impropriety. *See State ex rel. Meyers v. Tippecanoe County Court*, 432 N.E.2d 1377 (Ind. 1982); *State v. Cooper*, 63 Ohio Misc. 1, 409 N.E.2d 1070 (1980). *Contra State v. Jones*, 180 Conn. 443, 429 A.2d 936 (1980), *overruled on other grounds sub nom. State v. Powell*, 186 Conn. 547, 442 A.2d 939 (1982). Although ABA Model Rule 1.11(c) does not mandate vicarious disqualification of the government lawyer's associates in an agency or department, Rule 1.9 serves to protect the government lawyer's former clients from the lawyer's participation in matters adverse to their interests that are substantially related to the lawyer's prior representation. The ABA Model Rules also prohibit a government lawyer from negotiating for private employment with any person "who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally or substantially." ABA Model Rule 1.11(c)(2). A few commentators have proposed more severe restrictions on government lawyers than those in Rule 1.11(c)(2). *See* Allen, *Ethics Committee Recommendations on Former Government Attorneys in Private Practice*, 2 Dist. Law. 46 (1977); *cf.* Lacovara, *Restricting the Private Law Practice of Former Government Lawyers*, 20 Ariz. L. Rev. 369 (1978); Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 Duke L.J. 1. This rule only proscribes negotiation for private employment with parties or lawyers involved in matters in which the government lawyer participates personally and substantially. *Cf.* 18 U.S.C. § 208 (Supp. III 1979) (requiring government employee to give notice to superior of all negotiations for private employment).

A related provision under the ABA Model Code was DR 9–101(C) prohibiting a lawyer from stating or implying an ability to influence a government body. Such conduct would also be indirectly proscribed under the Model Rules by Rule 3.5(a) (governing lawyer conduct with regard to judges, jurors, potential jurors and other officials) and Rule 8.4(e) (prohibiting a lawyer from indicating an ability to improperly influence a government agency or official).

RULE 1.12 FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is

participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges *pro tempore*, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge *pro tempore* or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those rules correspond in meaning.

Model Code Comparison

Paragraph (a) is substantially similar to DR 9-101(A), which provided that a lawyer "shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity." Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There was no counterpart in the Model Code to paragraphs (b), (c) or (d).

With regard to arbitrators, EC 5-20 stated that "a lawyer [who] has undertaken to act as an impartial arbitrator or mediator, . . . should not thereafter

ification. If [after] disclosure, the parties . . . all agree, . . . the judge is no longer disqualified, and may participate in the proceeding."

The screening process to avoid imputed disqualification would be similar to that for other government employees. *See* ABA Model Rule 1.11 & legal background.

ABA Model Rule 1.12 does not apply to an arbitrator, since an arbitrator, unlike a judge or other judicial officer, has not served as an impartial decision maker in the dispute.

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 violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

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

(e) 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

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.

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.

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. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constitu-

ed States Industries v. Goldman, 421 F. Supp. 7 (S.D.N.Y. 1976); *Cannon v. United States Acoustics Corp.*, 532 F.2d 1118 (7th Cir. 1976); *International Brotherhood of Teamsters v. Hoffa*, 242 F. Supp. 246 (D.D.C. 1965); *Lewis v. Shaffer Stores Co.*, 218 F. Supp. 238 (S.D.N.Y. 1963); *Otis & Co. v. Pennsylvania Railroad*, 57 F. Supp. 680, 682 (E.D. Pa. 1944), *aff'd per curiam*, 155 F.2d 522 (3d Cir. 1946); *Rowen v. LeMars Mutual Insurance Co.*, 230 N.W.2d 905 (Iowa 1975); *Perillo v. Advisory Committee on Professional Ethics*, 83 N.J. 366, 416 A.2d 801 (1980); 13 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 6025 (rev. perm. ed. 1980); *see also National Farmer's Union Property & Casualty Co. v. O'Daniel*, 329 F.2d 60, 66 (10th Cir. 1964). *But see In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355 (9th Cir. 1981), *vacating* 502 F. Supp. 1092 (C.D. Cal. 1980), *cert. denied*, 455 U.S. 990 (1982) (under *Upjohn* lawyer-client privilege extends to former employees, thus lawyer for corporation may also represent former employees regarding depositions without conflict of interest). It has been held that counsel may not represent both a corporation and its wholly owned subsidiary in an antitrust action when a possibility of future conflict exists. *Federal Trade Commission v. Exxon Corp.*, 636 F.2d 1336 (D.C. Cir. 1980). Regarding representation in a merger of a partially owned subsidiary and a parent company, *see Kohn v. American Metal Climax*, 322 F. Supp. 1331 (E.D. Pa. 1970).

ABA Model Rule 1.13(e) requires the lawyer to generally comply with Rule 1.7 (conflicts of interest) when engaging in joint representation. When a potential for conflict exists, Rule 1.7 requires the lawyer to explain the problem and obtain the consent of the parties involved before proceeding. In such a case, consent on behalf of the organization must be obtained from "an appropriate official of the organization other than the individual who is to be represented. . . ." ABA Model Rule 1.13(e); *see also Burks v. Lasker*, 441 U.S. 471, 474 (1979); *Gaines v. Haughton*, 645 F.2d 761 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Lewis v. Anderson*, 615 F.2d 778, 782–83 (9th Cir. 1979), *cert. denied*, 449 U.S. 869 (1980); *Abbey v. Control Data Corp.*, 603 F.2d 724, 727–30 (8th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980); *Maldonado v. Flynn*, 485 F. Supp. 274 (S.D.N.Y. 1980), *modified*, 671 F.2d 729 (2d Cir. 1982); *Maher v. Zapata Corp.*, 490 F. Supp. 348 (S.D. Tex. 1980).

RULE 1.14 CLIENT UNDER A DISABILITY

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

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

the Mentally Ill, 44 Tex. L. Rev. 424, 451–57 (1966); Lockwood, *How To Represent a Client Facing Civil Commitment*, 26 Prac. Law. 51, 53 (1980).

In the course of representation, the lawyer interacts with third persons, such as relatives, physicians and appointed guardians, whose interests may conflict with the interests of the disabled client. *See, e.g., Horacek v. Exon*, 357 F. Supp. 71 (D. Neb. 1973); Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 Calif. L. Rev. 840, 857–59 (1974); Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 Stan. L. Rev. 625, 628, 631 (1979). The lawyer should not allow his or her vigor and independent judgment to be adversely affected by these other interests. *See, e.g., Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977) (independent representation for children required in custody dispute); *In re Sippy*, 97 A.2d 455 (D.C. 1953) (lawyer should not allow parent seeking institutionalization of child to control child's legal representation); *Marsden v. Commonwealth*, 352 Mass. 564, 227 N.E.2d 1 (1967) (independent representation for child required in juvenile proceedings); *De Montigny v. De Montigny*, 75 Wis. 2d 131, 233 N.W.2d 463 (1975) (independent representation for children required in custody dispute).

RULE 1.15 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

less lawyer represented to third party that lawyer would do otherwise). *But see Adler v. Robson, Miller & Osseman*, 467 N.Y.S.2d 810 (Ct. Cl. 1983) (lawyer not personally liable for services of court stenographer provided to lawyer pursuant to representation of client). Furthermore, the ABA Standing Committee on Ethics and Professional Responsibility has held that it is not improper for a lawyer requesting a physician's services for the client to permit the client to sign an agreement with the physician directing the lawyer to withhold from any future recovery of funds all sums necessary to pay the accrued bills of the physician. ABA Informal Opinion 1295 (Aug. 18, 1974).

Regarding an actual claim asserted by a third party against funds in the lawyer's custody, the comment to ABA Model Rule 1.15 provides: "A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client." *See also Unigard Insurance Co. v. Tremont*, 37 Conn. Super. 596, 430 A.2d 30 (1981) (lawyer found guilty of conversion for disbursing funds to client with knowledge that client's insurance company had a lien on those funds).

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 withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

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

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

(3) the client insists upon pursuing an objective that the lawyer considers repugnant or inprudent;

(4) 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;

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

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

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

Mandatory Withdrawal

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to 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.

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

Discharge

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

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

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client

case to permit the entry of a default judgment against the client. *Sterling v. Jones,* 255 La. 842, 233 So. 2d 537 (1970); *Fairchild v. General Motors Acceptance Corp.,* 179 So. 2d 185 (Miss. 1965); *Dayton Bar Association v. Weiner,* 40 Ohio St. 2d 7, 317 N.E.2d 783 (1974). Similarly, it is professional misconduct for a lawyer to withdraw from representation of a purchaser in order to enter an agreement to make the purchase him- or herself. *In re Roache,* 446 N.E.2d 1302 (Ind. 1983).

Lawyers have also been disciplined for conduct involving abandonment of a case without proper withdrawal. *E.g., The Florida Bar v. Timson,* 257 So. 2d 44 (Fla. 1972) (allowing criminal appeal to be dismissed for lack of prosecution); *In re Price,* 244 Ga. 532, 261 S.E.2d 349 (1979) (allowing statute of limitations to run); *In re Ambrose,* 93 Ill. 2d 42, 442 N.E.2d 900 (1982) (failing to advise client of incomplete status of divorce); *see also In re McMurray,* 99 Wash. 2d 920, 665 P.2d 1352 (1983) (withdrawal without posting bail for client as promised). The lawyer's duty to avoid conduct prejudicial to the client applies equally when the client has discharged the lawyer. *Dayton Bar Association v. Weiner,* 40 Ohio St. 2d 7, 317 N.E.2d 783 (1974). Agreements purporting to avoid this duty are invalid. *Academy of California Optometrists v. Superior Court,* 51 Cal. App. 3d 999, 124 Cal. Rptr. 668 (1975).

Finally, the lawyer seeking withdrawal owes a duty to the court to perfect the withdrawal in time to prevent the necessity of obtaining a continuance of the case. *Smith v. Bryant,* 264 N.C. 208, 141 S.E.2d 303 (1965).

COUNSELOR

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

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

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people,

violate restraining order); *Cogdill v. First District Committee,* 221 Va. 376, 269 S.E.2d 391 (1980) (lawyer paid client for purpose of prostitution); *see also* ABA Model Rule 1.2(d).

The resolution of a legal problem may involve such nonlegal considerations as social responsibility, morality and economic, political or emotional consequences. It may be difficult, and often inappropriate, for a lawyer to limit advice to the narrow confines of compliance with procedural and substantive law. *See generally* ABA Formal Opinion 346 (Jan. 29, 1982); J. Pike, *Beyond the Law* 56–59 (1963); Cheatham, *The Growing Need for Specialized Legal Services,* 16 Vand. L. Rev. 497, 499 (1963); Lehman, *The Pursuit of a Client's Interest,* 77 Mich. L. Rev. 1078 (1979); *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A. J. 1159, 1160–61 (1958); Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public,* 40 A.B.A. J. 31, 32 (1954); Williams, *Professionalism and the Corporate Bar,* 36 Bus. Law. 160 (1980). Advice that apprises the client of the full implication of a proposed course of action is ordinarily proper and desirable. *People v. Razatos,* 636 P.2d 666 (Colo. 1981), *appeal dismissed,* 455 U.S. 930 (1982); *In re Montgomery,* 292 Or. 796, 643 P.2d 338 (1982); *see* IJA-ABA Joint Commission on Juvenile Justice Standards, Standards Relating to Counsel for Private Parties 9 (1976); H. Freeman, *Legal Interviewing and Counseling* (1964); Bradway, *A Suggestion: The Family Lawyer,* 45 A.B.A. J. 831 (1959); Darrell, *The Tax Practitioner's Duty To His Client and His Government,* 7 Prac. Law. 23 (1961); Harper & Harper, *Lawyers and Marriage Counselling,* 1 J. Fam. L. 73 (1961); Hellerstein, *Ethical Problems in Office Counselling,* 8 Tax L. Rev. 4 (1952); Paul, *The Lawyer as a Tax Advisor,* 25 Rocky Mtn. L. Rev. 412 (1953); Segal, *Labor Law: The Case for the Union Lawyer,* 44 A.B.A. J. 1056 (1958).

With regard to informing a client of potential adverse consequences, see *People v. Razatos,* 636 P.2d 666 (Colo. 1981), *appeal dismissed,* 455 U.S. 930 (1982); Oregon Opinion 464 (Aug. 1981). The duty to alert a client to potential adverse consequences is generally limited to matters within the scope of representation. *See Delta Equipment & Construction Co. v. Royal Indemnity Co.,* 186 So. 2d 454 (La. Ct. App. 1966).

RULE 2.2 INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

(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 consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is

little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

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

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

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, 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.

Comment

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

The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

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

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally,

Code of Professional Responsibility DR 5-105(A) (1981) (prohibiting dual representation in all divorce, custody, alimony, child support or property settlement cases); New Hampshire Opinion (unnumbered Mar. 16, 1982), 8 N.H.L. Weekly 393 (1982) (prohibiting divorce mediation by lawyer). With respect to dual representation during negotiations in which clients are attempting to reach amicable settlement without antagonistic litigation, see *Lessing v. Gibbons,* 6 Cal. App. 2d 598, 45 P.2d 258 (1935).

Common representation entails parallel duties to each client. A lawyer must not place the interests of one above the interests of others, or abandon one client to promote the legal interests of another. *Bar Association v. Shillman,* 61 Ohio St. 2d 364, 402 N.E.2d 514 (1980).

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

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

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

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not

388 F.2d 486 (2d Cir. 1968); Association of the Bar of the City of New York, *Proposed Amendments to Circular 230 with Respect to Tax Shelter Opinions*, 36 Rec. A.B. City N.Y. 133, 138–39 (1981); Association of the Bar of the City of New York, *Report by Special Committee on Lawyers' Role in Securities Transactions*, 33 Bus. Law. 1343, 1352–55 (1978). Knowingly false statements made in connection with the report are proscribed by ABA Model Rule 4.1 (truthfulness in statements to others). *See also Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976); ABA Section of Corporation, Banking and Business, *Legal Opinions Given in Corporate Transactions*, 33 Bus. Law. 2389, 2401–02 (1978). A lawyer may not provide a client with a report that the lawyer knows will assist the client in a criminal or fraudulent act. *See* ABA Model Rule 1.2(d) (scope of representation); Association of the Bar of the City of New York, *Report by Special Committee on Lawyers' Role in Securities Transactions*, 33 Bus. Law. 1343, 1351 (1978).

With regard to confidentiality of information relating to an evaluation, see *Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (en banc); *Mead Data Central v. United States Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *United States v. Tellier*, 255 F.2d 441 (2d Cir. 1958); ABA, *Statement of Policy Regarding Lawyers' Responses to Auditors' Request for Information*, 31 Bus. Law. 1709 (1976); Association of the Bar of the City of New York, *Report by Special Committee on Lawyers' Role in Securities Transactions*, 33 Bus. Law. 1343, 1362 (1978); Cooney, *The Registration Process: The Role of the Lawyer in Disclosure*, 33 Bus. Law. 1329, 1335–37 (1978); Lorne, *The Corporate & Securities Adviser, the Public Interest, and Professional Ethics*, 76 Mich. L. Rev. 423, 486–90 (1978); O'Neal & Thompson, *Vulnerability of Professional-Client Privilege in Shareholder Litigation*, 31 Bus. Law. 1775, 1790 (1976); Note, *Attorney Responses to Audit Letters: The Problem of Disclosing Loss Contingencies Arising from Litigation and Unasserted Claims*, 51 N.Y.U. L. Rev. 838 (1976); Note, *The Scope of Attorneys' Responses to Auditors' Requests for Information—The ABA and AICPA Compromise*, 1976 U. Ill. L.F. 783.

ADVOCATE

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

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

Model Code Comparison

DR 7-101(A)(1) stated that a lawyer does not violate the duty to represent a client zealously "by being punctual in fulfilling all professional commitments." DR 7-102(A)(1) provided that a lawyer "shall not . . . file a suit, assert a position, conduct a defense [or] delay a trial . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

Legal Background

A lawyer is required to avoid causing unnecessary delay in the institution of, and throughout the course of, litigation, including appeal. ABA Model Rule 3.2; *cf.* ABA Model Code DR 7-102(A)(1). A lawyer owes a duty to the court to "assist the court in the expeditious consideration and disposal of cases." *People v. Pincham,* 3 Ill. App. 3d 295, 298, 279 N.E.2d 108, 110 (1972) (quoting *People v. Buster,* 77 Ill. App. 2d 224, 231, 222 N.E.2d 31, 35 (1966)); *accord Unemployment Compensation Division v. Bjornsrud,* 261 N.W.2d 396 (N.D. 1977) (plaintiff's lawyer has responsibility to move quickly for trial); *Westerly Community Credit Union v. Industrial National Bank,* 103 R.I. 662, 663 n.1, 240 A.2d 586, 587 n.1 (1968) (expeditious disposition of litigation is the obligation of both the bench and the bar). Assisting the courts in expeditious case consideration necessarily includes following court orders. *See Chira v. Lockhead Aircraft Corp.,* 634 F.2d 664 (2d Cir. 1980) (lawyer's failure to complete discovery within six months as ordered); *Cleminshaw Co. v. City of Norwich,* 93 F.R.D. 338 (D. Conn. 1981) (lawyer's prolonged and unjustified failure to provide discovery requests and failure to obey discovery orders); *In re Siracusa,* 445 A.2d 663 (D.C. 1982) (lawyer's willful failure to appear in court); *James v. State,* 385 So. 2d 1145 (Fla. Dist. Ct. App. 1980) (lawyer's failure to appear in court); *In re Baldwin,* 278 S.C. 292, 294 S.E.2d 790 (1982) (repeated failure to

Justice Delayed: The Pace of Litigation in Urban Trial Courts (1978); P. Connolly, E. Holleman & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center 1978); P. Connolly & P. Lombard, *Judicial Controls and the Civil Litigative Process: Motions* (Federal Judicial Center 1980); S. Flanders, *Case Management and Court Management in the United States District Courts* (Federal Judicial Center 1977); Addresses delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice Apr. 7–9, 1976, 70 F.R.D. 79 (1976). Any solution must necessarily involve appropriate disciplinary measures. *See* Edelstein, *The Ethics of Dilatory Motion Practice: Time for Change*, 44 Fordham L. Rev. 1069, 1078–79 (1976). The formulation stated in ABA Model Rule 3.2 parallels that suggested in 1979 by the National Commission for the Review of Antitrust Laws and Procedures in its "Report to the President and the Attorney General." *See also* Edelstein, *The Ethics of Dilatory Motion Practice: Time for Change*, 44 Fordham L. Rev. 1069, 1079 (1976) (suggesting amendment to DR 7-102(A) which would subject a lawyer to discipline for submitting a motion intended primarily for delay or when lawyer should know substantial delay will result and, if granted, the motion will secure little relief).

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not

1983). With regard to fraud upon a tribunal in connection with a proceeding to determine fitness to stand trial, see *People v. Lewis*, 75 Ill. App. 3d 560, 393 N.E.2d 1380 (1979).

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

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

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

1966) (prosecutor advised witnesses to crime not to talk to defense lawyers unless prosecutor was present); *State v. Martindale*, 215 Kan. 667, 527 P.2d 703 (1974) (lawyer who knew that necessary witnesses were present in the courthouse but failed to inform the court or opposing counsel engaged in conduct prejudicial to the administration of justice).

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate *ex parte* with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

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

Model Code Comparison

With regard to paragraphs (a) and (b), DR 7-108(A) provided that "[b]efore the trial of a case a lawyer . . . shall not communicate with . . . anyone he knows to be a member of the venire. . . ." DR 7-108(B) provided that during the trial of a case a lawyer "shall not communicate with . . . any member of the jury." DR 7-110(B) provided that a lawyer shall not "communicate . . . as to the merits of the cause with a judge or an official before whom the proceeding is pending, except . . . upon adequate notice to opposing counsel," or as "otherwise authorized by law."

With regard to paragraph (c), DR 7-106(C)(6) provided that a lawyer shall not engage in "undignified or discourteous conduct which is degrading to a tribunal."

(prosecutor repeatedly called murder victim "the dead boy," shouted at witnesses, flourished the murder weapon in the faces of jury and witnesses, snapped the trigger while cross-examining the defendant, and made other prejudicial comments); *Rojas v. Richardson,* 52 U.S.L.W. 2165 (5th Cir. Aug. 29, 1983) (counsel's closing remarks to jury referring to plaintiff as illegal alien held "incendiary," "derogatory," "prejudicial," and "unsupported"); *In re Castellano,* 46 A.D.2d 792, 361 N.Y.S.2d 23 (1974) (sarcastic and improper comments, calling proceedings "nonsense" and "farce," gratuitously informing jury of news item regarding trial, calling witness "scum of the earth" and concluding examination with "I think I have to throw up," as well as holding private conversations with jury at jury box).

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraphs (a) and (b) (1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Comment

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

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

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

person exercising ordinary common sense." *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 579 (1973). The Supreme Court has expressed great concern that prohibitions on speech not be allowed to chill constitutionally protected expression, *Hynes v. Mayor,* 425 U.S. 610 (1976); *see Widoff v. Disciplinary Board,* 54 Pa. Commw. 124, 420 A.2d 41, *aff'd,* 494 Pa. 129, 430 A.2d 1151 (1980), *cert. denied,* 455 U.S. 914 (1982).

The courts in *Hirschkop* and *Chicago Council* examined the various sections of ABA Model Code DR 7-107 in light of the vagueness doctrine, and held that DR 7-107(D), extending the proscription against extrajudicial statements to "other matters that are reasonably likely to interfere with a fair trial," was "so imprecise that it can be a trap for the unwary." *Hirschkop,* 594 F.2d at 371. *See also Chicago Council,* 522 F.2d at 256. ABA Model Rule 3.6 does not continue such a broad "catchall" provision.

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

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

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

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Comment

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

Paragraph (c) does not apply to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

States, 242 F.2d 101, 115 (5th Cir. 1957). A prosecutor must fulfill promises that are a part of the inducement for a plea. *Santobello v. New York,* 404 U.S. 257 (1971); *see United States v. Brown,* 500 F.2d 375 (4th Cir. 1974); *People v. Selikoff,* 35 N.Y.2d 227, 318 N.E.2d 784, 360 N.Y.S.2d 623 (1974).

A prosecutor is also bound by the rules governing lawyers generally. For instance, it is improper under ABA Model Rule 4.1 for a prosecutor to make an inaccurate or misleading statement of law to an unrepresented defendant. *See, e.g., United States v. Duvall,* 537 F.2d 15 (2d Cir.), *cert. denied,* 426 U.S. 950 (1976). In addition, a prosecutor is included within the proscription of ABA Model Rule 3.6 against making certain extrajudicial statements, and must exercise "reasonable care" to prevent members of the prosecutor's staff from making statements prohibited by Rule 3.6, *see* ABA Model Rule 3.8(e). *See generally* Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges,* 50 Tex. L. Rev. 629 (1972) (prosecutors who engage in trial misconduct should be subject to the same discipline as that imposed on defense counsel).

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Comment

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

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

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

may not engage in fraudulent or deceptive practices that would be impermissible in an adjudicatory proceeding. ABA Model Rule 3.9 prohibits such conduct by reference to Rules 3.3 (candor toward tribunal) and 3.4 (fairness to opposing party). *See In re Brown,* 389 Ill. 516, 59 N.E.2d 855 (1945); *cf. Segretti v. State Bar,* 15 Cal. 3d 878, 544 P.2d 929, 126 Cal. Rptr. 793 (1976). Second, a lawyer may not engage in legally prohibited ex parte communications with individual members of a legislative or administrative body. Ex parte contacts with such a body are regulated by statute and by the rules of the relevant tribunal. *See generally* Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government Party,* 61 Minn. L. Rev. 1007 (1977). ABA Model Rule 3.9 directs compliance with such regulations by reference to Rule 3.5 (impartiality of tribunal). *See also* ABA Model Rule 3.4(c). The third problem concerns the means a lawyer may employ to influence decision makers. Early authorities deplored the use of threats concerning future campaign support or contributions, *see* C. Horsky, *The Washington Lawyer* 49–50 (1952). Canon 26 of the ABA Canons of Ethics, which confined argument before a legislative body to "reason and understanding," reflected a view of the legislative and political process that had little basis in reality. *See* Degnan, *The Role of the Lawyer in Agency Decision Making,* 36 Food Drug Cosm. L.J. 510 (1981). *See generally* Cohen, *The Good Man and the Role of Reason in Legislative Law,* 41 Cornell L.Q. 386 (1956). In contrast, ABA Model Rule 3.9 makes no attempt to define permissible argument or entreaty, but by reference to Rule 3.5 adverts to law controlling the conduct of lobbyists generally. *See, e.g.,* 36 U.S.C. § 1304 (Supp. III 1979).

With regard to applicable principles when an administrative agency is an adverse party, see ABA Model Rule 4.1 (truthfulness in statements to others) and, for example, ABA Formal Opinion 314 (Apr. 27, 1965).

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

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

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

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless 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 party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Comment

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee 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).

This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Model Code Comparison

This Rule is substantially identical to DR 7-104(A)(1).

Legal Background

ABA Model Rule 4.2 continues the traditional prohibition on communicating with a person known to be represented by another lawyer without that lawyer's consent. *See* ABA Model Code DR 7-104(A)(1). *See generally* Annot., 26 A.L.R.4th 430 (1983). Rule 4.2 is intended to preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer. *See, e.g., Powell v. Alabama*, 287 U.S. 45 (1932); *In re Atwell*, 232 Mo. App. 186, 115 S.W.2d 527 (1938); *In re Mussman's Case*, 111 N.H. 402, 286 A.2d 614 (1971). *But cf. Meat Price*

Finally, improper communication with a represented party may also have incidental effects. *See, e.g., Chilcutt v. Baker*, 355 S.W.2d 338 (Mo. Ct. App. 1962) (stipulated custody decree modified); *Obser v. Adelson*, 96 N.Y.S.2d 817 (Sup. Ct. 1949) (motion to suppress evidence granted), *aff'd*, 276 A.D. 999, 95 N.Y.S.2d 757 (1950). *But see Noble v. Sears Roebuck & Co.*, 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973) (although lawyers were negligent in their choice of investigators, damages were not recoverable for their instructions to investigators to contact a party without the consent of that party's lawyer); *Nestlerode v. Federal Insurance Co.*, 66 A.D.2d 504, 414 N.Y.S.2d 398 (1979) (statements by a lawyer during recess to opposing counsel's client that a rejection of a settlement offer would result in large losses to the client's business is not a separate cause of action for intentional infliction of emotional distress).

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.

Comment

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

Model Code Comparison

There was no direct counterpart to this Rule in the Model Code. DR 7-104(A)(2) provided that a lawyer shall not "[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel. . . ."

Legal Background

In representing a client, a lawyer often deals with persons not represented by counsel. An unrepresented person, however, may be naive in legal matters and may therefore misunderstand the opposing lawyer's role and loyalties in the matter. Several safeguards have been developed. First, a lawyer may interview a potential defendant and take a statement only if the lawyer advises the potential defendant that the interview is being conducted pursuant to the lawyer's position as counsel for the claimant. ABA Informal Opinion 908 (Feb. 24, 1966). Similarly, a lawyer may interview an employee of an opposing party or a nonparty

affirmative duty to clarify the lawyer's role to an unrepresented person who misunderstands that role. ABA Model Rule 4.3. *See In re Baron*, 342 So. 2d 505 (Fla. 1977); *Lyons v. Paul*, 321 S.W.2d 944 (Tex. Civ. App. 1958). For a discussion of a lawyer's advice to a witness not to cooperate in an investigation of the client's unlawful activities, see ABA Model Rule 3.4(f); *In re Blatt*, 65 N.J. 539, 324 A.2d 15 (1974). *See generally* Comment, *Consideration of the Prohibition Against Attorney-Opponent Communication*, 2 J. Legal Prof. 195 (1977).

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Comment

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

Model Code Comparison

DR 7-106(C)(2) provided that a lawyer shall not "[a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." DR 7-102(A)(1) provided that a lawyer shall not "take . . . action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." DR 7-108(D) provided that "[a]fter discharge of the jury . . . the lawyer shall not ask questions or make comments to a member of that jury that are calculated merely to harass or embarrass the juror. . . ." DR 7-108(E) provided that a lawyer "shall not conduct . . . a vexatious or harassing investigation of either a venireman or a juror."

Legal Background

A lawyer is required to represent a client diligently and may take lawful action on the client's behalf even though another person may thereby be burdened. ABA Model Rule 1.3, *e.g.*, *State v. Quick*, 266 Kan. 308, 597 P.2d 1108 (1979); *In re Sears*, 71 N.J. 175, 364 A.2d 777 (1976). ABA Model Rule 4.4, however, proscribes actions that "have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." This Rule modifies ABA Model Code DR 7-106(C)(2), prohibiting a lawyer from asking a question that the lawyer "has no reasonable basis to believe is relevant." The Model Code provi-

ABA Informal Opinion 1407 (Feb. 17, 1978); *cf.* ABA Informal Opinion 1357 (Nov. 13, 1975) (any statements made at public meetings are public and may be recorded).

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

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

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

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

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

Model Code Comparison

There was no counterpart to this Rule in the Model Code.

Legal Background

A subordinate lawyer remains liable for his or her misconduct occurring at the direction of a supervisor or resulting from fear of loss of employment, although the court may consider those facts in mitigation of the penalty imposed. *E.g., Attorney Grievance Commission v. Kahn*, 290 Md. 654, 431 A.2d 1336 (1981); *In re Mogel*, 18 A.D.2d 203, 238 N.Y.S.2d 683 (1963); *In re Knight*, 129 Vt. 428, 281 A.2d 46 (1971); *see In re Lemisch*, 321 Pa. 110, 184 A. 72 (1936); *In re Goldberg*, 321 Pa. 109, 184 A. 74 (1936); *see also In re Kiley*, 22 A.D.2d 527, 256 N.Y.S.2d 848 (1965). These authorities involve a subordinate lawyer's participation in clearly wrongful conduct. The proposition stated in ABA Model Rule 5.2(b)—that a "subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory

lawyer's reasonable resolution of an arguable question of professional duty"—has not been squarely presented to a court.

The responsibility of a lawyer to report another lawyer's violation of the Rules of Professional Conduct is determined by ABA Model Rule 8.3.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Model Code Comparison

There was no direct counterpart to this Rule in the Model Code. DR 4-101(D) provided that a lawyer "shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client. . . ." DR 7-107(J) provided that "[a] lawyer shall exercise reasonable care to prevent his employees and

ble for actions of business manager which the lawyer knew constituted ethical violations); *In re Famularo,* 67 N.J. 20, 334 A.2d 331 (1975) (lawyer is required to maintain office in such a way that proper attention is given to legal matters which are the lawyer's responsibility); *Attorney Grievance Committee v. Goldberg,* 292 Md. 650, 441 A.2d 338 (1982) (failure to supervise employee is ground for lawyer supervision); *In re Rude,* 88 S.D. 416, 221 N.W.2d 43 (1974) (lawyer must conduct office in such a way that clients' funds are safeguarded and promptly remitted); *In re Campbell,* 133 Wis. 2d 715, 335 N.W.2d 881 (1983) (lawyer responsible for unlicensed lawyer-employee's unauthorized practice of law).

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judg-

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Comment

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

Model Code Comparison

With regard to paragraph (a), DR 3-101(B) of the Model Code provided that "[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

With regard to paragraph (b), DR 3-101(A) of the Model Code provided that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law."

Legal Background

Paragraph (a): Practice in Jurisdiction Where Not Licensed

A state has the power to prohibit a lawyer from practicing in its jurisdiction until admitted to its bar. *See, e.g., United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967); *Bedrosian v. Mintz*, 518 F.2d 396, 400 (2d Cir. 1975); *Wilson v. Wilson*, 416 F. Supp. 984, 986–87 (D. Or. 1976), *aff'd*, 430 U.S. 925 (1977); *Brown v. Supreme Court*, 359 F. Supp. 549, 551 (E.D. Va. 1973); *McKenzie v. Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973); *State v. Ross*, 36 Ohio App. 2d 185, 304 N.E.2d 396 (1973). It is the professional obligation of a lawyer to comply with state laws regulating the unauthorized practice of law. ABA Model Rule 5.5(a). Rule 5.5 does not purport to define what constitutes improper practice by an out-of-state lawyer. *See* ABA Formal Opinion 316 (Jan. 18, 1967) ("It is a matter of law, not of ethics, as to where an individual may practice law.").

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

Comment

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

Model Code Comparison

This Rule is substantially similar to DR 2-108.

Legal Background

A lawyer is prohibited from entering into any agreement that restricts the lawyer's right to practice law, either incident to a partnership or employment agreement, or as part of a settlement agreement. ABA Model Rule 5.6; ABA Model Code DR 2-108. Restrictive covenants in lawyers' employment agreements have generally been opposed by the organized bar on grounds that they lead to bartering of clients and are inconsistent with the public's interest in obtaining counsel of its choice. Restrictions on a lawyer's right to practice are thus treated differently from most other anticompetitive agreements, the latter generally being permissible if reasonable. *Cf.* 6a *Corbin on Contracts* §§ 1384–89 (1962). The primary reason for this departure seems to be a desire to preserve a client's freedom to employ counsel of his or her choice. This freedom is seen as outweighing a lawyer's interest in being protected against potential unfair competition for clients. *Cf.* Note, *Attorneys Must Not Enter into Partnership Agreements Prohibiting Themselves from Representing Former Clients upon Termination of the Partnership,* 4 Fordham Urb. L.J. 195 (1975). The ABA Standing Committee on Ethics and Professional Responsibility, in ABA Formal Opinion 300 (Aug. 7, 1961), stated: "[A] general covenant restricting an employed lawyer, after leaving the employment, from practicing in the community for a stated period, appears to this Committee to be an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status." The Ethics Committee also stated that it is improper for an

which the selling lawyer could practice. *Hicklin v. O'Brien*, 11 Ill. App. 2d 541, 138 N.E.2d 47 (1956). Note that ABA Model Rule 5.6 prohibits all restrictive covenants for lawyer's services, whether appurtenant to the sale of a law practice, or to an employment or partnership agreement. *But see* Minkus, *The Sale of a Law Practice: Toward a Professionally Responsible Approach*, 12 Golden Gate L. Rev. 353, 375–376 (1982).

Similarly, lawyers are prohibited from making or entering into agreements in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties. *See, e.g.*, D.C. Opinion 35 (June 28, 1977). ABA Informal Opinion 1039 (May 29, 1968) held that it was unethical to accompany settlements in private antitrust litigation with covenants not to sue or aid anyone in suit against the settling defendants. *See also* Oregon Opinion 258 (Feb. 8, 1974).

PUBLIC SERVICE

RULE 6.1 *PRO BONO PUBLICO* SERVICE

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Comment

The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process.

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

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional work load, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal

Rush, 46 N.J. 399, 217 A.2d 441 (1966); *cf. United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965); *Sontag v. State*, 629 P.2d 1269 (Okla. Crim. App. 1981), *cert. denied*, 102 S. Ct. 1001 (1982); Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 Cardozo L. Rev. 255 (1981).

For a discussion of the lawyer's public service responsibilities, see ABA Special Committee on Public Interest Practice, *Implementing the Lawyer's Public Interest Practice Obligation* (1977); Association of the Bar of the City of New York Special Committee on the Lawyer's Pro Bono Obligations, *Toward a Mandatory Contribution of Public Service Practice by Every Lawyer* (1979); Brian, *The Public Responsibilities of Lawyers*, 13 Manitoba L.J. 175 (1983); Christensen, *The Lawyer's Pro Bono Publico Responsibility*, 1981 Am. B. Found. Research J. 1; Ehrlich, *Rationing Justice*, 34 Record 729 (1979).

RULE 6.2 ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

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

Appointed Counsel

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

"The professional obligation of court appointed counsel to his client and to the court is certainly no less than that of privately retained counsel. Competence and diligence are expected and required. Court appointed counsel are subject to removal and censure unless they comply with the requirements of our rules." *State v. Aycoth*, 272 N.C. 48, 50, 157 S.E.2d 655, 656 (1967); *accord Ferri v. Ackermann*, 444 U.S. 193 (1979); *In re Eldredge*, 530 S.W.2d 221 (Mo. 1975); *People v. Norman*, 252 Cal. App. 2d 381, 60 Cal. Rptr. 609 (1967); *People v. Curry*, 1 Ill. App. 3d 87, 272 N.E.2d 669 (1971).

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

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

It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Model Code Comparison

There was no counterpart to this Rule in the Model Code.

Legal Background

The ABA Model Rules permit a lawyer to serve as a director, officer or member of a legal services organization even though the lawyer may represent clients privately who have an interest adverse to the clients represented by the

Where directors of a lawyer referral service are on opposing sides of litigation, ABA Model Rule 1.7 is also applicable. *Accord* Massachusetts Opinion 79-5 (1979).

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

Model Code Comparison

There was no counterpart to this Rule in the Model Code.

Legal Background

The ABA Model Rules permit lawyers to engage in law reform activities that affect the interests of a client; however, if a client may be materially benefitted by a decision in which the lawyer participates, the lawyer must disclose that fact. ABA Model Rule 6.4. This Rule is analogous to law prohibiting public officeholders from accepting payment from private clients when the circumstances suggest a willingness or ability to exercise improper influence on the client's behalf. ABA Model Code DR 8-101(A)(3); *see In re Vasser*, 75 N.J. 357, 382 A.2d 1114 (1978); *In re D'Auria* , 67 N.J. 22, 334 A.2d 332 (1976); *In re Gordon*, 58 N.J. 386, 277 A.2d 879 (1971); ABA Informal Opinion 1182 (Dec. 5, 1971) (lawyer-legislator may accept retainer from private client); Rotunda, *Law, Lawyers and Managers*, in *The Ethics of Corporate Conduct* (Walton ed. 1977).

INFORMATION ABOUT LEGAL SERVICES

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:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Comment

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

Model Code Comparison

DR 2-101 provided that "[a] lawyer shall not . . . use . . . any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." DR 2-101(B) provided that a lawyer "may publish or broadcast . . . the following information . . . in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information . . . complies with DR 2-101(A), and is presented in a dignified manner. . . ." DR 2-101(B) then specified twenty-five categories of information that may be disseminated. DR 2-101(C) provided that "[a]ny person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to [the agency having jurisdiction under state law]. . . . The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers."

Rule 8.4(c) (a lawyer who engages in dishonesty, fraud, deceit or misrepresentation is guilty of professional misconduct).

ABA Model Rule 7.1(c) prohibits comparisons of the lawyer's services with those of other lawyers, unless such comparisons can be factually substantiated. The *Bates* decision expressly reserved questions concerning representations about the quality of legal services, but noted that such claims may be misleading to the extent that they are not susceptible of measurement or verification. 433 U.S. at 383–84. However, statements that a lawyer's fees are reasonable, or that services will be rendered competently or promptly, can be verified by reference to objective standards independently established by the profession. *See* ABA Model Rule 1.1 (defining competent representation), ABA Model Rule 1.3 (lawyer must act with diligence and promptness), and ABA Model Rule 1.5 (lawyer's fee must be reasonable); Huber, *Competition at the Bar and the Proposed Code of Professional Standards*, 57 N.C.L. Rev. 559, 583–84 (1979). *See generally Bishop v. Committee on Professional Ethics & Conduct*, 521 F. Supp. 1219, 1226 (S.D. Iowa 1981) ("verifiable truthful use of restrained adjectives" is permissible, but "unrestrained, hucksterish adjectives . . . have a high potential to mislead" and are therefore prohibited), *vacated as moot and remanded*, 686 F.2d 1278 (8th Cir. 1982). On the other hand, since legal problems can vary widely, *see* Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv. L. Rev. 702 (1977); Note, *Advertising, Solicitation, and the Profession's Duty To Make Legal Counsel Available*, 81 Yale L.J. 1181 (1972), statements comparing the quality of a lawyer's services with the quality of services provided by other lawyers ordinarily can be misleading and require special caution. *See The Florida Bar v. Curry*, 211 So. 2d 169 (Fla. 1968); *see also* Comment, *Deceptive Advertising and the Federal Trade Commission: A Perspective*, 6 Pepperdine L. Rev. 439 (1979). *Compare Jay Norris, Inc. v. FTC*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979) (upholding FTC requirement that advertising claims be subject to prior substantiation) *with Triangle Publications v. Knight-Ridder Newspapers*, 445 F. Supp. 875 (S.D. Fla. 1978) (truthful comparative advertising cannot be enjoined).

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation as defined in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the

usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

Comment

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

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

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

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

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

N.Y.S.2d 456 (1982), *aff'd*, 60 N.Y.2d 229 (1983); *In re Greene*, 78 A.D.2d 131, 433 N.Y.S.2d 853 (1980), *aff'd*, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), *cert. denied*, 455 U.S. 1035 (1982); Comment, *Three Years Later*, 45 Mo. L. Rev. 562, 568–71 (1980).

On the other hand, all advertising involves an element of solicitation—an explicit or implicit invitation to deal. The "solicitation" that the United States Supreme Court held to be appropriately prohibited in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), involved both the invitation to deal and in-person delivery of that invitation. The *Ohralik* opinion emphasized the substantial dangers of undue pressure, overreaching and duress inherent in in-person solicitations. *Ohralik* notes that in such circumstances the individual may often feel compelled to make an immediate decision without adequate opportunity for reflection. It is arguable that general mailings do not present those dangers. *See In re Primus*, 436 U.S. 412 (1978) (solicitation by mail); *Kentucky Bar Association v. Stuart*, 586 S.W.2d 933 (Ky. 1978); *Koffler v. Joint Bar Association*, 51 N.Y.2d 140, 149, 412 N.E.2d 927, 933, 432 N.Y.S.2d 872, 878 (1980), *rev'g* 70 A.D.2d 252, 420 N.Y.S.2d 560 (1979), *cert. denied*, 450 U.S. 1026 (1981); Comment, *Three Years Later*, 45 Mo. L. Rev. 562 (1980). The absence of personal contact in *In re Primus* appears to have been an important factor in the Court's holding that, under the facts, solicitation rules could not be constitutionally applied. 436 U.S. at 435–36.

Accordingly, the ABA Model Rules do not ban all mailings, but prohibit contact by mail only when it constitutes "solicitation" as defined by Rule 7.3. *See* ABA Model Rule 7.3 legal background.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in-person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Comment

There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment

to other lawyers, which do not present the dangers at which Rule 7.3 is directed. *See also* ABA Model Rule 7.2 legal background.

Although the ABA Model Code generally did not allow communications by mail regarding a lawyer's services, *see* ABA Model Code DR 2-101(B), an exception existed for a "brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters." *Id.* DR 2-102(A)(2). However, such an announcement could be mailed only to "lawyers, clients, former clients, personal friends, and relatives." *Id.*; *see also Hartford County Grievance Committee v. Trantolo*, No. 221214 (Conn. Super. Ct. Apr. 22, 1981) (mailing announcement to nonlawyers with whom lawyer had no prior relationship improper); ABA Formal Opinion 301 (Nov. 27, 1961); Annot., 53 A.L.R.3d 1261 (1973) (distribution of announcement as grounds for disciplinary actions). This Model Code distinction between announcements and other communications made by mail has become meaningless in light of a recent Supreme Court decision. In *In re R.M.J.*, 455 U.S. 191 (1982), the Court reversed a state court's imposition of discipline on a lawyer for mailing announcements to people who were neither clients, former clients, personal friends, nor relatives. The Court held that such communications are constitutionally protected; and since there are less restrictive means of protecting the public, a ban on such mailings is constitutionally impermissible. *Id.* at 201. The Model Rules do not distinguish professional announcements from other communications regarding a lawyer's services.

ABA Model Rule 7.3 prohibits actual overreaching. *Accord In re Bossov*, 360 Ill. 2d 439, 328 N.E.2d 309, *cert. denied*, 423 U.S. 928 (1975); *Kentucky Bar Association v. Donoghoe*, 486 S.W.2d 703 (Ky. 1972); *State v. Martin*, 410 P.2d 49 (Okla. 1965); *In re Berlant*, 458 Pa. 439, 328 A.2d 471 (1974), *cert. denied*, 421 U.S. 964 (1975). *Compare In re Heirich*, 10 Ill. 2d 357, 140 N.E.2d 825, *cert. denied*, 355 U.S. 805 (1957) *with In re Rerat*, 232 Minn. 1, 44 N.W.2d 273 (1950).

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(b) a lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation; and

(c) (provisions on designation of specialization of the particular state).

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

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

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

Model Code Comparison

With regard to paragraph (a), DR 2-102(A) provided that "[a] lawyer . . . shall not use . . . professional announcement cards . . . letterheads, or similar professional notices or devices, except . . . if they are in dignified form. . . ." DR 2-102(B) provided that "[a] lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that . . . a firm may

2-102(E) (rescinded Feb. 1980) (prohibiting communication of multiple professions); ABA Informal Opinion 1248 (Nov. 7, 1972) (based on rescinded Model Code provision); ABA Informal Opinion 1316 (Apr. 7, 1975) (based on rescinded Model Code provision). *But see In re Nelson*, 327 N.W.2d 576 (Minn. 1982) (lawyer disciplined for listing multiple professions on cards and letterhead); *In re Advisory Committee on Professional Ethics Opinion No. 447*, 86 N.J. 473, 432 A.2d 59 (1981) (lawyer may not include "C.P.A." designation on letterhead). To the extent that such information is truthful, it is helpful to consumers. Such statements are also not prohibited by ABA Model Rule 7.4 (regulating designation of specialization) since they do not indicate special competence as a lawyer, but competence as defined and evaluated by the other profession involved.

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

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

This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A per-

768, 159 Cal. Rptr. 848 (1979); *Committee on Legal Ethics v. Graziani*, 157 W. Va. 167, 200 S.E.2d 353, 355 (1973), *cert. denied*, 416 U.S. 995 (1974). If an applicant in an admission proceeding chooses to refuse to answer questions it will be the applicant's failure to meet his burden of proof, rather than his assertion of the privilege, that will be the reason for his denial of admission. If the state were precluded by the fifth amendment from denying admission to an individual who refuses to answer questions, thereby failing to meet his burden of proof, the effect would be to shift the burden of proof to the state to establish that the individual is not fit to become a lawyer.

ABA Model Rule 8.1 does not continue the provision in DR 1-101(B) of the Model Code that "a lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education or other relevant attribute." That provision could be broadly construed as prohibiting a lawyer from providing legal representation to a candidate for admission whom the lawyer believes is unqualified. In any case, it requires a lawyer to forecast the decision of the admission authority. *See generally* the discussion on this provision in Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 Tex. L. Rev. 267, 271 (1970).

RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

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

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Accord State Bar v. Semaan, 508 S.W.2d 429 (Tex. Civ. App. 1974) (inasmuch as criticism was expression of opinion, the truth or falsity of underlying allegation not in issue); *Justices of the Appellate Division v. Erdmann*, 39 A.D.2d 223, 225, 333 N.Y.S.2d 863, 866 (1972) (Greenblott, J., dissenting) (criticism of the judiciary that would be more accurately described as a colorful figure of speech than as an accusation should not be subject to discipline), *rev'd on other grounds*, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973). *Contra In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971) (district attorney was disciplined for criticizing a court's opinion as "shocking" and an exercise in "semantical gymnastics"). Compare *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 386, 366 N.E.2d 1299, 1309, 397 N.Y.S.2d 943, 954 (Fuchsberg, J., concurring), *cert. denied*, 434 U.S. 969 (1977), in which the court distinguished between opinions and facts for purpose of first amendment protections.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

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

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

conduct in which disciplinary action was initiated by a judge, see *People v. McMichael*, 199 Colo. 433, 609 P.2d 633 (1980) (lawyer advised client to testify falsely); *Kentucky Bar Association v. Cohen*, 625 S.W.2d 573 (Ky. 1981) (alteration of evidence), *cert. denied*, 456 U.S. 1007 (1982); *Louisiana State Bar Association v. Edwards*, 387 So. 2d 1137 (La. 1980) (creation of false evidence); *In re Rabb*, 83 N.J. 109, 415 A.2d 1168 (1980) (fraud in a settlement conference); *Cincinnati Bar Association v. Gebhart*, 69 Ohio St. 2d 287, 431 N.E.2d 1031 (1982) (misrepresentations in court); *In re Kennedy*, 104 Wis. 2d 1, 309 N.W.2d 843 (1981) (failed to respond to judge's letters inquiring about status of case and failed to appear at hearing); *In re Krueger*, 103 Wis. 2d 192, 307 N.W.2d 184 (1981) (counseled client to give false address).

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

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

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

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)

RULE 8.5 JURISDICTION

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

Comment

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

Model Code Comparison

There was no counterpart to this Rule in the Model Code.

Legal Background

A lawyer's conduct is subject to regulation by a jurisdiction in which the lawyer is licensed to practice, even though the conduct occurred in another jurisdiction. *In re Van Bever*, 55 Ariz. 368, 101 P.2d 790 (1940); *Barnes v. District Court*, 178 Cal. 500, 173 P. 1100 (1918); *Office of Disciplinary Counsel v. Cashman*, 63 Hawaii 382, 629 P.2d 105 (1981); *In re Neff*, 83 Ill. 2d 20, 413 N.E.2d 1282, 46 Ill. Dec. 169 (1980); *In re Cook*, 67 Ill. 2d 26, 364 N.E.2d 86, 7 Ill. Dec. 99 (1977); *In re Major*, 275 S.C. 251, 269 S.E.2d 345 (1980); *State v. Pounds*, 525 S.W.2d 547 (Tex. Civ. App. 1975); *State Board of Law Examiners v. Brown*, 53 Wyo. 42, 77 P.2d 626 (1938); ABA Standards for Lawyer Discipline and Disability Proceedings Standard 4.1 (1979). Conversely, a state court has no jurisdiction to discipline a lawyer not licensed to practice in that state. *Sperry v. Florida*, 373 U.S. 379 (1963); *cf. State v. Pounds*, 525 S.W.2d 547 (Tex. Civ. App. 1975) (court retains jurisdiction to discipline attorney who has left the state for acts committed while still practicing in state). A lawyer admitted in a jurisdiction pro hac vice, however, is subject to the disciplinary authority of that jurisdiction. *See, e.g., Kentucky Bar Association v. Shane*, 553 S.W.2d 467 (Ky. 1977). Although a disbarred lawyer is no longer subject to the discipli-