

**S.J.C. Rule 3:07**  
**MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT**

As amended effective 9/1/18

Please click the Rule, section header, or page number to view that individual Rule or section.

<b>Preamble and Scope</b> .....	2
Preamble: A Lawyer's Responsibilities .....	2
Scope .....	3
Rule 1.0: Terminology .....	4
<b>Client-Lawyer Relationship</b> .....	7
Rule 1.1: Competence .....	7
Rule 1.2: Scope of Representation and Allocation of Authority between Client and Lawyer .....	8
Rule 1.3: Diligence .....	10
Rule 1.4: Communication .....	11
Rule 1.5: Fees .....	12
Rule 1.6: Confidentiality of Information .....	20
Rule 1.7: Conflict of Interest: Current Clients .....	25
Rule 1.8: Conflict of Interest: Current Clients: Specific Rules .....	31
Rule 1.9: Duties to Former Clients .....	35
Rule 1.10: Imputed Disqualification: General Rule .....	37
Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees .....	40
Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral .....	42
Rule 1.13: Organization as Client .....	44
Rule 1.14: Client With Diminished Capacity .....	46
Rule 1.15: Safekeeping Property .....	48
Rule 1.15A: Client Files .....	57
Rule 1.16: Declining or Terminating Representation .....	60
Rule 1.17: Sale of Law Practice .....	62
Rule 1.18: Duties to Prospective Client .....	64
<b>Counselor</b> .....	65
Rule 2.1: Advisor .....	65
Rule 2.2: Intermediary [Reserved] .....	66
Rule 2.3: Evaluation for Use by Third Persons .....	66
Rule 2.4: Lawyer Serving as Third-Party Neutral .....	67
<b>Advocate</b> .....	68
Rule 3.1: Meritorious Claims and Contentions .....	68
Rule 3.2: Expediting Litigation .....	69
Rule 3.3: Candor Toward the Tribunal .....	69
Rule 3.4: Fairness to Opposing Party and Counsel .....	73
Rule 3.5: Impartiality and Decorum of the Tribunal .....	74
Rule 3.6: Trial Publicity .....	75
Rule 3.7: Lawyer as Witness .....	77
Rule 3.8: Special Responsibilities of a Prosecutor .....	79
Rule 3.9: Advocate in Nonadjudicative Proceedings .....	81

<b>Transactions with Persons other than Clients</b> .....	82
Rule 4.1: Truthfulness in Statements to Others .....	82
Rule 4.2: Communication with Person Represented by Counsel .....	83
Rule 4.3: Dealing with Unrepresented Person .....	84
Rule 4.4: Respect for Rights of Third Persons .....	84
<b>Law Firms and Associations</b> .....	85
Rule 5.1: Responsibilities of Partners, Managers and Supervisory Lawyers .....	85
Rule 5.2: Responsibilities of a Subordinate Lawyer .....	86
Rule 5.3: Responsibilities Regarding Nonlawyer Assistants .....	87
Rule 5.4: Professional Independence of a Lawyer .....	88
Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice Of Law .....	89
Rule 5.6: Restrictions on Right to Practice .....	92
Rule 5.7: Responsibilities Regarding Law-Related Services .....	92
<b>Public Service</b> .....	94
Rule 6.1: Voluntary Pro Bono Publico Service .....	94
Rule 6.2: Accepting Appointments .....	95
Rule 6.3: Membership in Legal Services Organization .....	96
Rule 6.4: Law Reform Activities Affecting Client Interests .....	96
Rule 6.5: Nonprofit and Court-Annexed Limited Legal Services Programs .....	97
<b>Information about Legal Services</b> .....	98
Rule 7.1: Communications Concerning a Lawyer's Services .....	98
Rule 7.2: Advertising .....	98
Rule 7.3: Solicitation of Clients .....	100
Rule 7.4: Communication of Fields of Practice .....	101
Rule 7.5: Firm Names and Letterheads .....	102
<b>Maintaining the Integrity of the Profession</b> .....	103
Rule 8.1: Bar Admission and Disciplinary Matter .....	103
Rule 8.2: Judicial and Legal Officials .....	103
Rule 8.3: Reporting Professional Misconduct .....	104
Rule 8.4: Misconduct .....	104
Rule 8.5: Disciplinary Authority; Choice Of Law .....	105

**S.J.C. RULE 3:07**  
**MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT**  
**AS AMENDED EFFECTIVE 9/1/2018**

**PREAMBLE AND SCOPE**

**PREAMBLE: A LAWYER'S RESPONSIBILITIES**

**A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.**

1. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the Rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

2. In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

3. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

4. As a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

5. Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as in substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

6. A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing

party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

7. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

8. The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

9. To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

10. The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

11. Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

## **SCOPE**

[1] The Rules of Professional Conduct are Rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may" are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken

when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

## Preamble

[2] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court Rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily on understanding and voluntary compliance, secondarily on reinforcement by peer and public opinion, and, finally, when necessary, on enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal Rules. The Rules simply provide a framework for the ethical practice of law.

[3] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[4] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the Attorney General, and Federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth.

[5] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking

the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act on uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, including the wilfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[6] "A violation of a canon of ethics or a disciplinary Rule . . . is not itself an actionable breach of duty to a client." *Fishman v. Brooks*, 396 Mass. 643, 649 (1986). The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. The fact that a Rule is just a basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not necessarily mean that an antagonist in a collateral proceeding or transaction may rely on a violation of a Rule. "As with statutes and regulations, however, if a plaintiff can demonstrate that a disciplinary Rule was intended to protect one in his position, a violation of that Rule may be some evidence of the attorney's negligence." *Id.* at 649.

[7] Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

[8] [RESERVED]

[9] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

## RULE 1.0: TERMINOLOGY

The following definitions are applicable to the Rules of Professional Conduct:

(a) "Bar association" includes an association of specialists in particular services, fields, and areas of law.

(b) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(c) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, limited liability entity, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government entity, or other organization.

(e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under substantive or procedural law and has a purpose to deceive .

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(g) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(h) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(i) "Person" includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.

(j) "Qualified legal assistance organization" means a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, and is not in violation of any applicable law.

(k) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

## Rule 1.0

(l) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(m) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(n) "State" includes the District of Columbia, Puerto Rico, and federal territories or possessions.

(o) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(p) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(q) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

(r) These Rules shall be known and cited as the Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.).

### **Comment**

#### ***Confirmed in Writing***

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

#### ***Firm***

[2] Whether two or more lawyers constitute a firm within paragraph (d) 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 that suggests 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 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.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, 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.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

***Fraud***

[5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

***Informed Consent***

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of

other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person’s consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of “writing” and “confirmed in writing,” see paragraphs (q) and (c). Other Rules require that a client’s consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of “signed,” see paragraph (q).

[8] The final category of qualified legal assistance organization requires that the organization “receives no profit from the rendition of legal services.” That condition refers to the entire legal services operation of the organization; it does not prohibit the receipt of a court-awarded fee that would result in a ‘profit’ from that particular lawsuit. An award of attorney’s fees that leads to an operating gain in a fiscal year does not create a “profit” for purposes of this subparagraph.

## **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**

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter

to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. See Rule 7.4.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A

## Rule 1.1

newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

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

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

### **Thoroughness and Preparation**

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

scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

### **Retaining or Contracting With Other Lawyers**

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct Rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules, such as in the context of discovery.

### **Maintaining Competence**

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, and engage in continuing study and education

## **RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

(a) A lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these Rules. A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process. 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 scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

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

**Comment**

**Allocation of Authority between Client and Lawyer**

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

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

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

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to

abide by the client's decisions is to be guided by reference to Rule 1.14.

**Independence from Client's Views or Activities**

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

**Agreements Limiting Scope of Representation**

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

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

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.5, 1.8 and 5.6. Although paragraph (c) does not require that the client's informed consent to a limited representation be in

## Rule 1.2

writing, the specification of the scope of representation as well as the rate or basis of the lawyer's fee is generally required to be communicated to the client in writing by Rule 1.5(b).

### **Criminal, Fraudulent and Prohibited Transactions**

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

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of

the client in the matter. See Rule 1.16(a). But see Rule 3.3(e). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

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

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

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

## **RULE 1.3: DILIGENCE**

A lawyer shall act with reasonable diligence and promptness in representing a client. The lawyer should represent a client zealously within the bounds of the law.

### **Comment**

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

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

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may

be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude a lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the

client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client may depend on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each practitioner prepare a plan, in conformity with applicable Rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. See S.J.C. Rule 4:01, § 14.

## **RULE 1.4: COMMUNICATION**

(a) A lawyer shall:

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

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

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

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

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

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

### **Comment**

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

### **Communicating with Client**

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer. See Rule 1.2(a) and Comment 3 thereto.

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other

circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

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

## Rule 1.4

### Explaining Matters

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

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it

is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

### Withholding Information

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

[8] There will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning the representation.

## RULE 1.5: FEES

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive 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) (1) Except as provided in paragraph (b)(2), the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after

commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) The requirement of a writing shall not apply to a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged to the client to be less than \$500. Where an indigent representation fee is imposed by a court, no fee agreement has been entered into between the lawyer and client, and a writing is not required.

(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. Except for contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims, a contingent fee agreement shall be in writing and signed in duplicate by both the lawyer and the client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the lawyer for a period of six years after the conclusion of the contingent fee matter. The writing shall state the following:

- (1) the name and address of each client;
- (2) the name and address of the lawyer or lawyers to be retained;
- (3) the nature of the claim, controversy, and other matters with reference to which the services are to be performed;
- (4) the contingency upon which compensation will be paid, whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him or her by the lawyer, and if the lawyer is to be paid any fee for the representation that will not be determined on a contingency, the method by which this fee will be determined;
- (5) the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer out of amounts collected, and unless the parties otherwise agree in writing, that the lawyer shall be entitled to the greater of (i) the amount of any attorney's fees awarded by the court or included in the settlement or (ii) the amount determined by application of the percentage or other formula to the recovery amount not including such attorney's fees;
- (6) the method by which litigation and other expenses are to be calculated and paid or reimbursed, whether expenses are to be paid or reimbursed only from the recovery and whether such expenses are to be deducted from the recovery before or after the contingent fee is calculated.
- (7) if the lawyer intends to pursue such a claim, the client's potential liability for expenses and reasonable attorney's fees if the attorney-client relationship is terminated before the conclusion of the case for any reason, including a statement of the basis on which such expenses and fees will be

## Rule 1.5

claimed, and, if applicable, the method by which such expenses and fees will be calculated; and

(8) if the lawyer is the successor to a lawyer whose representation has terminated before the conclusion of the case, whether the client or the successor lawyer is to be responsible for payment of former counsel's attorney's fees and expenses, if any such payment is due.

Upon conclusion of a contingent fee matter for which a writing is required under this paragraph, the lawyer shall provide the client with a written statement explaining the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. At any time prior to the occurrence of the contingency, the lawyer shall, within twenty days after either 1) the termination of the attorney-client relationship or 2) receipt of a written request from the client when the relationship has not terminated, provide the client with a written itemized statement of services rendered and expenses incurred; except, however, that the lawyer shall not be required to provide the statement if the lawyer informs the client in writing that he or she does not intend to claim entitlement to a fee or expenses in the event the relationship is terminated before the conclusion of the contingent fee matter.

(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, the client is notified before or at the time the client enters into a fee agreement for the matter that a division of fees will be made and consents to the joint participation in writing and the total fee is reasonable. This limitation does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

(f) (1) The following forms of contingent fee agreement may be used to satisfy the requirements of paragraphs (c) and (e) if they accurately and fully reflect the terms of the engagement.

(2) A lawyer who uses Form A does not need to provide any additional explanation to a client beyond that otherwise required by this Rule. The form contingent fee agreement identified as Form B includes two alternative provisions in paragraphs (3) and (7). A lawyer who uses Form B shall show and explain these options to the client, and obtain the client's informed consent confirmed in writing to each selected option. A client's initialing next to the selected option meets the "confirmed in writing" requirement.

(3) The authorization of Forms A and B shall not prevent the use of other forms consistent with this Rule. A lawyer who uses a form of contingent fee agreement

that contains provisions that materially differ from or add to those contained in Forms A or B shall explain those different or added provisions or options to the client and obtain the client's informed consent confirmed in writing. For purposes of this Rule, a fee agreement that omits option (i) in paragraph (3), and, where applicable, option (i) in paragraph (7) of Form B is an agreement that materially differs from the model forms. A fee agreement containing a statement in which the client specifically confirms with his or her signature that the lawyer has explained that there are provisions of the fee agreement, clearly identified by the lawyer, that materially differ from, or add to, those contained in Forms A or B meets the "confirmed in writing" requirement.

(4) The requirements of paragraphs (f)(1) - (3) shall not apply when the client is an organization, including a non-profit or governmental entity.

**CONTINGENT FEE AGREEMENT, FORM A**

To be Executed in Duplicate

Date: \_\_\_\_\_, 20\_\_

The Client \_\_\_\_\_  
(Name) (Street & Number) (City or Town)

retains the Lawyer \_\_\_\_\_  
(Name) (Street & Number) (City or Town)

to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are.

(2) The contingency upon which compensation is to be paid is recovery of damages, whether by settlement, judgment or otherwise.

(3) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation other than from amounts collected for the client by the lawyer.

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending or ascending scale in relation to amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney's fees awarded by a court or included in a settlement. The lawyer's compensation shall be such attorney's fees or the amount determined by the percentage calculation described above, whichever is greater.

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to

## Rule 1.5

[Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] The lawyer is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures

Signatures of client and lawyer

(To client) \_\_\_\_\_

\_\_\_\_\_  
(Signature of Client)

(To lawyer) \_\_\_\_\_

\_\_\_\_\_  
(Signature of Lawyer)

---

### CONTINGENT FEE AGREEMENT, FORM B

To be Executed in Duplicate

Date: \_\_\_\_\_, 20\_\_

The Client \_\_\_\_\_

(Name) (Street & Number) (City or Town)

retains the Lawyer \_\_\_\_\_

(Name) (Street & Number) (City or Town)

to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is:

(3) Costs and Expenses. The client should initial next to the option selected.

- (i) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer; or
- (ii) The client is not to be liable to pay compensation or court costs and expenses of litigation otherwise than from amounts collected for the client by the lawyer, except as follows:

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending or ascending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney's fees awarded by a court or included in a settlement. The lawyer's compensation shall be such attorney's fees or the amount determined by the percentage calculation described above, whichever is greater. [Modify the last two sentences as appropriate if the parties agree on some other basis for calculation.]

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will be entitled to receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] Payment of any fees owed to former counsel. The client should initial next to the option selected.

- (i) The lawyer is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses; or
- (ii) The client is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

## Rule 1.5

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures

Signatures of client and lawyer

(To client) \_\_\_\_\_

\_\_\_\_\_  
(Signature of Client)

(To lawyer) \_\_\_\_\_

\_\_\_\_\_  
(Signature of Lawyer)

### Comment

#### Basis or Rate of Fee

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to the fees and expenses must 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 account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client.

[1A] Rule 1.5(a) departs from Model Rule 1.5(a) by retaining the standard of former DR2-106(A) that a fee must be illegal or clearly excessive to constitute a violation of this Rule. However, it does not affect the substantive law that fees must be reasonable to be enforceable against the client.

[1B] Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. As such, the standard differs from that for fees, as described in Comment 1A. A lawyer may seek reimbursement for the cost of services performed in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[2] A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the scope of the representation and the basis or rate of the fee is set forth. Ordinarily, the lawyer should send the written fee statement to the client before any substantial services are rendered. Where the client retains a lawyer for a single-session consultation or where the total fee to the client is reasonably expected to be less than \$500, a writing is not required, although the scope of the

representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client.

[3] Contingent fees, like any other fees, are subject to the not-clearly-excessive standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is clearly excessive, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain matters. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should inform the client of alternative bases for the fee and explain their implications.

[3A] A lawyer must inform the client at the time representation is undertaken if there is a possibility that a legal fee or other payments will be owed under other circumstances. A lawyer may pursue a quantum meruit recovery or payment for expenses advanced only if the contingent fee agreement so provides.

[3B] The "fair value" of the legal services rendered by the attorney before the occurrence of a contingency in a contingent fee case is an equitable determination designed to prevent a client from being unjustly enriched if no fee is paid to the attorney. Because a contingent fee case does not require any certain amount of labor or hours worked to achieve its desired goal, a lodestar method of fee calculation is of limited use in assessing a quantum meruit fee. A quantum meruit award should take into account the benefit actually conferred on the client. Other factors relevant to determining "fair value" in any particular situation may include those set forth in Rule 1.5(a), as well as the circumstances of the discharge or withdrawal, the amount of legal work required to bring the case to conclusion after the discharge or withdrawal, and the contingent fee to which the lawyer would have been entitled upon

the occurrence of the contingency. Unless otherwise agreed in writing, the lawyer will ordinarily not be entitled to receive a fee unless the contingency has occurred. Nothing in this Rule is intended to create a presumption that a lawyer is entitled to a quantum meruit award when the representation is terminated before the contingency occurs.

[3C] When the attorney-client relationship in a contingent fee case terminates before completion, and the lawyer makes a claim for fees or expenses, the lawyer is required to state in writing the fee claimed and to enumerate the expenses incurred, providing supporting justification if requested. In circumstances where the lawyer is unable to identify the precise amount of the fee claimed because the matter has not been resolved, the lawyer is required to identify the amount of work performed and the basis employed for calculating the fee due. This statement of claim will help the client and any successor attorney to assess the financial consequences of a change in representation.

[3D] A lawyer who does not intend to make a claim for fees in the event the representation is terminated before the occurrence of the contingency entitling the lawyer to a fee under the terms of a contingent fee agreement would not be required to use paragraph (6) of the model forms of contingent fee agreement specified in Rule 1.5(f)(1) and (2). However, if a lawyer expects to make a claim for fees if the representation is terminated before the occurrence of the contingency, the lawyer must advise the client of his or her intention to retain the option to make a claim by including the substance of paragraph (6) of the model form of contingent fee agreement in the engagement agreement and would be expected to be able to provide records of work performed sufficient to support such a claim.

#### **Terms of Payment**

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

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

A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

#### **Prohibited Contingent Fees**

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

#### **Division of Fee**

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee if the client has been informed that a division of fees will be made and consents in writing. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[7A] Unlike ABA Model Rule 1.5(e), Paragraph (e) does not require that the division of fees be in proportion to the services performed by each lawyer or require the lawyer to assume joint responsibility for the representation in order to be entitled to a share of the fee. The Massachusetts Rule does not require disclosure of the fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer.

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

#### **Disputes over Fees**

[9] In the event of a fee dispute not otherwise subject to arbitration, the lawyer should conscientiously consider submitting to mediation or an established fee arbitration service. If such procedure is required by law or agreement, the lawyer shall comply with such requirement. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. For purposes of paragraph 1.5(f)(3), a provision requiring that fee disputes be resolved by arbitration is a provision that differs materially from the forms of contingent fee agreement set forth in this Rule and is subject to the prerequisite that the

## Rule 1.5

lawyer explain the provision and obtain the client's consent, confirmed in writing.

### Form of Fee Agreement

[10] Paragraph (f) provides model forms of contingent fee agreements and identifies explanations that a lawyer must provide to a client, except where the client is an organization, including a non-profit or governmental entity.

[11] Paragraphs (f)(1) and (f)(2) provide two forms of contingent fee agreement that may be used. Because paragraphs (3) and (7) of Form A do not contain alternative provisions, a lawyer who uses Form A does not need to provide any special explanation to the client. Paragraphs (2), (3), and (7) of Form B differ from Form A. While in most contingency cases, the contingency upon which compensation will be paid is recovery of damages, paragraph (2) of Form B permits lawyers and clients to agree to other lawful contingencies. A lawyer is not required to provide any special explanation when using paragraph (2). Paragraphs (3) and (7) of Form B allow options for the payment of costs and expenses and the payment of reasonable attorney's fees and expenses to former counsel. To ensure that a client gives informed consent to the agreed-upon option, a lawyer who uses Form B must retain in the form both options contained in paragraphs (3) and, where applicable, paragraph

(7); show and explain these options to the client; and obtain the client's informed consent confirmed in writing to the selected option.

[12] Paragraph (f)(3) permits the lawyer and client to agree to modifications to Forms A and B, including modifications which are more favorable to the lawyer, to the extent permitted by this Rule. However, a lawyer using a modified form of fee agreement must explain to the client any provisions that materially differ from or add to those contained in Forms A and B, and obtain the client's informed written consent. For purposes of this Rule, an agreement that does not contain option (i) in paragraph (3) and, where applicable, option (i) in paragraph (7) of Form B is materially different, and a lawyer must explain those different or added provisions to the client, and obtain the client's informed written consent.

[13] When attorney's fees are awarded by a court or included in a settlement, a question arises as to the proper method of calculating a contingent fee. Rule 1.5(c)(5) and paragraph (4) of the form agreements contained in Rule 1.5(f) state the default Rule, but the parties may agree on a different basis for such calculation, such as applying the percentage to the total recovery, including attorneys fees.

## RULE 1.6: CONFIDENTIALITY OF INFORMATION

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

(b) A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, Rule 4.1(b), 8.1 or Rule 8.3 must reveal, such information:

- (1) to prevent reasonably certain death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another;
- (2) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to property, financial, or other significant interests of another;
- (3) to prevent, mitigate or rectify substantial injury to property, financial, or other significant interests of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was

involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to the extent permitted or required under these Rules or to comply with other law or a court order, or

(7) to detect and resolve conflicts of interest arising from the lawyer's potential change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, confidential information relating to the representation of a client.

(d) A lawyer participating in a lawyer assistance program, as hereinafter defined, shall treat the person so assisted as a client for the purposes of this Rule. Lawyer assistance means assistance provided to a lawyer, judge, other legal professional, or law student by a lawyer participating in an organized nonprofit effort to provide assistance in the form of (a) counseling as to practice matters (which shall not include counseling a law student in a law school clinical program) or (b) education as to personal health matters, such as the treatment and rehabilitation from a mental, emotional, or psychological disorder, alcoholism, substance abuse, or other addiction, or both. A lawyer named in an order of the Supreme Judicial Court or the Board of Bar Overseers concerning the monitoring or terms of probation of another attorney shall treat that other attorney as a client for the purposes of this Rule. Any lawyer participating in a lawyer assistance program may require a person acting under the lawyer's supervision or control to sign a nondisclosure form approved by the Supreme Judicial Court. Nothing in this paragraph (d) shall require a bar association-sponsored ethics advisory committee, the Office of Bar Counsel, or any other governmental agency advising on questions of professional responsibility to treat persons so assisted as clients for the purpose of this Rule.

**Comment**

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

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent or as otherwise permitted by these Rules, the lawyer must not reveal confidential information relating to the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to

communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.

[3] The principle of client-lawyer confidentiality established by this Rule is broader than the attorney-client privilege (and the work product doctrine). The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The Rule of client-lawyer confidentiality also applies in situations other than those where evidence is sought from the lawyer through compulsion of law.

[3A] "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b)

## Rule 1.6

likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the lawyer has agreed to keep confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. A lawyer may not disclose confidential information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope. Information that is "generally known in the local community or in the trade, field or profession to which the information relates" includes information that is widely known. Information about a client contained in a public record that has received widespread publicity would fall within this category. On the other hand, a client's disclosure of conviction of a crime in a different state a long time ago or disclosure of a secret marriage would be protected even if a matter of public record because such information was not "generally known in the local community." As another example, a client's disclosure of the fact of infidelity to a spouse is protected information, although it normally would not be after the client publicly discloses such information on television and in newspaper interviews. The accumulation of legal knowledge that a lawyer gains through practice ordinarily is not client information protected by this Rule. In addition, the factual information acquired about the structure and operation of an entire industry during the representation of one entity within the industry would not ordinarily prevent an attorney from undertaking a successive representation of another entity in a matter when the attorney had no other relevant confidential information from the earlier representation and there was no other conflict of interest at issue.

[3B] All these examples explain the addition of the word "confidential" before the word "information" in Rule 1.6(a) as compared to the comparable ABA Model Rule. It also explains the elimination of the words "or is generally known" in Rule 1.9(c)(1) as compared to the comparable ABA Model Rule. The elimination of such information from the concept of protected information in Rule 1.9(c) has been achieved more generally throughout the Rules by the addition of the word "confidential" in this Rule

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

### Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations,

for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed, or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other confidential information relating to a client of the firm, unless the client has instructed that particular confidential information be confined to specified lawyers. Before accepting or continuing representation on such a basis, the lawyers to whom such restricted confidential information will be communicated must assure themselves that the restriction will not contravene firm governance Rules or prevent them from discovering disqualifying conflicts of interests.

### Disclosure Adverse to Client

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

[6A] The use of the term "substantial" harm or injury in paragraphs (b)(1), (b)(2) and (b)(3) of this Rule restricts permitted revelation by limiting the permission granted to instances when the harm or injury is likely to be more than trivial or small. The reference to bodily harm in paragraph (b)(1) is not meant to require physical injury as a prerequisite. Acts of statutory rape, for example, fall within the concept of bodily harm. Rule 1.6(b)(1) also permits a lawyer to reveal confidential information in the specific situation where such information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution. This language has been included to permit disclosure of confidential information in these circumstances where the failure to disclose may not involve the commission of a crime.

[7] Paragraph (b)(2) is a limited exception to the Rule of confidentiality that permits the lawyer to reveal confidential information to the extent necessary to enable affected persons or appropriate authorities to prevent the commission of a crime or fraud that the lawyer reasonably believes is likely both to occur and to result in substantial injury to the interests or property of another. The lawyer should

not ignore facts that would lead a reasonable person to conclude that disclosure is permissible. Although paragraph (b)(2) does not require the lawyer to reveal the misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal confidential information relating to the representation in limited circumstances.

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

[8A] Paragraphs (b)(2) and (b)(3) each permit a lawyer to disclose client confidential information under certain circumstances to prevent or ameliorate harm caused by the commission of a crime or fraud. Disclosure is permitted only when the harm constitutes substantial injury to property, financial, or other significant interests of another. The modifier "significant" is added to emphasize that a substantial injury to an insignificant interest is not an adequate basis for disclosure. Unlike the corresponding ABA Model Rule, this Rule permits disclosure to prevent or ameliorate harm to non-financial interests as well as to property or financial interests. For example, the kidnapping of a child by a non-custodial parent may result in substantial injury to the vital interest of the other parent in maintaining custody of or even contact with his or her child. A criminal trespasser might invade a significant privacy interest of another. A person by crime or fraud might deprive someone of the right to vote or some other significant right of participation in the political process. These interests are not financial interests, but are sufficiently important that lawyers should have the discretion to disclose client confidential information to prevent or ameliorate crimes and frauds that substantially injure those interests.

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

the importance of a lawyer's compliance with the Rules of Professional Conduct.

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

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

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

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited confidential information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment 7. Under these circumstances, lawyers and law firms are permitted to disclose limited confidential information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, the general extent of the lawyer's involvement in the matter, and information about whether the matter has terminated. Even this limited confidential information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the

## Rule 1.6

possible new relationship. Moreover, the disclosure of any such information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information received pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment 5, such as when a lawyer in a firm discloses confidential information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. See also Rule 1.16.

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

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the confidential information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable. See also Rule 1.16, Comment 3.

[17] Paragraph (b) permits but does not require the disclosure of confidential information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as: (1) the seriousness of the potential harm to others; (2) the degree of certainty that the harm will occur, including the attorney's assessment of the accuracy of the information; (3) the imminence of the harm; (4) the apparent absence of any other feasible way to prevent the potential harm; (5) the extent to which the client may be using or has used the lawyer's services to bring about the harm, or the lawyer's own involvement in the transaction; (6) the circumstances under which the lawyer acquired the confidential information, including if the information is protected by the attorney-client privilege; and (7) the nature of the lawyer's relationship with the client and with those who might be injured by the client. Some of these factors may also be relevant to the exercise of discretion under paragraphs (b)(4) through (b)(7). In any instance, disclosure should be no greater than the lawyer reasonably believes necessary to prevent the harm. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. The reference to Rules 3.3, 4.1(b), 8.1 and 8.3 in the opening phrase of Rule 1.6(b) has been added to emphasize that Rule 1.6(b) is not the only provision of these Rules that deals with the disclosure of confidential information. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

### Notice of Disclosure to Client.

[17A] Whenever these Rules permit or require the lawyer to disclose a client's confidential information, the issue arises whether the lawyer should, as a part of the confidentiality and loyalty obligation and as a matter of competent practice, advise the client beforehand of the plan to disclose. It is not possible to state an absolute Rule to govern a lawyer's conduct in such situations. In some cases, it may be impractical or even dangerous for the lawyer to advise the client of the intent to reveal confidential information either before or even after the fact. Indeed, such revelation might thwart the reason for creation of the exception. It might hasten the commission of a dangerous act by a client or it might enable clients to prevent lawyers from defending themselves against accusations of lawyer misconduct. But there will be instances, such as the intended delivery of whole files to prosecutors to convince them not to indict the lawyer, where the failure to give notice would prevent the client from making timely objection to the revelation of too much confidential information. Lawyers will have to weigh the various factors and make reasonable judgments about the demands of loyalty, the requirements of competent practice, and the policy reasons for creating the exception to confidentiality.

in order to decide whether they should give advance notice to clients of the intended disclosure.

**Acting Competently to Preserve Confidentiality**

[18] Paragraph (c) requires a lawyer to act competently to safeguard confidential information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is

beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments 3 and 4.

[19] When transmitting a communication that includes confidential information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the confidential information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

**Former Client**

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

**RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS**

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

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

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

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

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

(2) the representation is not prohibited by law;

## Rule 1.7

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

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

### Comment

#### General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For the lawyer's duties with respect to information provided to the lawyer by a prospective client, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(f) and (c).

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

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

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

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

#### Identifying Conflicts of Interest: Directly Adverse

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

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

**Identifying Conflicts of Interest: Material Limitation**

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

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

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

**Personal Interest Conflicts**

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

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers

before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. Because of this fiduciary duty to clients, combining a professional relationship with any intimate personal relationship raises concerns about conflict of interest, impairment of the judgment of both lawyer and client, and preservation of attorney-client privilege. These concerns are particularly acute when a lawyer has a sexual relationship with a client.

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

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

**Prohibited Representations**

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

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

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, under federal criminal statutes certain representations by a

## Rule 1.7

former government lawyer are prohibited, despite the informed consent of the former client. In addition, Chapter 268A of the General Laws may limit the ability of a lawyer to represent both a state, county or municipal government or governmental agency and a private party having a matter that is either pending before that government or agency or in which the government or agency has an interest, even when the interests of the government or agency and the private party appear to be similar.

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

### Informed Consent

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

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

### Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client

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

### Revoking Consent

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

### Consent to Future Conflict

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

Conflicts in Litigation

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

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

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

#### **Nonlitigation Conflicts**

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse

conflicts in transactional matters, see Comment 7. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment 8.

[27] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the lawyer should make clear his or her relationship to the parties involved.

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

#### **Special Considerations in Common Representation**

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

## Rule 1.7

whether the situation involves creating or terminating a relationship between the parties.

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

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

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

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

### Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client. As to lawyers representing governmental entities, see Scope [4].

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

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

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

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

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

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

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

(c) A lawyer shall not, for his own personal benefit or the benefit of any person closely related to the lawyer, solicit any substantial gift from a client, including a testamentary gift, or prepare for a client an instrument giving the lawyer or a person closely related to the lawyer any substantial gift, including a testamentary gift, unless the lawyer or other recipient of the gift is closely related to the client. For purposes of this Rule, a person is "closely related" to another person if related to such other person as sibling, spouse, child, grandchild, parent, or grandparent, or as the spouse of any such person.

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

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

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

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

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

(1) the client gives informed consent;

## Rule 1.8

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

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

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

(h) A lawyer shall not

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

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

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

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

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

(j) Reserved

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

### **Comment**

#### **Business Transactions Between Client and Lawyer**

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

of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the

restrictions in paragraph (a) are unnecessary and impracticable.

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

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

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

#### **Use of Confidential Information Related to Representation**

[5] Use of confidential information relating to the representation to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person violates the lawyer's duty of loyalty. Paragraph (b) prohibits such use of client confidential information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1, and 8.3. Paragraph (b) applies when such information is used to benefit either the lawyer

or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase.

#### **Gifts to Lawyers**

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

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

[8] Appointments as executor of a client's estate or other potentially lucrative fiduciary position will be subject to the general conflict of interest provision in Rule 1.7. The lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

#### **Literary Rights**

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

#### **Financial Assistance**

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

## Rule 1.8

expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

### Person Paying for a Lawyer's Services

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

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

### Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the client's informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The Rule stated in this paragraph is a corollary of both these Rules and provides that, before any

settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(f) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable Rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class. Similar considerations may apply in derivative actions.

### Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement, including compliance with Rule 1.5(f) where applicable. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

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

### Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general Rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e),

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

contingent fees in civil cases are governed by Rule 1.5.

[17] Reserved

[18] Reserved

[19] Reserved

Imputation of Prohibitions

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

## **RULE 1.9: DUTIES TO FORMER CLIENTS**

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

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

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

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter,

unless the former client gives informed consent, confirmed in writing.

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

(1) use confidential information relating to the representation to the disadvantage of the former client, or for the lawyer's advantage, or the advantage of a third person, except as Rule 1.6, Rule 3.3, or Rule 4.1 would permit or require with respect to a client; or

(2) reveal confidential information relating to the representation except as Rule 1.6 Rule 3.3, or Rule 4.1 would permit or require with respect to a client.

### **Comment**

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to

rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has

## Rule 1.9

represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment 9. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

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

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

possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

### **Lawyers Moving Between Firms**

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation’s particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm’s clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

by these Rules. However, the fact that a lawyer has once served a client ordinarily does not preclude the lawyer from using generally known information about that client when later representing another client. See Comment 3A to Rule 1.6.

[8] Paragraph (c) provides that confidential information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person unless the client gives informed consent, except as permitted or required

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(f). With regard to the effectiveness of an advance waiver, see Comment 22 to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

**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, or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. A lawyer employed by the Public Counsel Division of the Committee for Public Counsel Services and a lawyer assigned to represent clients by the Private Counsel Division of that Committee are not considered to be associated. Lawyers are not considered to be associated merely because they have each individually been assigned to represent clients by the Committee for Public Counsel Services through its Private Counsel Division.

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

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

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

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

(d) When a lawyer becomes associated with a firm ("new firm"), the new firm may not undertake to or continue to represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer (the "personally disqualified lawyer"), or the former firm, had previously represented a client whose interests are materially adverse to the new firm's client unless:

(1) the personally disqualified lawyer has no information protected by Rule 1.6 or Rule 1.9 that is material to the matter ("material information"); or

## Rule 1.10

(2) the personally disqualified lawyer (i) had neither involvement nor information relating to the matter sufficient to provide a substantial benefit to the new firm's client and (ii) is screened from any participation in the matter in accordance with paragraph (e) of this Rule and is apportioned no part of the fee therefrom.

(e) For the purposes of paragraph (d) of this Rule and of Rules 1.11 and 1.12, a personally disqualified lawyer in a firm will be deemed to have been screened from any participation in a matter if:

(1) all material information possessed by the personally disqualified lawyer has been isolated from the firm;

(2) the personally disqualified lawyer has been isolated from all contact with the new firm's client relating to the matter, and any witness for or against the new firm's client;

(3) the personally disqualified lawyer and the new firm have been precluded from discussing the matter with each other;

(4) the former client of the personally disqualified lawyer or of the former firm receives notice of the conflict and an affidavit of the personally disqualified lawyer and the new firm describing the procedures being used effectively to screen the personally disqualified lawyer, and attesting that (i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of the new firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter; and

(5) the personally disqualified lawyer and the new firm reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the new firm and its client.

In any matter in which the former client and the new firm's client are not before a tribunal, the firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

(f) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

### Comment

#### Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers 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 the 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 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 the other.

[2] 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.

[3] 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, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular Rule that is involved, and on the specific facts of the situation.

[4] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(d)(2)(i). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9.

[5] Reserved.

#### **Principles of Imputed Disqualification**

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

another, the situation is governed by Rules 1.9(b) and 1.10(b), (d) and (e).

[6A] The Rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified.

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

[8] Paragraphs (d) and (e) of Rule 1.10 apply when a lawyer moves from a private firm to another firm ("new firm") and are intended to create procedures similar in some cases to those under Rule 1.11(b) for lawyers moving from a government agency to a private firm. Paragraphs (d) and (e) of Rule 1.10, unlike the provisions of Rule 1.11, do not permit a firm, without the consent of the former client of the disqualified lawyer or of the disqualified lawyer's former firm, to handle a matter with respect to which the personally disqualified lawyer was involved to a degree sufficient to provide a substantial benefit to the new firm's client or had confidential information relating to the matter sufficient to provide a substantial benefit to the new firm's client, as noted in Comment 11 below. Like Rule 1.11, however, Rule 1.10(d) can only apply if the lawyer no longer represents the client of the former firm after the lawyer arrives at the lawyer's new firm.

[9] If the lawyer has no information protected by Rule 1.6 or Rule 1.9 about the representation of the former client, the new firm is not disqualified and no screening procedures are required. This would ordinarily be the case if the lawyer did no work on the matter and the matter was not the subject of discussion with the lawyer generally, for example at firm or working group meetings. The lawyer must search his or her files and recollections carefully to determine whether he or she has confidential information. The fact that the lawyer does not immediately remember any details of the former client's representation does not mean that he or she does not in fact possess confidential information material to the matter.

## Rule 1.10

[10] If the lawyer does have confidential information about the representation of the client of his former firm, the firm with which he or she is newly associated may represent a client with interests adverse to the former client of the newly associated lawyer only if the personally disqualified lawyer did not have involvement or confidential information relating to the matter sufficient to provide a substantial benefit to the new firm's client, the personally disqualified lawyer is apportioned no part of the fee, and all of the screening procedures are followed, including the requirement that the personally disqualified lawyer and the new firm reasonably believe that the screening procedures will be effective. For example, in a very small firm, it may be difficult to keep information screened. On the other hand, screening procedures are more likely to be successful if the personally disqualified lawyer practices in a different office of the firm from those handling the matter from which the personally disqualified lawyer is screened.

[11] In situations where the personally disqualified lawyer was involved in a matter to a degree sufficient to provide a substantial benefit to the new firm's client or had confidential information relating to a matter sufficient to provide a substantial benefit to the new firm's client, the new firm will generally only be allowed to handle the matter if the former client of the personally disqualified lawyer or of the former law firm consents and the new firm reasonably believes that the representation will not

be adversely affected, all as required by Rule 1.7. This differs from the provisions of Rule 1.11, in that Rule 1.11(a) permits a firm to handle a matter against a government agency, without the consent of the agency, with respect to which one of its associated lawyers was personally and substantially involved for that agency, provided that the procedures of Rule 1.11(a)(1) and (2) are followed. Likewise, Rule 1.11(b) permits a firm to handle a matter against a government agency, without the consent of the agency, with respect to which one of its associated lawyers had substantial material information even if that lawyer was not personally and substantially involved for that agency, provided that the lawyer is screened and not apportioned any part of the fee.

[12] The former client is entitled to review of the screening procedures if the former client believes that the procedures will not be or have not been effective. If the matter involves litigation, the court before which the litigation is pending would be able to decide motions to disqualify or to enter appropriate orders relating to the screening, taking cognizance of whether the former client is seeking the disqualification of the firm upon a reasonable basis or without a reasonable basis for tactical advantage or otherwise. If the matter does not involve litigation, the former client can seek judicial review of the screening procedures from a trial court.

### **RULE 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees**

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a 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 gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), 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 timely 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.

(c) 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. As used in this Rule, the term “confidential government information” means information that 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. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee;

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator, may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) 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.

**Comment**

[1] A lawyer who has served or is currently serving as a public officer or employee or is specially retained by the government is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. See G. L. c. 268A. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(f) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or

employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation Rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a

## Rule 1.11

former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a public agency and another client, the risk exists that power or discretion vested in public authority might be used for the special benefit of another client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, 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. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification Rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment 9.

[6] Paragraphs (b) and (c) contemplate a screening arrangement. These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

## **RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL**

(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, mediator, or other third-party neutral, or law clerk to such a person unless all parties to the current proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party

neutral may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer or an arbitrator, ~~or~~ mediator or other third-party neutral.

(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 timely 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 parties and any appropriate tribunal to enable them 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**

[1] 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 by these Rules 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 lawyer should also consider applicable statutes and regulations, e.g. G.L. c. 268A. The term "adjudicative officer" includes such officials as magistrates, referees, special masters, hearing officers and other parajudicial officers. Canon 6A(2) of the Code of Judicial Conduct (S.J.C. Rule 3:09) provides that a retired judge recalled to active service "shall not, for a period of six months following the date of retirement, resignation, or most recent service as a retired judge pursuant to G. L. c. 32, §§ 65E-65G, perform court-connected dispute resolution services except on a pro bono publico basis, enter an appearance, or accept an appointment to represent any party in any court of the Commonwealth."

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed

in writing. See Rule 1.0(f) and (c). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.10(f). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[6] Law clerks who serve before they are admitted to the bar are subject to the limitations stated in Rule 1.12(b). For purposes of this Rule, the term "law clerk" shall include judicial interns and others who provide similar legal assistance to a judge or other adjudicative officer or to an arbitrator, mediator, or other third-party neutral.

## Rule 1.13

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

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

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

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

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

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

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

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is

required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

**Comment**

***The Entity as the Client***

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

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

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

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, 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. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and

subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

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

***Relation to Other Rules***

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3, 4.1, or 8.3. Moreover, the lawyer may be subject to disclosure obligations imposed by law or court order as contemplated by Rule 1.6(b)(5). Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal confidential information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (7). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being

## Rule 1.13

used by an organization to further a crime or fraud by the organization, Rule 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose confidential information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal. Nothing in these Rules prohibits the lawyer from disclosing what the lawyer reasonably believes to be the basis for his or her discharge or withdrawal.

### **Government Agency**

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [4]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for

public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

### **Clarifying the Lawyer's Role**

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

### **Dual Representation**

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

### **Derivative Actions**

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

## **RULE 1.14: CLIENT WITH DIMINISHED CAPACITY**

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

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

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

**Comment**

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

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

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer may also consult family members even though they may be personally interested in the situation. Before the lawyer discloses confidential information of the client, the lawyer should consider whether it is likely that the person or entity to be consulted will act adversely to the client's interests. Decisions under Rule 1.14(b) whether and to what extent to consult or to disclose confidential information are matters of professional judgment on the lawyer's part.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If the lawyer represents the guardian as

distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rules 1.2(d), 1.6, 3.3 and 4.1.

**Taking Protective Action**

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

[6] In determining whether a client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate

## Rule 1.14

circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a client is unable to make an adequately considered decision regarding an issue, and if achieving the client's expressed preferences would place the client at risk of a substantial harm, the attorney has four options. The attorney may:

- i. advocate the client's expressed preferences regarding the issue;
- ii. advocate the client's expressed preferences and request the appointment of a guardian ad litem or investigator to make an independent recommendation to the court;
- iii. request the appointment of a guardian ad litem or next friend to direct counsel in the representation; or
- iv. determine what the client's preferences would be if he or she were able to make an adequately considered decision regarding the issue and represent the client in accordance with that determination.

In the circumstances described in clause (iv) above where the matter is before a tribunal and the client has expressed a preference, the lawyer will ordinarily inform the tribunal of the client's expressed preferences. However, there are circumstances where options other than the option in clause (i) above will be impermissible under substantive law or otherwise inappropriate or unwarranted. Such circumstances arise in the representation of clients who are competent to stand trial in criminal, delinquency and youthful offender, civil commitment and similar matters.

Counsel should follow the client's expressed preference if it does not pose a risk of substantial harm to the client, even if the lawyer reasonably determines that the client has not made an adequately considered decision in the matter.

### **Disclosure of the Client's Condition**

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Confidential information relating to the

representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

### **Emergency Legal Assistance**

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

## **RULE 1.15:SAFEKEEPING PROPERTY**

### **(a) Definitions:**

(1) "Trust property" means property of clients or third persons that is in a lawyer's possession in connection with a representation and includes property held in any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, executor, or otherwise. Trust property does not include documents or other property received by a lawyer as investigatory material or potential evidence. Trust property in the form of funds is referred to as "trust funds."

(2) “Trust account” means an account in a financial institution in which trust funds are deposited. Trust accounts must conform to the requirements of this Rule.

**(b) Segregation of Trust Property.** A lawyer shall hold trust property separate from the lawyer's own property.

(1) Trust funds shall be held in a trust account.

(2) No funds belonging to the lawyer shall be deposited or retained in a trust account except that:

(i) Funds reasonably sufficient to pay bank charges may be deposited therein, and

(ii) Trust funds belonging in part to a client or third person and in part currently or potentially to the lawyer shall be deposited in a trust account, but the portion belonging to the lawyer must be withdrawn at the earliest reasonable time after the lawyer's interest in that portion becomes fixed. A lawyer who knows that the right of the lawyer or law firm to receive such portion is disputed shall not withdraw the funds until the dispute is resolved. If the right of the lawyer or law firm to receive such portion is disputed within a reasonable time after notice is given that the funds have been withdrawn, the disputed portion must be restored to a trust account until the dispute is resolved.

(3) A lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or as expenses incurred.

(4) All trust property shall be appropriately safeguarded. Trust property other than funds shall be identified as such.

**(c) Prompt Notice and Delivery of Trust Property to Client or Third Person.** Upon receiving trust funds or other trust 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 as otherwise permitted by law or by agreement with the client or third person on whose behalf a lawyer holds trust property, 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.

**(d) Accounting.**

(1) Upon final distribution of any trust property or upon request by the client or third person on whose behalf a lawyer holds trust property, the lawyer shall promptly render a full written accounting regarding such property.

(2) On or before the date on which a withdrawal from a trust account is made for the purpose of paying fees due to a lawyer, the lawyer shall deliver to the client in writing (i) an itemized bill or other accounting showing the services rendered, (ii) written notice of amount and date of the withdrawal, and (iii) a

## **Rule 1.15**

statement of the balance of the client's funds in the trust account after the withdrawal.

### **(e) Operational Requirements for Trust Accounts.**

(1) All trust accounts shall be maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person on whose behalf the trust property is held, except that all funds required by this Rule to be deposited in an IOLTA account shall be maintained in this Commonwealth.

(2) Each trust account title shall include the words "trust account," "escrow account," "client funds account," "conveyancing account," "IOLTA account," or words of similar import indicating the fiduciary nature of the account

(3) For each trust account opened, the lawyer shall submit written notice to the bank or other depository in which the trust account is maintained confirming to the depository that the account will hold trust funds within the meaning of this Rule. The lawyer shall retain a copy executed by the bank and the lawyer for the lawyer's own records. The notice shall identify the bank, account, and type of account, whether pooled, with interest paid to the IOLTA Committee (IOLTA account), or individual account with interest paid to the client or third person on whose behalf the trust property is held. For purposes of this Rule, one notice is sufficient for a master or umbrella account with individual subaccounts.

(4) No withdrawal from a trust account shall be made by a check which is not prenumbered. No withdrawal shall be made in cash or by automatic teller machine or any similar method. No withdrawal shall be made by a check payable to "cash" or "bearer" or by any other method which does not identify the recipient of the funds.

(5) Every withdrawal from a trust account for the purpose of paying fees to a lawyer or reimbursing a lawyer for costs and expenses shall be payable to the lawyer or the lawyer's law firm.

(6) Each lawyer who has a law office in this Commonwealth and who holds trust funds shall deposit such funds, as appropriate, in one of two types of interest-bearing accounts: either (i) a pooled account ("IOLTA account") for all trust funds which in the judgment of the lawyer are nominal in amount, or are to be held for a short period of time, or (ii) for all other trust funds, an individual account with the interest payable as directed by the client or third person on whose behalf the trust property is held. The foregoing deposit requirements apply to funds received by lawyers in connection with real estate transactions and loan closings, provided, however, that a trust account in a lending bank in the name of a lawyer representing the lending bank and used exclusively for depositing and disbursing funds in connection with that particular bank's loan transactions, shall not be required but is permitted to be established as an IOLTA account. All IOLTA accounts shall be established in compliance with the provisions of paragraph (g) of this Rule.

(7) Property held for no compensation as a custodian for a minor family member is not subject to the Operational Requirements for Trust Accounts set out in this paragraph (e) or to the Required Accounts and Records in paragraph (f) of this Rule. As used in this paragraph, "family member" refers to those individuals specified in Rule 7.3(a)(3).

**(f) Required Accounts and Records:** Every lawyer who is engaged in the practice of law in this Commonwealth and who holds trust property in connection with a representation shall maintain complete records of the receipt, maintenance, and disposition of that trust property, including all records required by this paragraph. Records shall be preserved for a period of six years after termination of the representation and after distribution of the property. Records may be maintained by computer subject to the requirements of subparagraph (1)G of this paragraph (f) or they may be prepared manually.

**(1) Trust Account Records.** The following books and records must be maintained for each trust account:

**A. Account Documentation.** A record of the name and address of the bank or other depository; account number; account title; opening and closing dates; and the type of account, whether pooled, with net interest paid to the IOLTA Committee (IOLTA account), or account with interest paid to the client or third person on whose behalf the trust property is held (including master or umbrella accounts with individual subaccounts).

**B. Check Register.** A check register recording in chronological order the date and amount of all deposits; the date, check or transaction number, amount, and payee of all disbursements, whether by check, electronic transfer, or other means; the date and amount of every other credit or debit of whatever nature; the identity of the client matter for which funds were deposited or disbursed; and the current balance in the account.

**C. Individual Client Records.** A record for each client or third person for whom the lawyer received trust funds documenting each receipt and disbursement of the funds of the client or third person, the identity of the client matter for which funds were deposited or disbursed, and the balance held for the client or third person, including a subsidiary ledger or ledger for each client matter for which the lawyer receives trust funds documenting each receipt and disbursement of the funds of the client or third person with respect to such matter. A lawyer shall not disburse funds from the trust account that would create a negative balance with respect to any individual client.

**D. Bank Fees and Charges.** A ledger or other record for funds of the lawyer deposited in the trust account pursuant to paragraph (b)(2)(i) of this Rule to accommodate reasonably expected bank charges. This ledger shall document each deposit and expenditure of the lawyer's funds in the account and the balance remaining.

## Rule 1.15

**E. Reconciliation Reports.** For each trust account, the lawyer shall prepare and retain a reconciliation report on a regular and periodic basis but in any event no less frequently than every sixty days. Each reconciliation report shall show the following balances and verify that they are identical:

- (i) The balance which appears in the check register as of the reporting date.
- (ii) The adjusted bank statement balance, determined by adding outstanding deposits and other credits to the bank statement balance and subtracting outstanding checks and other debits from the bank statement balance.
- (iii) For any account in which funds are held for more than one client matter, the total of all client matter balances, determined by listing each of the individual client matter records and the balance which appears in each record as of the reporting date, and calculating the total. For the purpose of the calculation required by this paragraph, bank fees and charges shall be considered an individual client record. No balance for an individual client may be negative at any time.

**F. Account Documentation.** For each trust account, the lawyer shall retain contemporaneous records of transactions as necessary to document the transactions. The lawyer must retain:

- (i) bank statements.
- (ii) all transaction records returned by the bank, including canceled checks and records of electronic transactions.
- (iii) records of deposits separately listing each deposited item and the client or third person for whom the deposit is being made.

**G. Electronic Record Retention.** A lawyer who maintains a trust account record by computer must maintain the check register, client ledgers, and reconciliation reports in a form that can be reproduced in printed hard copy. Electronic records must be regularly backed up by an appropriate storage device.

**(2) Business Accounts.** Each lawyer who receives trust funds must maintain at least one bank account, other than the trust account, for funds received and disbursed other than in the lawyer's fiduciary capacity.

**(3) Trust Property Other than Funds.** A lawyer who receives trust property other than funds must maintain a record showing the identity, location, and disposition of all such property.

**(4) Dissolution of a Law Firm.** Upon dissolution of a law firm, the partners shall make reasonable efforts to ensure the maintenance of client trust account records specified in this Rule.

**(g) Interest on Lawyers' Trust Accounts.**

(1) The IOLTA account shall be established with any bank, savings and loan association, or credit union authorized by Federal or State law to do business in Massachusetts and insured by the Federal Deposit Insurance Corporation or similar State insurance programs for State chartered institutions. At the direction of the lawyer, funds in the IOLTA account in excess of \$100,000 may be temporarily reinvested in repurchase agreements fully collateralized by U.S. Government obligations. Funds in the IOLTA account shall be subject to withdrawal upon request and without delay.

(2) Lawyers creating and maintaining an IOLTA account shall direct the depository institution:

(i) to remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the IOLTA Committee;

(ii) to transmit with each remittance to the IOLTA Committee a statement showing the name of the lawyer who or law firm which deposited the funds; and

(iii) at the same time to transmit to the depositing lawyer a report showing the amount paid, the rate of interest applied, and the method by which the interest was computed.

(3) Lawyers shall certify their compliance with this Rule as required by S.J.C. Rule 4:02, § (2).

(4) This court shall appoint members of a permanent IOLTA Committee to fixed terms on a staggered basis. The representatives appointed to the committee shall oversee the operation of a comprehensive IOLTA program, including:

(i) the receipt of all IOLTA funds and their disbursement, net of actual expenses, to the designated charitable entities, as follows: sixty-seven percent (67%) to the Massachusetts Legal Assistance Corporation and the remaining thirty-three percent (33%) to other designated charitable entities in such proportions as the Supreme Judicial Court may order;

(ii) the education of lawyers as to their obligation to create and maintain IOLTA accounts under this Rule;

(iii) the encouragement of the banking community and the public to support the IOLTA program;

(iv) the obtaining of tax rulings and other administrative approval for a comprehensive IOLTA program as appropriate;

## **Rule 1.15**

(v) the preparation of such guidelines and Rules, subject to court approval, as may be deemed necessary or advisable for the operation of a comprehensive IOLTA program;

(vi) establishment of standards for reserve accounts by the recipient charitable entities for the deposit of IOLTA funds which the charitable entity intends to preserve for future use; and

(vii) reporting to the court in such manner as the court may direct.

(5) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall receive IOLTA funds from the IOLTA Committee and distribute such funds for approved purposes. The Massachusetts Legal Assistance Corporation may use IOLTA funds to further its corporate purpose and other designated charitable entities may use IOLTA funds either for (a) improving the administration of justice or (b) delivering civil legal services to those who cannot afford them.

(6) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall submit an annual report to the court describing their IOLTA activities for the year and providing a statement of the application of IOLTA funds received pursuant to this Rule.

### **(h) Dishonored Check Notification.**

All trust accounts shall be established in compliance with the following provisions on dishonored check notification:

(1) A lawyer shall maintain trust accounts only in financial institutions which have filed with the Board of Bar Overseers an agreement, in a form provided by the Board, to report to the Board in the event any properly payable instrument is presented against any trust account that contains insufficient funds, and the financial institution dishonors the instrument for that reason.

(2) Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon thirty days notice in writing to the Board.

(3) The Board shall publish annually a list of financial institutions which have signed agreements to comply with this Rule, and shall establish Rules and procedures governing amendments to the list.

(4) The dishonored check notification agreement shall provide that all reports made by the financial institution shall be identical to the notice of dishonor customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors. Such reports shall be made simultaneously with the notice of dishonor and within the time provided by law for such notice, if any.

(5) Every lawyer practicing or admitted to practice in this Commonwealth shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(6) The following definitions shall be applicable to this subparagraph:

(i) “Financial institution” includes (a) any bank, savings and loan association, credit union, or savings bank, and (b) with the written consent of the client or third person on whose behalf the trust property is held, any other business or person which accepts for deposit funds held in trust by lawyers.

(ii) “Notice of dishonor” refers to the notice which a financial institution is required to give, under the laws of this Commonwealth, upon presentation of an instrument which the institution dishonors.

(iii) “Properly payable” refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this Commonwealth.

**Comment**

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. Separate trust accounts are warranted when administering estate monies or acting in similar fiduciary capacities.

[2] In general, the phrase “in connection with a representation” includes all situations where a lawyer holds property as a fiduciary, including as an escrow agent. For example, an attorney serving as a trustee under a trust instrument or by court appointment holds property “in connection with a representation”. Likewise, a lawyer serving as an escrow agent in connection with litigation or a transaction holds that property “in connection with a representation”. However, a lawyer serving as a fiduciary who is not actively practicing law does not hold property “in connection with a representation.”

[2A] Legal fees and expenses paid in advance that are to be applied as compensation for services subsequently rendered or for expenses subsequently incurred are trust property and are required by paragraphs (b)(1) and (b)(3) to be deposited to a trust account. These fees and expenses can be withdrawn by a lawyer only as fees are earned or expenses incurred. The Rule does not require flat fees to be deposited to a trust account, but a flat fee that is deposited to a trust account is subject to all the provisions of this Rule, including paragraphs (b)(2) and (d)(2). A flat fee is a fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services, whether relatively simple and of short duration, or complex and protracted. For the obligation to refund an unearned fee in the event of a discharge or withdrawal, see Rule 1.16(d).

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. 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. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[6] How much time should elapse between the receipt of funds by the lawyer and notice to the client or third person for whom the funds are held pursuant to paragraph (c) depends on the circumstances. By example, notice must be furnished immediately upon receipt of funds in settlement of a disputed matter, but a lawyer acting as an escrow agent or trustee routinely collecting various items of income may give notice by furnishing a complete statement of receipts and expenses on a regular periodic basis satisfactory to

## Rule 1.15

the client or third person. Notice to a client or third person is not ordinarily required for payments of interest and dividends in the normal course, provided that the lawyer properly includes all such payments in regular periodic statements or accountings for the funds held by the lawyer.

[6A] Paragraph (d)(2) provides that, on or before the date of any withdrawals from a trust account to pay fees due, the lawyers must provide the client in writing with, among other information, an itemized bill or other accounting showing the services rendered. Because the definition of “trust property” in paragraph (a)(1) includes funds held in a fiduciary capacity, lawyers who represent themselves as fiduciaries (such as personal representatives, executors, conservators, guardians or trustees) must comply with paragraph (d)(2) by creating, prior to or contemporaneous with any withdrawal of fees, the bills or accountings required by the Rule to justify payment. Such accountings may consist of itemized written time records, formal written bills, or other contemporaneous written accountings that show the services rendered and the method for calculating the fees. The lawyer is also required to maintain all trust account records specified in paragraphs (e) and (f) of this Rule.

[7] Paragraph (e)(3) requires attorneys to provide a written notice to the bank or other depository when opening any account that is a trust account within the meaning of this Rule, regardless of whether the account is an IOLTA account or an individual trust account. The notice must be acknowledged in writing by the bank and an executed copy retained for the lawyer’s own records. Forms for opening an IOLTA account (called an Attorney’s Notice of Enrollment) may be found on the IOLTA Committee website or obtained by contacting the IOLTA Committee directly. See the IOLTA Guidelines for additional procedures to be used when opening IOLTA accounts. Forms for notice to a bank when opening an individual (i.e., non-IOLTA) trust account may be obtained online from the website of the Board of Bar Overseers. The use of these forms shall not prevent the use of other forms consistent with this Rule.

[8] Paragraph (e)(4) states the general Rule that all withdrawals and disbursements from trust account must be made in a manner which permits the recipient or payee of the withdrawal to be identified. It does not prohibit electronic transfers or foreclose means of withdrawal which may be developed in the future, provided that the recipient of the payment is identified as part of the transaction. When payment is made by check, the check must be payable to a specific person or entity. A prenumbered check must be used, except that starter checks may be used for a brief period between the opening of a new account and issuance of numbered checks by the bank or depository.

[9] Paragraph (f) lists records that a lawyer is obliged to keep in order to comply with the requirement that “complete records” be maintained. Additional records may be required to document

financial transactions with clients or third persons. Depending on the circumstances, these records could include retainer, fee, and escrow agreements and accountings, including RESPA or other real estate closing statements, accountings in contingent fee matters, and any other statement furnished to a client or third person to document receipt and disbursement of funds.

[10] The “Check Register,” “Individual Client Ledger” and “Ledger for Bank Fees and Charges” required by paragraph (f)(1) are all chronological records of transactions. Each entry made in the check register must have a corresponding entry in one of the ledgers. This requirement is consistent with manual record keeping and also comports with most software packages. In addition to the data required by paragraph (f)(1)(B), the source of the deposit and the purpose of the disbursement should be recorded in the check register and appropriate ledger. For non-IOLTA accounts, the dates and amounts of interest accrual and disbursement, including disbursements from accrued interest to defray the costs of maintaining the account, are among the transactions which must be recorded. Check register and ledger balances should be calculated and recorded after each transaction or series of related transactions.

[11] Periodic reconciliation of trust accounts is also required. Generally, trust accounts should be reconciled on a monthly basis so that any errors can be corrected promptly. Active, high-volume accounts may require more frequent reconciliations. A lawyer must reconcile all trust accounts at least every sixty days.

The three-way reconciliation described in paragraph (f)(1)(E) must be performed for any account in which funds related to more than one client matter are held. The reconciliation described in paragraph (f)(1)(E)(iii) need not be performed for accounts which only hold the funds of a single client or third person, but the lawyer must be sure that the balance in that account corresponds to the balance in the individual ledger maintained for that client or third person.

The method of preparation and form of the periodic reconciliation report will depend upon the volume of transactions in the accounts during the period covered by the report and whether the lawyer maintains records of the account manually or electronically. By example, for an inactive single-client account for which the lawyer keeps records manually, a written record that the lawyer has reconciled the account statement from the financial institution with the check register maintained by the lawyer may be sufficient.

[12] Lawyers who maintain records electronically should back up data on a regular basis. For moderate to high-volume trust accounts, weekly or even daily backups may be appropriate.

[13] Paragraph (f)(4), along with Rule 1.17(e), provides for the preservation of a lawyer’s client trust account records in the event of dissolution or

## Rule 1.15A

sale of a law practice. These provisions reflect the supervisory responsibilities of partners under Rule 5.1. Regardless of the arrangements the partners make among themselves for maintenance of the

client trust records, each partner can be held responsible for ensuring the availability of these records. For the definition of "law firm," "partner," and "reasonable," see Rules 1.0(d), (h), and (k).

### Rule 1.15A: Client Files

(a) For purposes of this Rule, the client's file consists of the following physical and electronically stored materials:

- (1) all papers, documents, and other materials, whether in physical or electronic form, that the client supplied to the lawyer;
- (2) all correspondence relating to the matter, whether in physical or electronic form;
- (3) all pleadings and other papers filed with or by the court or served by or upon any party relevant to the client's claims or defenses;
- (4) all investigatory or discovery documents, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence;
- (5) all intrinsically valuable documents of the client; and
- (6) copies of the lawyer's work product.

Paragraph (a) does not impose an obligation to preserve documents that a lawyer following customary practices would not normally preserve in the client's file. For purposes of subparagraph (5), documents are intrinsically valuable where they constitute trust property as defined in Rule 1.15 or have legal, operative, personal, historical or other significance in themselves, including wills, trusts and other executed estate planning documents, deeds, securities, negotiable instruments, and official corporate or other records. For purposes of this Rule, work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by the lawyer's employee, agent, or consultant, and not described in subparagraphs (2), (3), (4) or (5) above. Examples of work product include without limitation legal research, closing binders, records of witness interviews, and reports of negotiations.

(b) A lawyer must make the client's file available to a client or former client within a reasonable time following the client's or former client's request for his or her file, provided however, that:

- (1) the lawyer may at the lawyer's own expense retain copies of documents turned over to the client;
- (2) the client may be required to pay (i) any copying charges for copying the material described in subparagraphs (a)(3) and (a)(6), consistent with the lawyer's actual

## Rule 1.15A

copying cost, unless the client has already paid for such material, and (ii) the lawyer's actual cost for the delivery of the file;

(3) the lawyer is not required to turn over to the client investigatory or discovery documents for which the client is obligated to pay under the fee agreement but has not paid; and

(4) unless the lawyer and the client have entered into a contingent fee agreement, the lawyer is only required to turn over copies of the lawyer's work product for which the client has paid.

Notwithstanding anything in this paragraph (b) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would unfairly prejudice the client.

(c) Except for materials governed by paragraphs (d), (e) and (f), a lawyer shall take reasonable measures to retain a client's file in a matter until at least six years have elapsed after completion of the matter or termination of the representation in the matter unless (i) the lawyer has transferred the file or items to the client or successor counsel, or as otherwise directed by the client, or (ii) the client agrees in writing to an alternative arrangement for the file's custody or destruction, provided, however, that files relating to the representation of a minor shall be retained until at least six years after the minor reaches the age of majority. If the client has not requested the file within six years after completion or termination of the representation or within six years after a minor reaches the age of majority, the file may be destroyed except as provided in paragraphs (d), (e), and (f) below.

(d) Intrinsically valuable documents that constitute trust property of the client must be delivered to the client as provided in Rule 1.15(c). All other intrinsically valuable documents must be appropriately safeguarded and delivered in accordance with paragraph (b) above, or retained until such time as the documents no longer possess intrinsic value. If the client cannot be found, the lawyer shall securely retain such documents or, where applicable, deliver such items to an appropriate governmental repository.

(e) A lawyer shall not destroy a client's file if the lawyer knows or reasonably should know that:

(1) a lawsuit or other legal claim related to the client matter is pending or anticipated;

(2) a criminal or other governmental investigation related to the client matter is pending or anticipated; or

(3) a disciplinary investigation or proceeding related to the client matter or a claim before the Client Security Board is pending or anticipated.

(f) Criminal defense counsel and defense counsel in delinquency cases shall retain a client's files as follows:

## Rule 1.15A

- (1) for the life of the client if the matter resulted in a conviction and a sentence of death or life imprisonment with or without the possibility of parole; and
  - (2) in all other criminal or delinquency matters, for ten years after the latest of the completion of the representation, the conclusion of all direct appeals, or the running of an incarcerated defendant's maximum period of incarceration, but in no event longer than the life of the client.
- (g) A lawyer shall take reasonable measures to ensure that the destruction of all or any portion of a client file shall be carried out in a manner consistent with all applicable confidentiality obligations.

### Comments

[1] In order to represent clients competently in a matter, lawyers customarily maintain a file of papers and electronically stored information that will in the lawyers' judgment aid in the representation. This Rule governs lawyers' obligations with respect to the custody and destruction of client files. A lawyer's obligations with respect to client funds are governed by Rule 1.15 and, with specific respect to trust property such as jewelry and other valuables entrusted to the lawyer by the client, by Rule 1.15(b)(4). Lawyers are encouraged to address disposition of client files in the written engagement letter required by Rule 1.5(b)(1) and, in instances where particular arrangements for disposition or transfer have not been made, in the lawyer's final communication to the client at the conclusion of a matter.

[2] The client's file in a given matter consists of those items that must be made available upon the client's direction to the client or successor counsel to provide a reasonably complete record of the services provided and, if the matter is unfinished, to give successor counsel what is needed to complete the representation. Thus, the client file for a litigation matter would include the pleadings and court filings, rulings and other documents issued by the court, all correspondence including with the client and opposing counsel, deposition transcripts, documents produced or received in discovery (subject to applicable protective orders), investigatory materials and expert reports, the trial record, memorialized legal research and analysis, and any settlement documents. In a case with a limited number of parties, the pleadings would include all the material pleadings. In a large case with many parties, such as a large bankruptcy proceeding, the pleadings would only include those directly relevant to the client's claims and defenses. The

client file for a transactional matter would include all correspondence, including with the client and counterparties and the exchange of drafts, contracts and other documents establishing the terms of the transaction (often gathered into a "closing binder"), and memorialized legal research and analysis.

[3] Multiple copies or drafts of the same document ordinarily do not constitute part of the client's file unless the matter is unfinished, and the client and successor counsel must have the drafts to complete the representation. Similarly, a lawyer's personal notes ordinarily do not constitute part of the client's file unless the notes are the only record of a witness interview, a settlement negotiation, a meeting with regulators or prosecutors, or some similar event. Once a document is finalized or personal notes of an event are memorialized, this Rule does not require preservation of the drafts or notes. However, documents that are part of the client's file at the time of a request for the file must thereafter be preserved and produced. Except as provided in Comment 4, this Rule does not require preservation of any physical documents that have been converted to electronic form.

[4] Unless other applicable law requires a particular document to be physically preserved for its legal effectiveness, a lawyer may maintain a client's file in electronic form, provided, however, that, for documents stored only in electronic form, the lawyer must make reasonable efforts to store such electronic files in a form that can be read with available technology for any period during which the file must be retained. If the original form of the document is important, however, it should not be destroyed without the client's permission.

[5] The client's file does not include a lawyer's administrative files such as conflict checks, billing and accounting records, and communications

## Rule 1.15A

within a law firm concerning matters of administration such as account creation, billing and collections, logistics, and the assignment and evaluation of personnel assigned to the matter. Such documents may be subject to discovery in a dispute concerning the representation, but ordinarily do not need to be provided to the client or successor counsel at the client's direction.

[6] Rule 1.15A does not supersede obligations imposed by court order, rules of a tribunal, or other law including discovery rules in civil cases, subpoenas and other mandatory process, and the law of spoliation and obstruction of justice. Similarly, Rule 1.15A does not supersede specific retention requirements imposed by other rules of professional conduct. See, e.g., Rule 1.5(c). The maintenance of records required for trust property and trust accounts is governed exclusively by Rule 1.15. A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period.

[7] Under paragraphs (c) and (f) of this Rule, the nature of the underlying case dictates the minimum time period that a file must be retained before it may be destroyed without client agreement. In addition, a lawyer may not destroy the files under paragraph (e) if the lawyer knows that there are legal or disciplinary proceedings pending or anticipated that relate to the matter for which the lawyer created the files, if the materials at issue are intrinsically valuable documents under paragraph (d), or if the lawyer has agreed

otherwise. If the conditions imposed by this Rule are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9 and other applicable law such as the Massachusetts Privacy Act, Mass. Gen. Laws c. 93H, and the HIPAA Privacy Rule, 45 C.F.R. Parts 160 and 164. See Rule 1.6(c). A lawyer may destroy a client's file in accordance with this Rule notwithstanding the possibility that there could be further proceedings after the expiration of the time limits set forth in this Rule (such as a motion for a new trial or for relief from a judgment in light of changes in the law or the discovery of additional evidence), so long as such proceedings are not pending or anticipated at the time of the destruction.

[8] The lawyer's obligations under this Rule to retain and return files to the client are not excused because the lawyer forwarded papers to the client from time to time during the course of the representation.

[9] Nothing in this Rule is intended to mandate that a lawyer destroy a file. A lawyer appropriately may decide to retain certain types or portions of files, or portions of files for longer than six years, such as files relating to a structured settlement or other matters creating long-term obligations to or by the client. Unless the lawyer and the client have otherwise agreed, a lawyer may retain a copy of the file or any document in the file.

## RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

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

- (1) the representation will result in violation of the Rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

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

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) If permission for withdrawal from employment is required by the Rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

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

**Comment**

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

**Mandatory Withdrawal**

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

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. If a lawyer's withdrawal is mandatory under these Rules, the lawyer's statement to that effect should ordinarily be accepted as sufficient. Lawyers should be mindful

of their obligations to both clients and the court under Rules 1.6 and 3.3.

**Discharge**

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

[5] An appointed lawyer should advise a client seeking to discharge the appointed lawyer of the consequences of such an action, including the possibility that the client may be required to proceed pro se.

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

**Optional Withdrawal**

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also

## Rule 1.16

permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

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

### **Assisting the Client upon Withdrawal**

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

[10] Rule 1.15(c) specifies the lawyer's obligation to return funds and other property to which the client is entitled, and Rule 1.15A(b) details the lawyer's obligation to make client files available to a client or former client at the client's request.

## **RULE 1.17: SALE OF LAW PRACTICE**

A lawyer or law firm may sell, and a lawyer or law firm may purchase, with or without consideration, a law practice, including good will, if the following conditions are satisfied:

- (a) [RESERVED]
- (b) [RESERVED]
- (c) The seller gives written notice to each of the seller's clients regarding:
  - (1) the proposed sale;
  - (2) the client's right to retain other counsel or to take possession of the file; and
  - (3) the fact that the client's consent to the transfer of that client's representation will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera confidential information relating to the representation only to the extent necessary to obtain an order authorizing the transfer.

(d) The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to include a particular representation in the purchase unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

(e) Upon the sale of a law practice, the seller shall make reasonable arrangements for the maintenance of property and records specified in Rule 1.15.

### **Comment**

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the

representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

[2] Reserved

[3] Reserved

[4] Reserved

[5] Reserved

[6] Reserved

#### Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to detailed confidential information relating to the representation, such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. If necessary to preserve client confidences, the lawyer shall request that the petition for a court order be considered in camera.

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

#### Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. The purchaser may, however, refuse to include a particular representation in the purchase unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

#### Other Applicable Ethical Standards

[11] Lawyers participating in the sale of some or all of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(f) for the definition of informed consent); and the obligation to protect confidential information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the Rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

#### Applicability of the Rule

[13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice that does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law firm, retirement plan and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

[16] This Rule does not require the seller to cease to engage in the practice of law in a geographical area. This is a matter for agreement between the parties to the transfer.

[17] Under Rule 1.17, a lawyer may sell all or part of the practice.

[18] A law practice may be transferred and acquired without the necessity of consideration, and the client's consent referred to in Rule 1.17(c)(3) is only to the transfer of that client's representation.

[19] The rule permits the estate or representative of a lawyer to make a transfer of the lawyer's practice to one or more purchasers.

[20] Paragraph (e) provides for the preservation of a lawyer's client trust account records in the event of the sale of a law practice and is the counterpart to Rule 1.15(f)(4), which applies when

## Rule 1.17

the law practice is dissolved. Comment 13 to Rule 1.15 is also applicable to paragraph (e) of this Rule.

## RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

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

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

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

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

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened, as defined in Rule 1.10(e), from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

### Comment

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

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if

a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of confidential information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides confidential information in response. See also Comment 4. In contrast, a consultation does not occur if a person provides confidential information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates uninvited confidential information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming

a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

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

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

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no confidential information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(f) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's

subsequent use of confidential information received from the prospective client.

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

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

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

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

## **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**

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

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

## Rule 2.1

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

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

course of action in the face of conflicting recommendations of experts.

### Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. See Comment 8 to Rule 1.4. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

## RULE 2.2: INTERMEDIARY [RESERVED]

## RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide 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 gives informed consent or providing the evaluation is impliedly authorized to carry out the representation.

(b) Reserved.

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

### Comment

#### Definition

[1] 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.

[1A] Where the person receiving the evaluation is also a client of the lawyer, the propriety of providing the evaluation is governed by Rule 1.7 and not this Rule. The propriety of a

lawyer's use of the client's confidential information in preparing the evaluation is governed by Rule 1.6.

[2] 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 have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general Rules concerning loyalty to client and preservation of confidences apply, which is not

the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

**Duties Owed to Third Person and Client**

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

**Access to and Disclosure of Information**

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should

have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

[5] Reserved.

**Financial Auditors' Requests for Information**

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

**RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL**

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

**Comment**

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court Rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various 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 or the Model Standards of Conduct for Mediators jointly

## Rule 3.1

prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution. In particular, lawyers in Massachusetts may be subject to the Uniform Rules of Dispute Resolution set forth in Supreme Judicial Court Rule 1.18.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a

client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12. See also Uniform Rule of Dispute Resolution 9(e) set forth in S.J.C. Rule 1.18.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(p)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

## ADVOCATE

### **RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS**

A lawyer shall not bring, continue, or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact 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.

#### **Comment**

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or

maliciously injuring a person, or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule. The principle underlying the provision that a criminal defense lawyer may put the prosecution to its proof in all circumstances often will have equal application to proceedings in which the involuntary commitment of a client is in issue.

[4] The option granted to a criminal defense lawyer to defend the proceeding so as to require proof of every element of a crime does not impose an obligation to do so. Sound judgment and reasonable trial tactics may reasonably indicate a different course.

**RULE 3.2: EXPEDITING LITIGATION**

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

**Comment**

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done 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.

**RULE 3.3: CANDOR TOWARD THE TRIBUNAL**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) 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

(3) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3(e). If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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

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

(e) In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed.

### Rule 3.3

(1) If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation;

(2) If, in the course of representing a defendant prior to trial, the lawyer discovers this intention and is unable to persuade the client not to testify falsely, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying.

(3) If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.

#### Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(p) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

#### Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

#### Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal

authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

### **Offering Evidence**

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes, except as provided in Rule 3.3(e). This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[7] Reserved.

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood. For issues raised by perjury by a criminal defendant, see Comments 11A-11E.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, Rule 3.3(e) separately addresses issues that arise in that context.

### **Remedial Measures**

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during

a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, and except as provided for in Rule 3.3(e), the advocate must take further remedial action. Except as provided in Rule 3.3(e), if withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

### **Perjury by a Criminal Defendant**

[11A] In the defense of a criminally accused, the lawyer's duty to disclose the client's intent to commit perjury or offer of perjured testimony is complicated by state and federal constitutional provisions relating to due process, right to counsel, and privileged communications between lawyer and client. Rule 3.3(e) accommodates these special constitutional concerns in a criminal case by providing specific procedures and restrictions to be followed in the rare situations in which the client states his intention to, or does, offer testimony the lawyer knows to be perjured in a criminal trial.

[11B] Rule 3.3(e) requires that a lawyer know that the client intends to present false testimony before the lawyer proceeds under paragraph (e). This standard requires that the lawyer, before invoking the Rule, act in good faith and have a firm basis in objective fact. Conjecture or speculation that the defendant intends to testify falsely is not enough. Inconsistencies in the evidence or in the defendant's version of events are also not enough to trigger the Rule, even though the inconsistencies, considered in light of the Commonwealth's proof, raise concerns in the lawyer's mind that the defendant is equivocating and not an honest person. Similarly, the existence of strong physical and forensic evidence implicating the defendant would not be sufficient. Lawyers may rely on facts made known to them, and are under no duty to conduct an independent investigation.

## Rule 3.3

[11C] In cases to which Rule 3.3(e) applies, it is the clear duty of the lawyer first to seek to persuade the client to refrain from testifying perjurally. That persuasion should include, at a minimum, advising the client that such a course of action is unlawful, may have substantial adverse consequences, and should not be followed. If that persuasion fails, and the lawyer has not yet accepted the case, the lawyer must not agree to the representation. If the lawyer learns of this intention after the lawyer has accepted the representation of the client, but before trial, and is unable to dissuade the client of his or her intention to commit perjury, the lawyer must seek to withdraw from the representation. The lawyer must request the required permission to withdraw from the case by making an application ex parte before a judge other than the judge who will preside at the trial. The lawyer must request that the hearing on this motion to withdraw be heard in camera, and that the record of the proceedings, except for an order granting a motion to withdraw, be impounded.

[11D] Once the trial has begun, the lawyer may seek to withdraw from the representation but is not required to do so if the lawyer reasonably believes that withdrawal would prejudice the client. If the lawyer learns of the client's intention to commit perjury during the trial, and is unable to dissuade the client from testifying falsely, the lawyer may not stand in the way of the client's absolute right to take the stand and testify. If, during a trial, the lawyer knows that his or her client, while testifying, has made a perjured statement, and the lawyer reasonably believes that any immediate action taken by the lawyer will prejudice the client, the lawyer should wait until the first appropriate moment in the trial and then attempt to persuade the client confidentially to correct the perjury.

[11E] In any of these circumstances, if the lawyer is unable to convince the client to correct the perjury, the lawyer must not assist the client in presenting the perjured testimony and must not argue the false testimony to a judge, or jury or appellate court as true or worthy of belief. Except as provided in this Rule, the lawyer may not reveal to the court that the client intends to perjure or has perjured himself or herself in a criminal trial.

### Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

### Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

### Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision. Rule 3.3(d) does not change the Rules applicable in situations covered by specific substantive law, such as presentation of evidence to grand juries, applications for search or other investigative warrants and the like.

[14A] When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit or the settlement of a suit involving a minor, the proceeding loses its adversarial character and in some respects takes on the form of an ex parte proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in ex parte proceedings and should be guided by Rule 3.3(d).

### Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal confidential information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

**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 appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness ; or

(3) assert 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, but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein;

(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;

(g) pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in preparing, attending or testifying

(2) reasonable compensation to a witness for loss of time in preparing, attending or testifying; and

(3) a reasonable fee for the professional services of an expert witness;

## Rule 3.4

(h) present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a private civil matter; or

(i) in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person. This paragraph does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding.

### Comment

[1] 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.

[2] 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 foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness as provided in paragraph (g).

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

[5] Paragraph (g) concerns the payment of funds to a witness. Compensation of a witness may not be based on the content of the witness's testimony or the result in the proceeding. A lawyer may pay a witness reasonable compensation for time lost and for expenses reasonably incurred in preparing for or attending the proceeding. A lawyer may pay a reasonable fee for the professional services of an expert witness.

[6] Paragraph (h) prohibits filing or threatening to file disciplinary charges as well as criminal charges solely to obtain an advantage in a private civil matter. The word "private" makes clear that a government lawyer may pursue criminal or civil enforcement, or both criminal and civil enforcement, remedies available to the government. This Rule is never violated by a report under Rule 8.3 made in good faith because the report would not be made "solely" to gain an advantage in a civil matter.

[7] Paragraph (i) concerns conduct before a tribunal that manifests bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation of any person. When these factors are an issue in a proceeding, paragraph (i) does not bar legitimate advocacy.

## 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 during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

- (1) the communication is prohibited by law or court order;
  - (2) the juror has made known to the lawyer, either directly or through communications with the judge or otherwise, a desire not to communicate with the lawyer;
  - (3) the communication involves misrepresentation, coercion, duress or harassment; or
  - (4) the communication is initiated by the lawyer without the notice required by law; or
- (d) engage in conduct intended to disrupt a tribunal.

**Comments**

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in S.J.C. Rule 3:09, the Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. Subject to the notice requirements discussed below, the lawyer may do so unless the communication is prohibited by law or a court order. For example, in most cases common-law principles bar inquiry into the contents of jury deliberations and the thought processes of jurors, but not into extraneous influences. The lawyer must respect the desire of the juror not to talk with the lawyer. Where a juror makes known to the judge a desire not to communicate with the lawyer, and the judge so informs the lawyer, the lawyer may not initiate contact with that juror, directly or indirectly. The lawyer may not engage in improper conduct during the communication.

[3A] If the lawyer wishes to initiate the communication with a juror or prospective juror after discharge of the jury, the lawyer must send notice of the lawyer's intent to initiate such contact to counsel for the opposing party or parties (or directly to the opposing party or parties, if not represented by counsel) five business days before contacting any juror. The notice must include a description of the proposed manner of contact and the substance of any proposed inquiry to the jurors, and, where

applicable, a copy of any letter or other form of written communication the lawyer intends to send. The preferred method of initiating contact with a juror is by written letter, and the letter must include a statement that the juror may decline any contact with the lawyer or terminate contact once initiated. If the lawyer seeks to initiate contact through an oral conversation (whether in person, by telephone, or otherwise), the lawyer is nonetheless required to provide opposing counsel or opposing parties with prior notice of the substance of the intended communication five business days before the contact is initiated. See *Commonwealth v. Moore*, 474 Mass. 541, 551-52 (2016).

[3B] If the juror initiates the communication with the lawyer and seeks to communicate about permissible subjects, such as the existence of extraneous influences on the jury deliberation process or the lawyer's performance during the trial, the lawyer is permitted to communicate with that juror after discharge of the jury without following these notice requirements.

[4] 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.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(p).

**RULE 3.6: TRIAL PUBLICITY**

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication

### Rule 3.6

and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved;
- (2) the information contained in a public record;
- (3) that an investigation of the matter is in progress;
- (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, in addition to subparagraphs (1) through (6):
  - (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.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) This Rule does not preclude a lawyer from replying to charges of misconduct publicly made against him or her or from participating in the proceedings of a legislative, administrative, or other investigative body.

#### Comment

[1] 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.

[2] 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.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate 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 that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that 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.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[7A] In making the statements permitted by paragraph (e), a lawyer must safeguard confidential information relating to the representation of a client as required by Rule 1.6.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

### **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 unless:

- (1) the testimony relates to an uncontested issue;

## Rule 3.7

(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

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

### Advocate-Witness Rule

[2] The trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The combination of roles may also prejudice another 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.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). 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. This Rule does not prohibit the lawyer from acting as a witness if the lawyer is a party to the action and is appearing pro se.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably

foresee that the lawyer would probably be a witness.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

### Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(c) for the definition of "confirmed in writing" and Rule 1.0(f) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

**RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

The prosecutor in a criminal case shall:

(a) refrain from prosecuting where the prosecutor lacks a good faith belief that probable cause to support the charge exists, and refrain from threatening to prosecute a charge where the prosecutor lacks a good faith belief that probable cause to support the charge exists or can be developed through subsequent investigation;

(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, unless a court first has obtained from the accused a knowing and intelligent written waiver of counsel;

(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;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege;

(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(iii) there is no other feasible alternative to obtain the information; and

(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose:

(1) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule; and

(2) take reasonable steps 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 or this Rule;

### Rule 3.8

(g) not avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused; and

(h) refrain from seeking, as a condition of a disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct.

(i) When, because of new, credible, and material evidence, a prosecutor knows that there is a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) if the conviction was not obtained by that prosecutor's office, disclose that evidence to an appropriate court or the chief prosecutor of the office that obtained the conviction, and

(2) if the conviction was obtained by that prosecutor's office,

(i) disclose that evidence to the appropriate court;

(ii) notify the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

(iii) disclose that evidence to the defendant unless a court authorizes delay for good cause shown; and

(iv) undertake or assist in any further investigation as the court may direct.

(j) When a prosecutor knows that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice.

(k) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (i) and (j), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

#### Comment

[1] 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, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Competent

representation of the government may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. 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.

[1A] While a prosecutor may not threaten to prosecute a charge that the prosecutor knows is not supported by probable cause, this rule does not prohibit a prosecutor from declaring the intention to prosecute an individual for as yet uncharged criminal conduct if the prosecutor has a good faith belief that probable cause to support the charge can be developed through subsequent investigation.

[2] Paragraph (c) permits a prosecutor to seek a waiver of pretrial rights from an accused if the court has first obtained a knowing and intelligent written waiver of counsel from the accused. The use of the term “accused” means that paragraph (c) does not apply until the person has been charged. Paragraph (c) also does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] 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.

[3A] The obligations imposed on a prosecutor by the rules of professional conduct are not coextensive with the obligations imposed by substantive law. Disclosure is required when the information tends to negate guilt or mitigates the offense without regard to the anticipated impact of the information. The obligations imposed under paragraph (d) exist independently of any request for the information. However, regardless of an individual's right to disclosure of exculpatory or mitigating information in criminal proceedings, a prosecutor violates paragraph (d) only if the information required to be disclosed is known to the prosecutor as tending to be exculpatory or mitigating.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the

announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to take reasonable steps to prevent all those assisting or associated with the prosecution team, but not under the direct supervision or control of the prosecutor, including law enforcement personnel, from making improper extrajudicial statements. A prosecutor's issuing the appropriate cautions to such persons will ordinarily satisfy the obligations of paragraph (f).

[7] Consistent with the objectives of Rules 4.2 and 4.3, disclosure under paragraph (i) to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. Paragraph (i) applies to new, credible, and material evidence regardless of whether it could previously have been discovered by the defense. The disclosures required by paragraph (i) should ordinarily be made promptly.

[8] Under paragraph (j), once the prosecutor knows that clear and convincing evidence establishes that the defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the injustice. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant, and notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

### **RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS**

A lawyer representing a client before a legislative body or administrative agency 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**

[1] 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 must deal with it honestly and in conformity with applicable Rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

## Rule 3.9

[2] 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.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a

negotiation or other bilateral transaction with a governmental agency or in connection with an application for license or other privilege or the client's compliance with generally applicable reporting requirements, such as filing of income tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

[4] Unless otherwise expressly prohibited, ex parte contacts with legislators and other persons acting in a legislative capacity are not prohibited.

## **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.

#### **Comment**

##### **Misrepresentation**

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

##### **Statements of Fact**

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

##### **Crime or Fraud by Client**

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that

the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed as having assisted the client's crime or fraud. In paragraph (b) the word "assisting" refers to that level of assistance which would render a third party liable for another's crime or fraud, i.e., assistance sufficient to render one liable as an aider or abettor under criminal law or as a joint tortfeasor under principles of tort and agency law. The requirement of disclosure in this paragraph is not intended to broaden what constitutes unlawful assistance under criminal, tort or agency law, but instead is intended to ensure that these Rules do not countenance behavior by a lawyer that other law marks as criminal or tortious.

[4] Paragraph (b) requires a lawyer in certain circumstances to disclose material facts to a third person "unless disclosure is prohibited by Rule 1.6." Rule 1.6(a) prohibits disclosure of confidential information relating to the representation of a client unless the client consents or the disclosure is impliedly authorized to carry out the representation. Rule 1.6(b), however, gives the lawyer permission to disclose confidential information without client consent in certain circumstances. For example, under Rule 1.6(b)(2), a lawyer may reveal confidential information to prevent a criminal or fraudulent act that is likely to result in substantial

injury to the property of another. If Rule 1.6(b) gives a lawyer permission to make disclosure, then disclosure is not prohibited by Rule 1.6, and disclosure under paragraph (b) of this Rule is mandatory. If Rule 1.6(b) does not give permission to disclose – as in the previous example when the injury from a criminal or fraudulent act is not

“substantial” – then the disclosure requirement of Rule 4.1(b) does not apply. See Rule 1.6, Comment 6A. Even if Rule 1.6 prohibits disclosure, the lawyer may have other duties, such as a duty to withdraw from the representation. See Rule 1.2(d) and Rule 1.16(a)(1).

## **RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**

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

### **Comment**

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

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

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

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. A lawyer may not, however, make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. For example, counsel could prepare and send written default notices and written demands required by such laws as Chapter 93A of the General Laws.

[5] Communications authorized by law may include communications by a lawyer on behalf of a

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

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

[7] In the case of a represented organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to make decisions about the course of the litigation. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact

## Rule 4.2

represented in the matter to be discussed. This means that the lawyer has knowledge of the fact of the representation; but such knowledge may be inferred from the circumstances. See Rule 1.0 (g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

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

### **RULE 4.3: DEALING WITH UNREPRESENTED PERSON**

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

#### **Comment**

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

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in

conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

### **RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS**

(a) 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.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

#### **Comment**

[1] 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 and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows

or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning or deleting the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes paper documents, email and

other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

## **LAW FIRMS AND ASSOCIATIONS**

### **RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS AND SUPERVISORY LAWYERS**

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority 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 or has comparable managerial authority 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**

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(d). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a)

## Rule 5.1

can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures 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 the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has

supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

## 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

[1] 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.

[2] 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.

## **RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

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

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority 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 or has comparable managerial authority 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**

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment 6 to Rule 1.1 (retaining lawyers outside the firm) and Comment 1 to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

### **Nonlawyers Within the Firm**

[2] 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 must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential 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.

### **Nonlawyers Outside the Firm**

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include retaining an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the

## Rule 5.3

firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a

matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

### **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 purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(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; and

(4) a lawyer or law firm may agree to share a statutory or tribunal-approved fee award, or a settlement in a matter eligible for such an award, with a qualified legal assistance organization that referred the matter to the lawyer or law firm, if the client consents, after being informed that a division of fees will be made, to the sharing of the fees and the total fee is reasonable.

(b) A lawyer shall not form a partnership or other business entity with a nonlawyer if any of the activities of the entity 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 limited liability entity 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 occupies the position of similar responsibility in any form of association other than a corporation including a limited liability company; or

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

#### **Comment**

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or

recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[3] Rule 5.4 (a) (4) explicitly permits a lawyer, with the client's consent, to share certain fees with a qualified legal assistance organization that has

referred the matter to the lawyer. The financial needs of these organizations, which serve important public ends, justify a limited exception to the prohibition against fee sharing with nonlawyers. Should abuses occur in the carrying out of such arrangements, they may constitute a violation of Rule 5.4(c) or Rule 8.4(d) or (h). The permission to share fees granted by this Rule is not intended to restrict the ability of those qualified legal assistance organizations that engage in the practice of law themselves to receive a share of another lawyer's legal fees pursuant to Rule 1.5 (e).

**RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

## Rule 5.5

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law or Rule of this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

### Comment

[1] A lawyer may practice law in this jurisdiction only if admitted to practice generally or if authorized by court Rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the Rules governing professional conduct in that person's jurisdiction.

[2] Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule 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.

[3] A lawyer may provide 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.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous, for example by placing a name on the office door or letterhead of another lawyer without qualification, even if the lawyer is not physically present here. A lawyer not admitted to practice in this jurisdiction must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of the lawyer's clients, the public or the courts. Paragraph (c)

identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) means the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in this jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal Rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court Rule or

other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court Rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may

have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted to any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees that are unrelated to their employment. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The nature of the relationship between the lawyer and client provides a sufficient safeguard that the lawyer is competent to advise regarding the matters for which the lawyer is employed.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for appropriate fees and charges.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in this jurisdiction even though not admitted when the lawyer is authorized to do so by federal or other law, which includes statute, court Rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

## Rule 5.5

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not admitted to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

## **RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE**

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of 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 client controversy.

### **Comment**

[1] An agreement restricting the right of lawyers 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.

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

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

## **RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES**

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

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures, which shall include notice in writing, to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

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

### **Comment**

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally

afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence

apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures, which shall include notice in writing, to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures, which shall include notice in writing, to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity

will not be a client-lawyer relationship. The communication must be made before entering into an agreement for provision of or providing law-related services, and must be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity which the lawyer controls complies in all respects with the Rules of Professional Conduct.

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

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7( a)(2) and 1.8(a),(b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.5, dealing with advertising and solicitation.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to

## Rule 5.7

confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

### **PUBLIC SERVICE**

#### **RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE**

A lawyer should provide annually at least 25 hours of *pro bono publico* legal services for the benefit of persons of limited means. In providing these professional services, the lawyer should:

(a) provide all or most of the 25 hours of *pro bono publico* legal services without compensation or expectation of compensation to persons of limited means, or to charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means. The lawyer may provide any remaining hours by delivering legal services at substantially reduced compensation to persons of limited means or by participating in activities for improving the law, the legal system, or the legal profession that are primarily intended to benefit persons of limited means; or,

(b) contribute from \$250 to 1% of the lawyer's annual taxable, professional income to one or more organizations that provide or support legal services to persons of limited means.

#### **Comment**

[1] Every lawyer, regardless of professional prominence or professional work load, should provide legal services to persons of limited means. This Rule sets forth a standard which the court believes each member of the Bar of the Commonwealth can and should fulfill. Because the Rule is aspirational, failure to provide the pro bono publico services stated in this Rule will not subject a lawyer to discipline. The Rule calls on all lawyers to provide a minimum of 25 hours of pro bono publico legal services annually. Twenty-five hours is one-half of the number of hours specified in the ABA Model Rule 6.1 because this Massachusetts Rule focuses only on legal activity that benefits those unable to afford access to the system of justice. In some years a lawyer may render greater or fewer than 25 hours, but during the course of his or her legal career, each lawyer should render annually, on average, 25 hours. Also, it may be more feasible to act collectively, for example, by a firm's providing through one or more lawyers an amount of pro bono publico legal services sufficient to satisfy the aggregate amount of hours expected from all lawyers in the firm. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation.

[2] The purpose of this Rule is to make the system of justice more open to all by increasing the pro bono publico legal services available to persons of limited means. Because this Rule

calls for the provision of 25 hours of pro bono publico legal services annually, instead of the 50 hours per year specified in ABA Model Rule 6.1, the provision of the ABA Model Rule regarding service to non-profit organizations was omitted. This omission should not be read as denigrating the value of the voluntary service provided to non-profit community and civil rights organizations by many lawyers. Such services are valuable to the community as a whole and should be continued. Service on the boards of non-profit arts and civic organizations, on school committees, and in local public office are but a few examples of public service by lawyers. Such activities, to the extent they are not directed at meeting the legal needs of persons of limited means, are not within the scope of this Rule. While the American Bar Association Model Rule 6.1 also does not credit general civic activities, it explicitly provides that some of a lawyer's pro bono publico obligation may be met by legal services provided to vindicate "civil rights, civil liberties and public rights." Such activities, when undertaken on behalf of persons of limited means, are within the scope of this Rule.

[2A] Paragraph (a) describes the nature of the pro bono publico legal services to be rendered annually under the Rule. Such legal services consist of a full range of activities on behalf of persons of limited means, including individual and class representation, the provision of legal advice, legislative lobbying, administrative Rule making, community legal

education, and the provision of free training or mentoring to those who represent persons of limited means.

[3] Persons eligible for pro bono publico legal services under this Rule are those who qualify for publicly-funded legal service programs and those whose incomes and financial resources are above the guidelines used by such programs but who, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations composed of low-income people, to organizations that serve those of limited means such as homeless shelters, battered women's centers, and food pantries or to those organizations which pursue civil rights, civil liberties, and public rights on behalf of persons of limited means. Providing legal advice, counsel and assistance to an organization consisting of or serving persons of limited means while a member of its board of directors would be pro bono publico legal services under this Rule.

[4] In order to be pro bono publico services under the first sentence of Rule 6.1 (a), services must be provided without compensation or expectation of compensation. The intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of this paragraph. Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected. The award of statutory attorneys' fees in a case accepted as a pro bono case, however, would not disqualify such services from inclusion under this section.

[5] A lawyer should perform pro bono publico services exclusively or primarily through activities described in the first sentence of paragraph (a). Any remaining hours can be provided in the ways set forth in the second sentence of that paragraph, including instances in which an attorney agrees to receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments and provision of services to individuals when the fee is substantially below a

lawyer's usual rate are encouraged under this sentence.

[6] The variety of activities described in Comment [3] should facilitate participation by government and corporate attorneys, even when restrictions exist on their engaging in the outside practice of law. Lawyers who by the nature of their positions are prohibited from participating in the activities described in the first sentence of paragraph (a) may engage in the activities described in the second sentence of paragraph (a) or make a financial contribution pursuant to paragraph (b).

[7] The second sentence of paragraph (a) also recognizes the value of lawyers engaging in activities, on behalf of persons of limited means, that improve the law, the legal system, or the legal profession. Examples of the many activities that fall within this sentence, when primarily intended to benefit persons of limited means, include: serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator, and engaging in legislative lobbying to improve the law, the legal system, or the profession.

[8] Lawyers who choose to make financial contributions pursuant to paragraph (b) should contribute from \$250 to 1% of the lawyer's adjusted net Massachusetts income from legal professional activities. Each lawyer should take into account his or her own specific circumstances and obligations in determining his or her contribution.

[9] Reserved

[10] Reserved

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

## **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**

## Rule 6.2

[1] 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

[2] 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.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

## 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 or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action 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

[1] 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.

[2] 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.

## 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

[1] 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.

## **Rule 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS**

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

- (1) is not subject to Rule 1.5(b);
- (2) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
- (3) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(3), Rule 1.10 is inapplicable to a representation governed by this Rule.

### **Comment**

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services -- such as advice or the completion of legal forms -- that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this

Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(3). Paragraph (a)(3) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

## Rule 7.1

### **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 contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

##### **Comment**

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

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified

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

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

#### **RULE 7.2: ADVERTISING**

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

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

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
  - (2) pay the usual charges of a legal service plan, not-for-profit lawyer referral service or qualified legal assistance organization;
  - (3) pay for a law practice in accordance with Rule 1.17;
  - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
    - (i) the reciprocal referral agreement is not exclusive, and
    - (ii) the client is informed of the existence and nature of the agreement;
- and

(5) pay fees permitted by Rule 1.5(e) or Rule 5.4(a)(4).

(c) Any communication made pursuant to this Rule shall include the name of the lawyer, group of lawyers, or firm responsible for its content.

**Comment**

[1] To assist the public in learning about and 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.

[2] [Reserved]

[3] [Reserved]

[3A] The advertising and solicitation Rules can generally be applied to computer-accessed or other similar types of communications by analogizing the communication to its hard-copy form. Thus, because it is not a communication directed to a specific recipient, a website or home page would generally be considered advertising subject to this Rule, rather than solicitation subject to Rule 7.3. For the distinction between advertising governed by this Rule and solicitations governed by Rule 7.3, see Comment 1 to Rule 7.3.

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

**Paying Others to Recommend a Lawyer**

[5] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers; Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan, not-for-profit lawyer referral service, or qualified legal assistance organization. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service is a consumer-oriented organization that provides unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and affords other client protections, such as complaint procedures or malpractice insurance requirements. A qualified legal assistance organization is defined by Rule 1.0(j).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rules 5.3 and 8.4(a). Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

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

## Rule 7.3

### RULE 7.3: SOLICITATION OF CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment for a fee, unless the person contacted:

- (1) is a lawyer;
- (2) has a prior professional relationship with the lawyer;
- (3) is a grandparent of the lawyer or the lawyer's spouse, a descendant of the grandparents of the lawyer or the lawyer's spouse, or the spouse of any of the foregoing persons; or
- (4) is (i) a representative of an organization, including a non-profit or government entity, in connection with the activities of such organization, or (ii) a person engaged in trade or commerce as defined in G. L. c. 93A, §1 (b), in connection with such person's trade or commerce.

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

- (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer;
- (2) the solicitation involves coercion, duress or harassment; or
- (3) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the target of the solicitation is such that the target cannot exercise reasonable judgment in employing a lawyer, provided, however, the prohibition in this clause (3) only applies to solicitations for a fee;

(c) [Reserved]

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association or other non-profit organization, and cooperate with any other qualified legal assistance organization.

#### Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] This Rule allows lawyers to conduct some form of solicitation of employment, except in a small number of very special circumstances, and hence

permits the public to receive information about legal services that may be useful to them. At the same time it recognizes the possibility of undue influence, intimidation, and overreaching presented by personal solicitation in the circumstances prohibited by this Rule and seeks to limit them by regulating the form and manner of solicitation by Rules that reach no further than the danger that is perceived. Lawyers are also required to comply with other applicable laws that govern solicitations.

[3] Paragraph (a) applies to in-person, live telephone, and real-time electronic contact by a lawyer. Paragraph (b) applies to all forms of solicitation, including both the real-time solicitation

covered by paragraph (a) and solicitation by written, recorded or other forms of electronic communication such as email. In determining whether a contact is permissible under Rule 7.3(b)(3), it is relevant to consider the times and circumstances under which the contact is initiated. For example, a person undergoing active medical treatment for traumatic injury is unlikely to be in an emotional state in which reasonable judgment about employing a lawyer can be exercised. The reference to the “physical, mental, or emotional state of the target of the solicitation” is intended to be all-inclusive of the condition of such person and includes anyone who for any reason lacks sufficient sophistication to be able to select a lawyer. A proviso in subparagraph (b)(3) makes clear that it is not intended to reduce the ability possessed by nonprofit organizations to contact the elderly and the mentally disturbed or disabled. Abuse of the right to solicit such persons by non-profit organizations may constitute a violation of paragraph (b)(2) of the Rule or Rule 8.4(c) or (d). The references in paragraph (a) and (b)(3) of the Rule to solicitation “for a fee” are intended to exempt solicitations by non-profit organizations. Where such an organization is involved, the fact that there may be a statutory entitlement to a fee is not intended by itself to bring the solicitation within the scope of the Rule. There is no blanket exemption from regulation for all solicitation that is not done “for a fee.” Non-profit organizations are subject to the general prohibitions of subparagraphs (b)(1) and (b)(2).

[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in

person, live telephone or real-time electronic contact can be disputed and may not be subject to third party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] While paragraph (b) permits written and other nondirect solicitation of any person, except under the special circumstances set forth in subparagraphs (1) through (3), paragraph (a) prohibits solicitation in person or by live telephone or real-time electronic communication, except in the situations described in subparagraphs (1) through (4). See also Comment 3A to Rule 7.2, discussing prohibited personal solicitation through computer-accessed or similar types of communications. The prohibitions of paragraph (a) do not of course apply to in-person solicitation after contact has been initiated by a person seeking legal services.

[6] Subparagraphs (1) through (4) of paragraph (a) acknowledge that there are certain situations and relationships in which concerns about overreaching and undue influence do not have sufficient force to justify banning all in-person solicitation. The risk of overreaching and undue influence is diminished where the target of the solicitation is a former client or a member of the lawyer’s immediate family. The word “descendant” is intended to include adopted and step-members of the family. Similarly, other lawyers and those who manage commercial, nonprofit, and governmental entities generally have the experience and judgment to make reasonable decisions with respect to the importunings of trained advocates soliciting legal business. Subparagraph (a)(4) permits in-person solicitation of organizations, whether the organization is a non-profit or governmental organization, in connection with the activities of such organization, and of individuals engaged in trade or commerce, in connection with the trade or commerce of such individuals.

[7] Paragraph (d) permits a lawyer to request referrals from described organizations.

## **RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE**

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

(b) Lawyers may hold themselves out publicly as specialists in particular services, fields, and areas of law if the communication is not false or misleading. Such holding out includes a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law. Lawyers who hold themselves out as specialists shall be held to the standard of performance of specialists in that particular service, field, or area.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law unless the name of the certifying organization is clearly identified in the communication and:

## Rule 7.4

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or accredited by the American Bar Association, or

(2) the communication states that the certifying organization is "a private organization, whose standards for certification are not regulated by a state authority or the American Bar Association."

### Comment

[1] Paragraphs (a) and (b) of this Rule permit a lawyer to indicate areas of practice in communications about the lawyer's services. Lawyers are generally permitted to hold themselves out as specialists in a particular service, field or area of law but the definition of what is included in the term "holding out" is broad and the examples in paragraph (b) are not intended to be exclusive. Any such claims of specialization are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (c) identifies the circumstances under which lawyers may state that they are certified as specialists in a field or area of law. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

## 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 or other professional designation 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

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Use of such names, including trade 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 or retired 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, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers who are not in fact partners, such as those who are only sharing office facilities, may not denominate themselves as, for example, "Smith and Jones," or "Smith and Jones, A Professional Association," for

those titles, in the absence of an effective disclaimer of joint responsibility, suggest partnership in the practice of law or that they are practicing law together in a firm. Likewise, the use of the term “associates” by a group of lawyers implies practice in either a partnership or sole proprietorship form and may not be used by a group in which the individual members disclaim the joint or vicarious

responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility.

[3] S.J.C. Rule 3:06 imposes further restrictions on trade names for firms that are professional corporations, limited liability companies or limited liability partnerships.

## **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**

[1] 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. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or

disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the Rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

### **RULE 8.2: JUDICIAL AND LEGAL OFFICIALS**

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 or a magistrate, or of a candidate for appointment to judicial or legal office.

#### **Comment**

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for appointment to judicial or legal offices. 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. A lawyer violates this Rule by impugning the integrity of a judge or magistrate either by making an intentionally false statement or by making a false statement when the lawyer has no reasonably objective basis for the statement.

## Rule 8.3

### **RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT**

(a) A lawyer who knows 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 Bar Counsel's office of the Board of Bar Overseers.

(b) A lawyer who knows 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 Commission on Judicial Conduct.

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

#### **Comment**

[1] This Rule requires lawyers to report serious violations of ethical duty by lawyers and judges. Even 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.

[2] A report about misconduct is not permitted or 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.

[3] While a measure of judgment is required in complying with the provisions of the Rule, a lawyer must report misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or disbarment, including misconduct that would constitute a "serious crime" as defined in S.J.C. Rule 4:01, § 12(3). Precedent for determining whether an offense would warrant suspension or disbarment may be found in the Massachusetts Attorney Discipline Reports. Section 12(3) of Rule 4:01 provides that a serious crime is "any felony, and ... any lesser crime a necessary element of which ... includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another to commit [such a crime]." In addition to a conviction of a

felony, misappropriation of client funds and perjury before a tribunal are common examples of reportable conduct. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A lawyer has knowledge of a violation when he or she possesses supporting evidence such that a reasonable lawyer under the circumstances would form a firm opinion that the conduct in question had more likely occurred than not. A report should be made to Bar Counsel's office or to the Judicial Conduct Commission, as the case may be. Rule 8.3 does not preclude a lawyer from reporting a violation of the Massachusetts Rules of Professional Conduct in circumstances where a report is not mandatory.

[3A] In most situations, a lawyer may defer making a report under this Rule until the matter has been concluded, but the report should be made as soon as practicable thereafter. An immediate report is ethically compelled, however, when a client or third person will likely be injured by a delay in reporting, such as where the lawyer has knowledge that another lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds.

[4] The duty to report past professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

### **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 (1) to influence improperly a government agency or official or (2) to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of judicial conduct or other law;
- (g) fail without good cause to cooperate with the Bar Counsel or the Board of Bar Overseers as provided in S.J.C. Rule 4:01, § 3; or
- (h) engage in any other conduct that adversely reflects on his or her fitness to practice law.

**Comment**

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

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

[3] [Reserved]

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

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

[6] Paragraph (e) prohibits the acceptance of referrals from a referral source, such as court or agency personnel, if the lawyer states or implies, or the client could reasonably infer, that the lawyer has an ability to influence the court or agency improperly.

[7] Paragraph (h) prohibits conduct that adversely reflects on a lawyer's fitness to practice law, even if the conduct does not constitute a criminal, dishonest, fraudulent, or other act specifically described in the other paragraphs of this Rule.

**Rule 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW**

**(a) Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the

## Rule 8.5

disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

**(b) Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the Rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a governmental tribunal, the Rules of the jurisdiction in which the tribunal sits, unless the Rules of the tribunal provide otherwise; and

(2) for any other conduct, the Rules of the jurisdiction in which the lawyer's principal office is located shall be applied, unless the predominant effect of the conduct is in a different jurisdiction, in which case the Rules of that jurisdiction shall be applied. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the Rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

### Comment

#### Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction.

[1A] In adopting Rule 5.5, Massachusetts has made it clear that out-of-state lawyers who engage in practice in this jurisdiction are subject to the disciplinary authority of this state. A great many states have Rules that are similar to, or identical with, Rule 5.5, and Massachusetts lawyers therefore need to be aware that they may become subject to the disciplinary Rules of another state in certain circumstances. Rule 8.5 deals with the related question of the conflict of law Rules that are to be applied when a lawyer's conduct affects multiple jurisdictions. Comments 2-7 state the particular principles that apply.

[1B] There is no completely satisfactory solution to the choice of law question so long as different states have different Rules of professional responsibility. When a lawyer's conduct has an effect in another jurisdiction, that jurisdiction may assert that its law of professional responsibility should govern, whether the lawyer was physically present in the jurisdiction or not.

#### Choice of Law

[2] A lawyer may be potentially subject to more than one set of Rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing Rules, or may be admitted to practice before a particular court with Rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Minimizing conflicts between Rules, as well as uncertainty about which Rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, paragraph (b) provides that any particular act of a lawyer shall be subject to only one set of Rules of professional conduct, makes the determination of which set of Rules applies to particular conduct as straightforward as possible, consistent with recognition of the appropriate regulatory interests of relevant jurisdictions, and provides protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a government tribunal, the lawyer shall be subject only to the Rules of the government tribunal, if any, or of the jurisdiction in which the government tribunal sits unless the Rules of that tribunal, including its choice of law Rule, provide otherwise. By limiting application of the Rule to matters before a government tribunal, e.g. a court or administrative agency, parties may establish which disciplinary Rules will apply in private adjudications such as arbitration.

[4A] As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, the choice of law is governed by paragraph (b)(2). Paragraph (b)(2) creates a "default" choice of the Rules of the jurisdiction in which the lawyer's principal office is located. There are several reasons for identifying such a default Rule. First, the jurisdiction where the lawyer principally practices has a clear regulatory interest in the conduct of such lawyer, even in situations where the lawyer's conduct affects other jurisdictions. Second, lawyers are likely to be more familiar with the Rules of the jurisdiction where they principally practice than with Rules of another jurisdiction, even if licensed in that other jurisdiction.

Indeed, most lawyers will be licensed in the jurisdiction where they principally practice, and familiarity with a jurisdiction's ethical Rules is commonly made a condition of licensure. Third, in many situations, a representation will affect many jurisdictions, such as a transaction among multiple parties who reside in different jurisdictions involving performance in yet other jurisdictions. The selection of any of the jurisdictions that are affected by the representation will often be problematic.

where the conduct would be constitutionally protected if performed in this jurisdiction.

[4B] There will be some circumstances, however, where the predominant effect of the lawyer's conduct will clearly be in a jurisdiction other than the jurisdiction in which the lawyer maintains his or her principal office. Accordingly, paragraph (b)(2) provides that when the predominant effect of the lawyer's conduct is in a jurisdiction other than the jurisdiction in which the lawyer's principal office is located, the ethical Rules of such other jurisdiction apply to such conduct. For example, when litigation is contemplated but not yet instituted in another jurisdiction, a lawyer whose principal office is in this jurisdiction may well find that the Rules of that jurisdiction govern the lawyer's ability to interview a former employee of a potential opposing party in that jurisdiction. Likewise, under Rule 8.5(b), when litigation is contemplated and not yet begun in this jurisdiction, a lawyer whose principal office is in another jurisdiction may well find that the Rules of this jurisdiction govern the lawyer's ability to interview a former employee of a potential opposing party in this jurisdiction.

[4C] A lawyer who serves as in-house counsel in this jurisdiction pursuant to Rule 5.5, and whose principal office is in this jurisdiction will be subject to the Rules of this jurisdiction unless the predominant effect of his or her conduct is clearly in another jurisdiction.

[5] The application of these Rules will often involve the exercise of judgment in situations in which reasonable people may disagree. So long as the lawyer's conduct reflects an objectively reasonable application of the choice of law principles set forth in paragraph (b), the lawyer shall not be subject to discipline under this Rule.

[6] If this jurisdiction and another jurisdiction were to proceed against a lawyer for the same conduct, they should identify and apply the same governing ethics Rules. Disciplinary authorities in this jurisdiction should take all appropriate steps to see that they do apply the same Rule to the same conduct as authorities in other jurisdictions, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent Rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. Moreover, no lawyer should be subject to discipline in this jurisdiction for violating the regulations governing advertising or solicitation of a non-U.S. jurisdiction